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

App No. 518/2009
211/2012

IN THE MATTER of Section 409B 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 current market rental of the leasehold interest in the land pursuant to a Deed of Lease dated 5 July 1985 between **TEREMOANA TINIRARU** and **MERE-MARIE VILMA MACQUARIE** in respect of the land known as **VAITAMANGA SECTION 88F1, ARORANGI**

AND
IN THE MATTER of an application by **PAULA LINEEN** of Auckland

Applicant

Hearing: 3 October 2012
26 April 2013

Judgment: 12 February 2014

DECISION OF JUSTICE W W ISAAC

Introduction

[1] This decision addresses two applications, 518/2009 and 211/2012, which both relate to determination of market rentals for Vaitamanga Section 88F1, Arorangi.

[2] Application 518/2009 sought a determination of market rental as at 1 August 2005. On 24 September 2012 I issued a decision with regard to a part of this application and determined

the market rental to be $5,242.85 per annum in relation to one of the leases over this land, being an area of 9,709m².

[3] An outstanding issue for App. 518/2009, which it was agreed by all parties would be better dealt with in conjunction with App. 211/2012, was a determination on whether or not a landowners lease, where rentals are fixed at $1.00, remain fixed or whether other circumstances may be taken into account allowing it to be fixed at market rates.

[4] Application 211/2012 was filed on 30 April 2012, with an amended application filed on 20 August 2012. The application sought to determine the market rental as at 1 August 2007.

Background

[5] On 9 March 1994 the applicant, Paula Lineen, and her sister, Mere-Marie Macquarrie, succeeded to their mother Teremoana Tinirau's interests as landowners in Vaimatanga Section 88F1 Arorangi, as well as other lands.

[6] Prior to succeeding to these interests, Teremoana Tinirau leased Vaitamanga Section 88F1, Arorangi to the respondent pursuant to a deed of lease dated 5 July 1985. For ease of reference I will refer to this as the "Main Lease". The rental was set at $1.00 per annum for a period of 60 years, with rent reviews to be every 10 years.

[7] The "Beachfront", an area of approximately 9,709m² contained within the Main Lease, was assigned to Vaitamanga Holdings Limited ("VHL") on 8 July 1997, and since then the land has been further subleased and assigned to other parties. The Beachfront land was the subject of App. 518/2009 and my 24 September 2012 decision.

[8] On 21 October 1997 an area of 902m² was also leased to VHL for $1.00 per annum, together with a one-off lump sum payment of $30,000. I will refer to this as the "Second Lease". Determination of market rental for this Second Lease is the subject of App. 211/2012.

[9] On 24 September 2012 I issued a decision fixing the rental for the Main Lease. I noted that a number of points were conceded by counsel. For completeness I set out the relevant paragraphs:[1]

> [3] ... the decision of Justice Grice dated 6 July 2009 between Paula Lineen, Mere-Marie Vilma Macquarrie and Vaitamanga Holdings Limited would be adopted.
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> [4] That decision found as follows:
>
> > 20. If the 2005 rental review under 'the Lease' dated 5 July 1985 is triggered then;
> >
> > > 1. Between the 2005 review date and 1 January 2007 the rent will be assessed in accordance with provisions of the lease as it stood prior to 1 January 1997.
> > >
> > > 2. With effect from 1 January 2007 to the next rental review date the rent will be assessed in accordance with the provisions of the lease as varied pursuant to s 106A of the Property Law Act.
> >
> > 21. If the 2005 rent review is triggered the next rent review will take place at an interval of not more than 5 years from the date of the actual rent review. Therefore if the rent review for 2005 takes place in 2009 the next review will be due on a date in 2014.
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> [5] Counsel also agreed that the rental determined for the Edgewater Hotel in 2004 was an appropriate comparison to be used in this case.
>
> [6] Finally Counsel agreed that the sole issue to be determined by this Court is to fix the Vaitamanga Holding Ltd rental for an area of 9709m² as at 1 February 2005.

[10] I determined that the rental be fixed at $5,242.85 based on the following:[2]

> (i) The starting point for the lease of 9709m² at 0.54 cents per metre amounts to $5242.86;
>
> (ii) Add 10% for the 10 year rental review period of $524.28;

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[1] *Lineen v Macquarrie*, app. 518/2009, 24 September 2012, at [4] – [6]
[2] Ibid at [39].

(iii) Add a further 5% for the difference between the 2004 and 2005 rental comparisons which amounts to $262.14;

(iv) The discount for this 'lease' not being beachfront but taking into account its good location and close proximity to the beach in my view is 15%. That is a discount of $786.43.

[11] As previously mentioned the issue regarding whether or not a landowners lease, where rentals are fixed at $1.00, remain fixed or whether other circumstances may be taken into account allowing it to be fixed at market rates is to be determined in the present application.

[12] At the hearing on 26 April 2013 I directed that counsel file submissions in respect of both applications and I would make my decision on the papers.

Submissions for the Applicant

App. 211/2012

[13] The applicant seeks orders determining the market rentals as at 1 August 2007 in respect of the Second Lease between the landowners and VHL dated 21 October 1997.

[14] It is submitted that the when determining the market rental for the Second Lease, the Main Lease provides the starting point of 0.54 cents per m^2, and subsequent increases are added for the annual reviews, which amounts to 60.75 cents per m^2.

[15] A further increase of 15% is also added on the basis that the Second Lease is a beachfront property, taking the total to 69.86 cents per m^2. When this figure is multiplied by the area of the Second Lease (902m^2), the rental per annum is $630.14.

[16] The applicant notes that in most situations the greater the area being leased, the lesser the amount paid per annum as rental. Therefore, it is submitted, the converse should apply and the rentals for the Second Lease must be greater than 69.86 cents per m^2 given that this area is 10 times smaller than the Main Lease.

[17] When fixing rentals the applicant submits that the following must be taken into account:

(i) The landowners received only $1.00 per annum for the first ten years of the Second Lease;

(ii) There must be a premium on the Second Lease because without the Second Lease the current lessee of the Main lease is landlocked with no beach access, meaning the Second Lease is extremely valuable to the extent that the Crown beach resort being the sublessee of the Main Lease would be able to operate as a "beach" resort and its value as a business would be greatly reduced if it did not have a sublease of the Second Lease which it does have; and

(iii) The Second Lease is premium value property.

[18] The applicant cites the *Murray* decision as an example of the Court's willingness to accept comparable leases, and the rentals which were accepted within that decision. The applicant submits that if an increase of 5% per annum was allowed in those cases due to their location on the inland side of the main road, then the rental for the Second Lease on Vaitamanga should be no less than $1.34 per m^2 given the Second Lease is prime beachfront property. Accordingly, the Second Lease should be fixed at $1,813 per annum as at 1 August 2007.

App. 518/2009

[19] There are two outstanding issues to be determined with regard to App. 518/2009, as agreed in a Joint Memorandum of Counsel dated 3 August 2010. They are as follows:

(i) Does the reference in the Deed of Lease (for the Main Lease) at paragraph (b) which provides that "...such reviews shall take into account whether the Lessee is related to the Landowner or is a landowner" mean that upon any rental review the rental can only be fixed at $1.00 per annum given that the Lessee is a landowner? and;

(ii) If not, at what level should the rentals be set as it relates to the area of land that is still vested in Mere-Marae Macquarrie pursuant to the Main Lease.

[20] The applicant submits that the key phrase for consideration is "take into account". It is clear and unambiguous in its meaning and when given its ordinary and natural meaning, an important consideration is whether the lessee is related to a landowner or is a landowner themselves. The applicant concedes that what is unclear is what weight is accorded to this factor.

[21] Additionally, the wording of the Deed of Lease would have been more specific if it had intended for the rentals to remain at $1.00 per annum upon any rental review where the lessee is related to a landowner.

[22] It is submitted that an objective approach must be taken for determining the rent where the lessee is related to the landowner (or is a landowner) and this in turn poses the question of what would the 'willing' lessee be prepared to pay the 'willing' lessor?

[23] With regard to the implications of s 106A of the Property Law Amendment Act 1997, the applicant submits that this section is clear in its intention to ensure that all landowners receive a fair rental income and to share in the benefits of developing their land.

[24] It is further submitted that the intent and spirit of the section would be contravened and the intention of Parliament would be frustrated if rentals remained at $1.00 per annum following any rental review.

[25] The applicant maintains that a lessee who is a landowner would still be willing to pay market rentals where that lessee is deriving a commercial gain from the land. As the respondent is receiving a commercial gain in the present situation, the applicant submits that in respect of the land which is vested in the respondent, rentals should be fixed as at 1 August 2005 at the full market rentals for comparable land, with the next rental review due in 2014. It is submitted that the Main Lease is the most comparable and accordingly rental should be set at $6,364.44 per annum (as at 2005).

[26] A different rental is proposed for the fixing of the rental as at 1 August 1995, and following consideration of the Puatiki Lease and Ngakuriao Lease, which are both Edgewater Hotel leases, a midway point of 0.36 cents is submitted by the applicant which, when the appropriate additions and discounts are applied, results in a total of $4,165.52.

Submissions for the respondent

App. 211/2012

[27] The respondent submits that the Edgewater Lease is the most comparable lease to the present situation as it is a similar sized area of land to the combined rental of the Main Lease and the Second Lease. If that proposition is accepted, the respondent asserts that there would be no discounts attributed for the lack of road frontage and no added percentage for the beach frontage.

[28] The following calculation is submitted by the respondent as a means of fixing the rental. If the rental per annum starts at 0.54c per m^2 for the 10,711m^2 (9,709 m^2 + 902 m^2), this amounts to $5,783.94, from which $5,242.85 (the Main Lease) is deducted bringing the total to $541.09. To this figure 10% is added for the 10 year rent review period, $54.11, and a further 15% is added for the difference between the 2004 and 2007 review periods ($81.16), bringing the total to $676.36.

[29] It is not that the respondent's calculation is incorrect however, it is based on 10,711 m^2 when it should have been based on 10,611 m^2. This being the case, and using the calculation of the respondent, the correct total is $609.02.

[30] A condition of the Second Lease was the payment of $30,000 to the applicant, which the respondent submits should be factored in when fixing the rent and for future rentals, and it should also be viewed as a benefit to the applicant given it was paid up front as opposed to increments of $500 per annum over a 60 year period.

[31] It is suggested that in order to reflect this payment, either $500 should be deducted from $609.02, or for 50% to be deducted from the $609.02. This would produce a rental somewhere between $109.02 – $304.51 for the Second Lease, as at 1 August 2007.

[32] In the alternative, the respondent suggests that if the Court were to consider only the Second lease and factor in both the beach frontage and its lack of road frontage then the rental could be formulated accordingly:

902m^2 x 0.54c = $487.08

+ 10% (10 yearly review) $48.71

+ 15% difference between 2004 & 2007 + 15% = $73.06

+ beach frontage $243.54

Total = $438.37

[33] Discounting this figure to reflect the payment of $30,000 will result in either no increase or a rental of $219.19 as at 1 August 2007.

[34] The respondent submits that the Island Hotel Lease provides another comparable situation, with its rental fixed by the Court on 1 September 2007 at approximately 0.55 cents per m^2. If this formula was applied to the Second Lease this would produce a rental as at 2007 of $496.10 plus 10% for the 10 yearly reviews ($49.61) a total of $545.60. If the $30,000 payment is deducted as 50%, then this brings the rental down to $272.80. Alternatively, $500 could be deducted, resulting in a rental of $45.60.

[35] The respondent disagrees with the applicant's suggestion that there be an increase in the rental because of the size of the Second Lease. While the respondent agrees that the *Murray* decision may be persuasive, it is contended that it is not binding on this Court and is not comparable for the purposes of the present application. It is a larger area of land which is why it is of added value.

[36] Reference is made to the 2010 decision of Justice Savage, in which he relied on an earlier decision of Justice Smith who fixed rental for a period commencing from 1 July 2000:

> 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 upfront payment for the lease and the rental itself. At page 3 Smith J observed:
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> > *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 upfront payment and does not reflect the true market rental within the area.*

[37] It is submitted that Savage J's above decision supports the proposition that the upfront payment must be taken into consideration when fixing rentals. His decision, as well as the *Murray* decision, further illustrate the importance of comparing "like with like".

[38] In conclusion, the maximum rental which can be paid under the Second Lease cannot be more than $438.37, with the 'logical' approach placing rental as at 1 August 2007 somewhere between $176.36 - $338.18.

App. 518/2009

[39] With regard to App. 518/2009, the respondent submits that the Court should only review the rental for the period 1 August 2005 and not the 1 August 1995 period. Counsel notes that there is another case before the Court that has been filed pursuant to s 641 of the Cook Islands Act 1915, a section which has never been argued before the Court, and which will have direct bearing on the 1995 review as that application contends that rent reviews of more than 12 years are statute barred.

[40] Three issues are raised by the respondent with regard to the Deed of Lease dated 5 July 1985 (the Main Lease), and its proviso for fixing the rent, which states:

> ...such rentals to be based upon then current market rentals for comparable land excluding all improvements effected to the land by the Lessee and the terms, conditions and provisions of this Deed but to be not less than the annual rental payable for the preceding ten years; **provided however that such reviews shall take into account whether the Lessee is related to the Landowner or is a landowner.**
>
> (emphasis added)

[41] The first issue is what is meant by this proviso; the second, what was the understanding of the Lessor and the Lessee when they signed the Main Lease containing the proviso; and thirdly, how is the Court going to apply the proviso when reviewing the rental under the Main Lease.

[42] The respondent suggests that more recent leases usually contain a clause that allows the lessee, once a mortgage has been paid off, to convert the lease back to an occupation right clause. It is noted that there is no such clause in the Main Lease because it predates the

creation of occupation right clauses. This implies that a landowner lease was not intended to be treated differently to an occupation right or a vesting order, with the intention that the landowner lease was intended to benefit the lessee in the same way as an occupation right or vesting order would.

[43] It is submitted that an inclusion of such a proviso is an indication to the Court that special considerations must be taken into account when reviewing rentals under a landowner lease, and it ensures that a lease is treated in the same manner as an occupation right and vesting order.

[44] It is submitted that this is the first case where the rental under a landowner lease (and where the landowner remains the lessee) is to be reviewed and as such the outcome of this case will impact on other landowner leases. It is further submitted that this indicates that the landowners did not want to 'penalise' the lessee by increasing rentals in the future.

[45] Although the proviso does not specify that the rental should remain at $1.00 per annum, the respondent submits that it should be interpreted in the context of the background of a landowner lease. The wording indicates that the intention of the parties at the time the lease was entered into was to maintain a lower rent.

[46] A further interpretation suggested by the respondent is that the proviso does not necessarily provide for rent to be nominal and is open to the possibility that in certain circumstances a higher rent could be imposed, provided that where the lessee is a landowner, or related to a landowner, rental remains less than market rental for comparable land.

[47] Two options are posed by the respondent. Firstly, that the rent remains at $1.00, as is the custom; or secondly, that the Court considers rentals for comparable land and then applies the proviso.

[48] When considering comparable properties and leases, the Court has held that there are three considerations. These are the similarities in location, size and ensuring that the land is within the same rental band. It is noted that in *Murray*, the Court also held that "it is not comparing like with like".

[49] The respondent submits that an additional factor is that the lands possess leases of a similar nature as that they are both landowner leases. To attempt to draw a comparison with the Main Lease is inappropriate because that is a not a landowner lease (nor is the lessee related to a landowner) and this is a similar issue for all of the comparative rentals provided by the applicant.

[50] If the Court were to consider non-landowner leases as comparable, the respondent submits that only the two leases on Raupa Section 87A5 in Arorangi, and vested in Pacific Heights Limited, would be appropriate. The rental for these leases are set as follows:

(i) Deed of Lease dated 8 November 2000 between Landowners and Tuakana Toeta of an area of 1,975m², rental as at 1 November 2005 is $800.00 per annum ($0.41 per m²), with 5 yearly reviews of $0.48 per m²;

(ii) Deed of Lease dated 17 July 2001 between the Landowners and Mona Heather for an area of 1,975m², rental as at 1 July 2005 is $600.00 per annum ($0.30 per m²), with 5 yearly rent reviews of $0.35 per m².

[51] Where there is no road frontage the Court has in some cases discounted rentals by 50%, and the respondent submits that in order to give meaning to the proviso, the discount must be more than 50%, and if all factors are taken into account, then there should be a 90% discount.

[52] If the Pacific Heights rentals are applied to the present Deed, being $4,832.26 ($0.41 x 11,789m²), minus 25% to account for the lack of any view, and further subtracting 90% for application of the proviso.

[53] In summary, the respondent submits that the proviso should be applied to fix the rental as at 1 August 2005 at either $1.00 per or in the alternative, at $362.42 per annum.

Discussion

211/2012

[54] On 24 September 2012 I determined part of the application in respect to deed of lease dated 5 July 1985 for an area of 9709m² as at 1 July 2005.

[55] The area remaining to be determined is a beach reserve area of 902 m² contained in the lease dated 21 October 1997.

[56] Having considered the submissions of the applicant and respondent I see no reason to depart from my reasoning and conclusions in my decision of 24 September 2012.

[57] I also consider it important to stress that in my previous decision I viewed the main lease and the second lease as separate leases requiring individual consideration.

[58] Notwithstanding, the calculations from the main lease are apposite to this determination having regard to the nature of the leases and the parties involved.

[59] As a result in relation to the second lease I determine as follows:

(i) The starting point for the lease of 902m² is 0.54 cents per m² amounting to $487.08

(ii) Add 10% for the 10 year rental period of $48.71

(iii) Add 15% for the difference between the Edgewater 2004 determination and this lease determination in 2007

(iv) Add 15% for beachfront locations

[60] In summary therefore, the rental determination for the second lease is as follows:

$487.08

$48.71

	$73.06
	$73.06
Total	$681.91

[61] Therefore, the rental determination for Vaitamanga Section 88F1, Arorangi as from 1 August 2007 is $681.91.

518/2009

[62] The area to be determined is that vested in Mere-Marie Vilma Macquarie pursuant to Deed of Lease dated 5 July 1985.

[63] The relevant provision in the Deed of Lease under consideration is as follows:

> ... provided however, that such reviews shall take into account whether the lessee is related to the landowner or is a landowner.

[64] The applicant maintains that this wording provides a distinction for the Court to determine a rental or review at a higher figure than $1.00 per annum and submits that where the parties cannot agree then current market rentals for comparable land excluding lessee improvements should be considered.

[65] When comparable rentals are considered the applicant submits the rental should be $4,165.52.

[66] The respondent on the other hand asks the Court to consider the background to this lease and the nature of the transaction between a mother and her two daughters.

[67] In essence the respondent sees this as a landowners lease and although the wording of the proviso in the lease does not expressly state that the rental shall remain at $1.00 per annum, that the provisos should be interpreted in the context of a landowner lease.

[68] Although I accept that the proviso is capable of an interpretation that a higher rental could be arrived at on review than $1.00 per annum, I consider the original dealing between Teremoana Tinirau and her two daughters to be highly relevant.

[69] I do not consider Teremoana Tinirau would have wanted to penalise either daughter and that she would have wanted the normal landowner lease provision to apply.

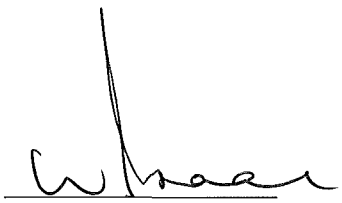
[70] Therefore, notwithstanding the ability to interpret the provision in such a way that would lead to a higher rental than $1.00 per annum, I am of the clear view that this is a land owner's lease.

[71] Also, I am of the view that the proviso requires me to take into account the relationship of the parties and when this is done, this is a case where the normal landowner lease rental of $1.00 applies.

[72] As a result I do not propose to change a situation that has existed in the Cook Islands for generations. That is, that the rental between landowners be set at $1.00 per annum. To do otherwise would be in my view highly inappropriate and lead to unnecessary and unwelcome family disputes.

[73] Therefore the rental for the Deed of Lease dated 5 July 1985 will be $1.00 per annum.

Dated at Wellington this 12th day of February 2014.



W W Isaac
JUSTICE