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

Application No. 68/93

IN THE MATTER of the land known as Atupare and Opiis 92J2 Block

A N D

IN THE MATTER of a Deed of Lease to **R.N. MCDONALD AND G.T.J. MCDONALD**

Mrs Browne for the Lessor
Mr Lynch for the Lessees

Date of Hearing : 8 July 1993
Date of Judgment : 14 September 1993

JUDGMENT OF DILLON J.

On 31 October 1977 Taru Moana leased a portion of his land above described to Mr and Mrs McDonald. The area of the land lease comprised 4,001 square metres; the lease was for a term of 60 years from 1 August 1977; the consideration was a capital sum of $9,000; and the initial rental was fixed at $200.00 per annum. The application on behalf of the current land owners is to assess a new rental based on a capital valuation and in accordance with the provisions set out in the lease for determining the rental payable. That provision is set out in Clause 2(b) of the lease which provides as follows :

For and during each succeeding period of five years of the said term an annual rental as shall be agreed upon by the lessor and lessees, 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 payable for the preceding five years."

The Court records do not disclose any agreement assessing the rental for the subsequent five yearly terms calculated from 1 August 1977. As a consequence this application by the land owners and not by the lessees throws up the fact that the original rental of $200.00 fixed in 1977 has continued unaltered for the last 16 years.

Mr Lynch, in his submissions, now suggests that Clause 2(b) permits that on each review of the annual rental such can be fixed for the ensuing five year period at a rate by agreement between the parties provided only that any agreement shall provide for a rental not less than for the preceding five years, namely $200.00. I accept that submission could be well founded if supported by evidence of an agreement. I have already indicated that there is no record of any agreement being filed in the Court. In fact there is no recorded agreement anywhere in existence and this is conceded by Mr McDonald.

Before proceeding further to a consideration of the evidence upon which Mr McDonald relies, it is appropriate at this point to confirm that the present application is for the Court to assess a valuation of the section based on current market values as at 1 August 1982; 1 August 1987; and finally at 1 August 1992.

Mrs Browne suggests that the rental based on the capital value for those three periods should be $350.00; $450.00; and $550.00 respectively.

As against that, Mr and Mrs McDonald suggest that there should be no increase in rental above $200.00 for the periods 1 August 1982 and 1 August 1987, and that the rental for the period from 1 August 1992 should be $400.00.

Mr Moana, who was the original lessor, is now deceased. He died in 1989. Mr McDonald gave evidence in support of his application as to what the value and consequential rental should be. He gave evidence of a discussion with the deceased which he says took place in 1984 on the verandah of the house situated on this land and occupied by himself and Mrs McDonald. He said that Mr Moana and he often talked together on the verandah and were good friends. Mr McDonald said that it had been agreed between them that there would be no increase in the rental for the second five year term that commenced on 1 August 1982. He said that this concession was arranged because of all the work which he had done for the

deceased during the first five years. He recounted how this work consisted mainly of extensive accountancy work because of difficulties Mr Moana had got into with the Inland Revenue Department and his failure to put in returns etc. He claimed in his evidence that he continued to do work for Mr Moana up until the latter died in 1989 and that his estimate of the accountancy work that he did was of the order of $2,000.00.

Mr McDonald admitted that while there was no further discussion with Mr Moana from 1984 until he passed away in 1989, nevertheless he believed that there was a mutual understanding between them that the rental should continue at $200.00 without adjustment.

Mr McDonald's evidence can therefore be summarised in this way. There is no evidence of the arrangements made in 1984 which the Court has been asked to accept without corroboration in any form. However there is only an understanding by Mr McDonald without mention of the subsequent term. There were in fact therefore no subsequent arrangements or discussions, but only what Mr McDonald has referred to as an understanding. There was this belief by Mr McDonald that because he was continuing to do certain accountancy work for Mr Moana, the arrangements made in 1984 should therefore continue unaltered and without any record of such arrangements.

Mr McDonald detailed the extent of the accountancy advice he claimed that he had provided during the first five years. He conceded that the advice in the following years was nowhere near as extensive. It was on this basis that Mr Lynch relied to substantiate the offer of $400.00 for the 1992 period, and to retain the original $200.00 for the 1982 and 1987 periods. He suggested to the Court that this suggestion or proposal could be justified by the analogy of the normal one dollar rental payable in inter-family leases in Rarotonga. He put it this way :

> "It is submitted that if a one dollar rent can be supported by family considerations, such an agreement not to increase the rent, or such a waiver, can be supported by consideration of friendship and mutual respect."

That analogy, in my opinion, is quite unacceptable. The nominal one dollar rentals are payable for family leases. This is not a family lease. If Mr Lynch is suggesting that there

is nothing wrong in Mr Moana and Mr and Mrs McDonald agreeing on a rental, partly satisfied by a friendship arrangement or an accountancy arrangement, then I would agree. Mr Lynch's difficulty, however, is that there is absolutely no evidence, apart from Mr McDonald himself, of such an arrangement. Mr McDonald has given evidence of an arrangement which he said was made with Mr Moana, who is now deceased. There is no written evidence of that arrangement. One would have expected a simple notion signed by both parties lodged in the Court would have clearly satisfied the requirements necessary to establish the point which Mr Lynch now tries to establish on the basis of a family lease with a one dollar nominal rental. It is even more surprising that Mr McDonald, who is a highly qualified and experienced accountant, has not taken that elementary step of recording the arrangements that he says were made between himself and Mr Moana.

Having said all that, there is the evidence that Mr McDonald has given about the work which he did for Mr Moana in the first five year period. Although that evidence is uncorroborated, it was given on oath and the Court is prepared to accept that evidence as justifying an agreement between Mr Moana and the lessees for the rental review that was due on 1 August 1982. There is no evidence of any subsequent agreement for the following periods and Mr McDonald's understanding without any agreement is quite insufficient to justify the rental continuing for a 16 year period. The only evidence of waiver relates to the review period due on 1 August 1982. Estoppel has not been established and does not apply.

That then requires me to consider the appropriate and comparative market values for the rentals to be assessed for the periods 1 August 1987 and 1 August 1992. The Court has been referred to property valuations and rentals which Counsel have submitted are relevant. Mrs Browne proposed that the rental to be fixed at 1 August 1987 should be $450.00 and at 1 August 1992 should be $550.00.

Part of this section is leased to the Airport Authority. The rental as at 1 July 1979 was fixed at $350.00. The value was reviewed at 1 July 1984 and the rental was fixed at $450.00.

It is accepted that the Airport Authority has a main road frontage, while Mr and Mrs McDonald's section is a rear section with a five metre right of way entrance. It is suggested that as a consequence of those factors this lowers the value of the section being considered.

Mr Lynch emphasised that not only has the Airport Authority section a main road frontage, but it is primarily used for commercial purposes. However this property is the residence of the Manager of the ANZ Bank. It is still a residential property and certainly does not convert into a commercial proposition simply because the Manager of a bank lives in the house. The status of a tenant does not fix the zoning to be attributed to a section.

Of more significance however is the rental paid by the Bank to the Airport Authority. I am told the rent is $15,000 per annum, rising next year to $19,200 per annum - these rentals compared with the rental paid by Mr McDonald of $200.00 per annum. The rental suggested by the owners at $450.00 certainly seems modest.

I have also considered the rental payable on the lease to Van Eijk - this section is not comparable in size. The Puaikura Reef Lodge's lease is likewise not comparable in my view since the rental was fixed as long ago as 1983.

The rental of $450.00 being paid by the Airport Authority was fixed at 1 July 1984. A comparison of that rental is relevant to the suggested rental of $450.00 for this section under review as at 1 August 1987 - that is three years later. An increase of $100.00 only for the following five years is in the Court's experience modest in the extreme.

Accordingly I fix the current market value of this property as at 1 August 1987 at $9,000.00 producing a rental of $450.00; and as at 1 August 1992 at $11,000.00 producing a rental of $550.00.

Costs of $100.00 plus a filing fee of $5.00 to be paid to Mrs Browne.