IN THE LAND COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

IN THE MATTER of MAURUNGA SECTION 12B1 NGATANGIIA

A N D

IN THE MATTER of Deeds of Lease dated 24th April 1978 and 6th December 1978 vested in RIMA NICHOLAS

Delivered: 17th March 1984

JUDGEMENT OF DILLON J.

This is an application to determine the capital value of land contained in one of two leases held by the applicant Rima Nicholas. Mrs Nicholas has a lease of two adjoining sections in Maurunga Section 12B1 Ngatangiia. The first property comprises 1100 square metres contained in Deed of Lease dated 24th of April 1978; the second comprises 970 square metres contained in Deed of Lease dated the 6th of December 1978. At this stage I am only concerned with the fixing of the capital value of the land in the first mentioned Deed of Lease, that is, covering the area of 1100 square metres.

The background history to the negotiations for this lease are both interesting, novel and perhaps unfortunate in so far as Mrs Nicholas is concerned. She was prompted to become involved in this lease because of a friendship with Mr and Mrs Hale who were American visitors with whom she had become friendly - so friendly, in fact, that one of Mrs Nicholas's own children was named after Mrs Hale. Mrs Nicholas gave evidence of her initial negotiations with Mrs Tuana whom Mrs Nicholas believed was one of the owners of this land. Mrs Tuana certainly did not dissuade Mrs Nicholas from this belief and all negotiations were done between these two ladies.

In fact, the Court was told subsequently by Mr Tylor, the solicitor acting for Mrs Tuana, that the land in question was in fact owned by Mrs Tuana's three brothers, all of whom lived in New Zealand; all of whom had, pursuant to some family arrangement, agreed that Mrs Tuana, while not an owner, could have the use of this other land in Rarotonga while the three brothers in New Zealand were going to have the use and exercise the rights and interests in New Zealand land.

In any case Mrs Tuana and Mrs Hale over a period negotiated for a lease of the property which initially started off by Mrs Nicholas offering $2,000 and this price was then upped to $4,000, subsequently increased to $8,000 and was finally settled at a figure of $10,000. Mr Tylor again confirmed that it was on his insistence throughout

that Mrs Tuana kept increasing the price until it reached the $10,000 figure, which Mr Tylor was prepared to recommend that Mrs Tuana accept.

It was at this stage that Mr Tylor then arranged a somewhat novel scheme whereby the three owners of this land leased it to a company which Mr Tylor formed called Muri Holdings Limited.

All the shares in this company were held by Mrs Tuana except one which was held by Mr Tylor. Muri Holdings Limited having acquired a lease of this section then immediately assigned the lease to Mrs Nicholas for the $10,000 consideration which had been agreed upon.

Mrs Nicholas in her evidence said that she had no idea of these arrangements; she had no solicitor of her own; and she relied on the papers which were prepared by Mr Tylor as giving her a lease of the land for which she was prepared to pay the sum of $10,000. Mrs Nicholas heard of the company, Muri Holdings Limited, on the day that she was to sign the papers prepared by Mr Tylor. There was a suggestion that this device was in the form of a tax saving exercise but this is unclear and, in any case, is irrelevant to these proceedings.

Summarising the position to this stage, Mrs Nicholas on the 24th of April 1978 paid $10,000 to Muri Holdings Limited for an assignment of a lease for 60 years at a rental of $50 for the first five years with a provision that rent be reviewed every five years thereafter and in other respects the lease to be on the usual terms and conditions. It is this question of the review that is now

up before the Court for its consideration.

Perhaps, while not of any consequence, but of interest only in completing the picture of what holdings Mrs Nicholas has, I was told that later in that year Mrs Tuana wanted further cash to meet her husband's accident claims and, as a result, a further Deed of Lease was drawn up and completed over the 910 square metres adjoining. A lump sum of $3,000 was paid by Mrs Nicholas to Mrs Tuana for this lease.

We are now dealing only, of course, with the lease dated 24th of April 1978. This was from the three owners living in New Zealand who granted the lease originally to Muri Holdings Limited for no payment; no consideration; and no goodwill. The lease was for a straight rental of $50 per annum only. The position, therefore, is that Muri Holdings Ltd received the $10,000 from Mrs Nicholas; Mrs Tuana, apart from one share, is the owner of Muri Holdings Limited and so Mrs Tuana received the $10,000; her three brothers who are the owners of the land received no part of that $10,000.

While the application is to determine the value of the 1100 square metres as at the 24th of April 1983, much evidence has been given and submissions made on the question of the $10,000 paid by Mrs Nicholas to Mrs Tuana and whether this should be taken into account - not allowed for - or credited to Mrs Nicholas on the current review of rental.

Mr Clarke, acting for Mrs Nicholas, has gone to extensive lengths to establish why this $10,000 should be taken into account in fixing the rental and why Mrs Nicholas should not be penalised because of the device of forming the company and assigning the lease, all at the one time. Mr Clarke in his carefully prepared submissions went to great lengths to show how there could be three different formulas invoked in order to take into account and give credit to Mrs Nicholas for the substantial amount of money which she has paid.

On the other hand Mr Tylor has given evidence himself of the desirability of the property claiming that it is the best on the Island and further he gave a detailed account of why the company was formed and the purpose to which the $10,000 was to be put towards; and the unfortunate results which emanated from Mrs Tuana's husband who, while returning from a social function, crashed into two cars and was required to meet the costs of repairs to those two vehicles, one to the extent of $6,000 and the other to the extent of $3,000. According to Mr Tylor's evidence, of the $10,000 paid by Mrs Nicholas $4,000 was used to purchase a vehicle which caused the subsequent accident. The balance of $6,000 was used to settle one accident claim and the subsequent lease of the adjoining section to Mrs Nicholas for $3,000, went towards settling the second accident claim.

The net result, according to Mr Tylor, was that what was intended to be a developmental exercise for these two sections, the first supporting the development of the ~~section~~ second, finished up as a disaster with nothing being developed.

Dealing firstly with the payment of the $10,000; the question has been raised throughout as to whether this amount of money is to be treated as a consideration; goodwill or rent in advance. At the end of the first Court hearing on the 21st of April 1983, the Court observed as follows:-

> "Mr Clarke has submitted that the present rental should be increased from $50 p.a. to $350 p.a. which is the end rental after having assessed the value and taken a 5 percent basis of it and then deducted from that an allowance cover the $10,000 goodwill which Mrs Nicholas paid in 1978 which is to be regarded and assessed as part of the rental over the total term of the lease to be apportioned to the total five year term. Mr Tylor says that Mrs Nicholas paid $10,000 to a company but while the company consisted of the three owners as shareholders. Nevertheless the company is a distinct and separate identity and that $10,000 as goodwill paid to a company and as such cannot be taken into account in assessing the rental and that you assess the rental to be $800 p.a. without deduction.
> Application adjourned for submissions."

Following on that hearing and prior to the subsequent hearing on the 19th of July, Mr Clarke filed certain submissions which emphasised that the Court " ... had determined that the cash taken should be taken into account to reduce the annual rental".

No such determination can be taken from the Court records and it is only now after a further Court Hearing and the availability of the further evidence that consideration can be given to this payment of $10,000.

Mr Clarke argues that:-

1. "The cash payment made to land owners on the grant of a lease is part of the consideration of the lease."
2. " The value of a lease cannot be determined without reference to the conditions of the lease."
3. "The capital value of that land does not change where the conditions of the lease are onerous or favourable; but the value of the lease does."
4. "Counsel for the respondent acknowledges that in determining rentals the Court may have regard to favourable or unfavourable terms of the lease, e.g., compensation for improvements. But Counsel for the respondent will not acknowledge a cash payment to the land owners as a favourable provision to the lessors that should also affect the rental."

5. "Rents would be set by reference to the terms, conditions and provisions of the lease as well as the land value. That it is submitted is entirely sound and proper. Where a land owner has received a favourable benefit this should be taken into account with regard to future rentals. Where an assignor of a lease receives that benefit (not the land owner) then the assignee should get no credit for this."

6. Mr Clarke then postulated three methods whereby credit would be given to Mrs Nicholas for the $10,000 which she had paid and these three methods are set out in detail with examples in the substantial submissions which Mr Clarke has filed. I do not propose to consider them in detail in this Judgement.

Mr Tylor in reply claimed that the land owners as lessors under the lease, which is now the subject of review, did not receive the payment of $10,000 made by Mrs Nicholas. He contends that if they had received it there may be some basis for the proposition put forward on Mrs Nicholas's behalf. But as the land owners have not received $10,000 or any part of it then he asks why should their new rental be assessed and, in fact, reduced as though they had received $10,000 which was received by Mrs Tuana.

It is clear from the evidence before the Court that Mrs Nicholas was prepared to pay $10,000 to acquire a lease of this section. The new rental, once assessed, may in fact prove a hardship to Mrs Nicholas and this hardship may be accentuated because there was some evidence that Mr and Mrs Hales's marriage has now broken up and the amount of their support under these circumstances to Mrs Nicholas was never canvassed. It is clear, however, from Mr Tylor's evidence that the three owners of this land residing in New Zealand did not receive any of the $10,000 paid by Mrs Nicholas. Put another way, if the payment of the $10,000 is credited to Mrs Nicholas's as rent in advance in accordance with any of the three methods suggested by Mr Clarke then this would mean that the three owners would receive less than the market rental for the next five years which, in itself, would be contrary to the provisions of the lease.

Now, whether this scheme was for tax relief, as suggested by Mr Clarke in cross-examination, or whether it was for any other reason, is not, I believe, of consequence in an application to determine what is the value of the land, but that is in fact all that the application relates to. Mr Clarke endeavoured to suggest that Mrs Nicholas thought she was dealing with the owners of this land and that the $10,000 was going to the owners on account of rent. However, this was

not established and the legal documentation does not support that contention. It is unfortunate, of course, that the legal implications of an assignment of the lease were never explained to Mrs Nicholas since Mr Tylor acted in effect for both parties, a situation which in hindsight, and because of the particular circumstances in this case, should have been avoided.

At this point, it is perhaps relevant to refer to one aspect of Mr Tylor's evidence when he was cross-examined closely on this very point when he said:

> "I drew up the lease the parties all agreed to. I did not see the need for the other party to seek legal advice. There was matters pertaining to something of a trust. I was not aware of them and did not advise her on that point."

It is clear that if Mrs Nicholas was treating the $10,000 that she had paid as an entitlement to a future credit then she should have been independently advised. The reference by Mr Tylor to a trust re-emphasises this point. However, the fact is that Mrs Nicholas was not independently advised; she did pay the $10,000 over to Mrs Tuana and she did receive an assignment of the lease which now has to be considered for the purposes of fixing its value so that subsequently rent can be assessed.

For these reasons, but principally because the owners received no benefit from the $10,000 paid by Mrs Nicholas, it would be quite contrary to the terms of the lease which Mrs Nicholas now holds, as lessee, to penalise the owners

for what Mrs Tuana as the original holder of the lease and Mrs Nicholas have agreed. That is, to pay the owners a rental less than the current market value as provided for in the lease.

Clause (b) of the lease which is relevant to this determination reads as follows:-

> "(b) FOR and during each succeeding period of five years of the said term an annual rental as shall be agreed upon by the Lessors and Lessee or failing agreement at such rental as shall be fixed by arbitration in accordance with the Arbitration Act 1908 such rental to be based upon current market values for comparable unimproved land and the terms and conditions of this Deed but to be not less than the rental for the preceding five years."

Turing to the question of a comparative value, Mr Clarke quoted Mr Lobb, who has had experience in such matters. Mr Tylor gave evidence as to what he believed was the value of this section. This evidence may be summarised as follows:-

1. Mr Lobb believed this section and the Little Polynesian section were comparable. He believed that of the total land of 2070 square metres in the Little Polynesian section, there was a one-third section available. The land in question here in this case is 1100 square metres. Mr Lobb

also indicated that the vegetation on this section is closer to the mean high-water mark. He also confirmed that the section had probably one of the best views in Rarotonga.

2. Mr Tylor referred to the Aremango Section 781A Block. One of the leases for this area is 1300 square metres, a goodwill of $16,000 was paid and the rental was either $200 or $400. He further mentioned that some 30 metres from the section towards the land in question a further lease was granted to a Mr Wade Swoboda, this lease being for 60 years, a goodwill of $20,000 having been paid and rental of $300 having been agreed upon. The area of this was in two pieces, 1671 square metres on the seaward side of the swamp and 1115 square metres on the inland side of the swamp.

3. Finally, Mr Tylor claimed that Mrs Nicholas's site situated at Muri Beach was undoubtedly, in his opinion, the most desirable of all sections on the Island of Rarotonga.

In dealing with the leases to South Pacific Consultants Limited and Mr Swoboda referred to by Mr Tylor, I believe that on the question of goodwill there are two distinct aspects which have to be considered:-

1. In the two examples given above by Mr Tylor the lessees have paid $20,000 and $16,000 respectively for 60 year leases, that is the worth of a lease to them.
2. Where a person buys a lease for a term still to run, that is the market value of the lease at the time of purchase. Such value being related to all the various terms of the lease.
3. It may be said that Mrs Nicholas fits into the second category having purchased the lease. However, because of the unusual circumstances I here referred to, I believe that she negotiated a 60 year lease with Mrs Tuana whom she thought was the owner of the land and who was in fact eventually able to give Mrs Nicholas a lease pursuant to a legally manipulated arrangement about which Mrs Nicholas was never independently advised.

Mrs Nicholas is, therefore, in the same position as the two examples given by Mr Tylor, namely, she has paid $10,000 for a 60 year lease; that does not mean the land is valued at $10,000 or more now; it means she paid $10,000 for a long term lease and the benefits that provides her; the value of the land must be assessed in relation to other comparable values.

The rental of South Pacific Consultants is either $200 or $400 for 1300 square metres. If $200 then that is a capitalised value at 5% of $4,000; if $400 is the rental then a comparable value is $8,000. The rental of Mr Swoboda was given as $300 per annum for a 1671 square metre section or a capitalised value of $6,000.

Mr Tylor placed his value on this section at $10,000 thus producing an annual rental of $800 per annum. It will be seen that this is considerably in excess of the value of two relevant leases he relied on. Bearing in mind also that Mrs Nicholas's section is 1100 square metres only.

Mr Clarke submitted the value for this section which is quite a bit smaller than the two examples given by Mr Tylor, should be fixed at $7,000 and a capitalised rental of $350 per annum. When compared with the areas of the adjoining leases referred to by Mr Tylor, this appears too high but I propose to adopt that figure and fix the value at $7,000; the rental at $350 per annum as from the 1st of April 1983. Costs of $100 are to be paid to Mr Tylor by Mrs Nicholas and the Registrar is to allow up to a further $100 of rent monies against a certified account from Mr Tylor.

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