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

APPLICATION NO. 509/02

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 **ENUAKURA SEC 25A NO. 1 AVARUA**

AND

IN THE MATTER of a Deed of Surrender and Grant Of Lease dated 6 June 1985 Vested in **STANDARD CHARTERED PROPERTY (COOK ISLANDS) LIMITED**

Applicant

Mr McFadzien for Lessee

Mr Mark Brown for landowners

Date of hearing: 1 September 2003

DECISION OF SMITH J

This is a rehearing of an application to determine the market rental for the land Enuakura Section 205Ano. 1 Avarua heard on the 15th August 2002 and determined on the 27th August 2002.

The learned Judge in reaching is decision applied a "broad approach" and stated that "comparable land" "must at the very least include land bounding the subject block and also land opposite or immediately across roads. Effectively we have an area encompassing CITC, ANZ Bank and the property submitted by the lessees."

With the greatest respect, the term "comparable lands" incorporates not only lands similar in locality and area, but comparable in rental.

Hingston J went on to say:

> "I have before me a decision of Smith J wherein he fixed the rental for Enuakura Section 5 (831 square metres) as from 1.8.99 at $20,540.00 per annum.
> For comparison purposes it is not relevant how Smith J arrived at the rental figures; it is the finding that is relevant."

In this, the learned Judge is arguing from a false premise. The decision relied upon by him fixing the market rental for Enuakura Sectioh 5 (CITC) was merely determining the amount of any increase to the rental which had originally been fixed by agreement between the parties.

That agreement provided for the surrender of the original lease, the grant of a new lease for 60 years with an up front payment of $200,000 and an annual rental of $20,000 pa.

The evidence before the Court at that time established that the amount of the up front payment of $200,000 was reduced in return for a substantial increase in the annual rental to be paid.

The Court accepted this but determined that on the basis of an increase in the GDP of 2.7% at the time determined an increase by that amount only.

The rental payable under the lease for Enuakura Section 5 is therefore an inflated rental fixed by the owners and the lessee to accord the reduced up front payment and does not reflect true market rental within the area.

Mr Brown has claimed in his submissions at paragraph 5 that the figures referred to in paragraph 7.2 of the submissions by counsel for the lessee are incorrect. The true figure should have been $120,000 representing $63,000 paid plus the equity in the lease surrendered valued at $55,000.

This was considered by this Court during the consideration of the rental for Enuakura Section 5 where it is recorded that there is a strong incentive factor determining the amount paid in that instance in that the lease was soon to expire and the lessee would then lose the improvements effected in the land.

The land Enuakura Sec 5 and the rental payable in respect thereof do not represent comparable land for the purposes of determining 205A1, and a preferable comparison should be made with the lands Ngatairi Section 47A4 and Ngatairi Section 47A3 as referred to by counsel for the lessee in his submissions.

There, counsel has calculated the respective rentals and applied them against the land Enuakura 205A1.

Taking an average of these, counsel suggests a rental for 1995 @ $1,541.66, 2000 @ $2,100.

As Hingston J has noted in the final paragraph of his decision, ".... the rental for the property (Enuakura Section 205A1) trebled on the review in 1991" increasing from $400 to $1200 and he therefore fixed the rental from 1 July 1995 at $3000.

There is nothing in the evidence before the Court to perpetrate the trebling of the rental and it is noted that the learned Judge fixed the rental for the succeeding period at $6500 which is a little over double that for the previous 5 years.

In the absence of any evidence justifying a three fold increase for the first three years this Court adopts the generally accepted provision of comparison with comparable properties.

The Lessee in a letter dated 18 September 2002 to the owners' representative offered to pay an additional $400 pa from the 1st July 1995 and $1000 – representing a further increase of $600 pa from 1st July 2000.

On this basis the lessee has indicated acceptance of increases representing;

1st July 1995	$1600 pa
1st July 2000	$2200 pa.

Those figures compare favorably with determinations of market rentals based upon the properties mentioned above and accepted by this Court as comparable lands.

The "broad approach" applied by Hingston J does not substantiate the figure of $6500 fixed for the term 1st July 2000 to 2005.

Even taking the rental of $20540 rental payable for Enuakura Section 5, which comprises 4830 square metres then deducting the arbitrary 50% premium for land not fronting the main road, the figure is reduced to $10,270. But the subject land comprises 2415 square metres approximately half of that of Enuakura 5 reducing the figure to $5135.

The owners representative agreed in Court that the 45-50% figure adopted by the Court was arbitrary and could have just as easily have been 30% or 60%. There is no evidence or precedent upon which such figure can be founded.

The accepted method of comparing market rentals in comparable lands should be applied in this instance and the comparisons made above are appropriate.

In terms of Sec. 409B of the Cook Islands Act 1915, the market rental for Enuakura 205A are fixed as follows:-

From 1st July 1995	$1600 pa
From 1st July 2000	$2200 pa.

Dated this 10th day of September 2003.

JUDGE