

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

**App No. 335/11
336/11**

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 by the lessor
NGAMATA MAKEA to
determine the market rental of
land pursuant to a Deed of Lease
dated 11 November 1983 of the
land known as POROITITARA
SECTION 190T2A, AVARUA
now vested in EVELYN
McMAHON

AND
IN THE MATTER of an application by the lessor
TOMASINA MURRAY to
determine the market rental of
land pursuant to a Deed of Lease
dated 17 December 1985 of the
land known as POROITITARA
SECTION 190T2B, AVARUA
now vested in EVELYN
McMAHON

Hearing: 22 April 2013

Judgment: 29 August 2013

DECISION OF JUSTICE W W ISAAC

[1] The applications before the Court are as follows:

- (i) An application by Ngamata Makea to determine the market rental of the land known as Poroititara Section 190T2A, Avarau pursuant to a Deed of Lease dated 11 November 1983 (“the Makea lease”).
- (ii) An application by Thomasina Murray to determine the market rental of the land known as Poroititara Section 190T2B, Avarua pursuant to a Deed of Lease dated 17 December 1985 (“the Murray lease”).

[2] The Makea lease contains 1037 metres squared and the Murray lease contains 1000 metres squared. Situated on both these blocks is the tourist accommodation known as Ariana Bungalows.

[3] The rental review provisions for both leases is identical and is set out as follows:

For and during each succeeding period of five years of the said term annual rentals as shall be agreed upon by the Lessor and Lessee and 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 therefrom 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 five years.

[4] The applications were heard by me at Rarotonga on 22 April 2013. Mr Moore appeared as agent for the applicant in both cases and Mrs Browne as counsel for the respondent.

[5] The Court also requested that Mr Desmond Eggleton an engineering consultant give independent expert valuation evidence on the appropriate rentals for those properties.

[6] Mr Moore filed further submissions following the Court hearing as invited, Mrs Browne chose not to and relied on earlier submissions.

Desmond Eggleton's Assessment

[7] Mr Eggleton set out his assessment to the Court in written form by letter dated 18 March 2012.

[8] In his assessment Mr Eggleton commented as follows:

- (a) Capital growth on land in Rarotonga rose strongly in the 1990s and into the 2000s.
- (b) The market has softened over the past couple of years.
- (c) The figure 3% of capital value in the 1980s reflected the then trend of inland leases being used more for residential purposes.
- (d) The sections have supported a commercial operation since the mid 1980s.
- (e) The leases are the older style and do not provide any commercial turnover percentage payment to land owners.
- (f) Recent leases provide between 1.5% to 2.5% turnover going to landowners. Given this, it is fair and reasonable that rental be calculated on a basis of 5% of capital/market value.

[9] On this basis the rentals suggested were:

(a) Section 190T2A:

| | |
|------|-------------------------------------|
| 1998 | Confirmed rental \$500 |
| 2003 | Capital value \$20740 rental \$1037 |
| 2008 | Capital value \$36295 rental \$1452 |
| 2013 | Capital value \$36295 rental \$1815 |

(b) Section 190T2B:

| | |
|------|--------------------------------------|
| 2006 | Confirmed rental \$600 |
| 2011 | Capital value \$28000 rental \$1400. |

[10] On 22 April 2013, Mr Eggleton was questioned by Mr Moore, Mrs Browne and the Court in relation to his recommendations. He clarified his position in the following way:

- (i) His approach is comparable around the whole island as the capital value is dependent on the location, the topography, the access and the utilities available. Therefore citing 5% of the capital value is a fair and reasonable approach at any point around the island on any piece of land.
- (ii) When the lease in question was determined there was no percentage of turnover on the lease for the landowner.
- (iii) Different situations require different approaches by the 5% of capital value is the fairest approach.
- (iv) It does not matter the particular formula provided in the lease document for the rent reviews in that he believes that we are moving more and more to a comparable basis to using the 5% factor of capital or market value.
- (v) The percentage of capital value determines a fair calculation of rental irrespective of where it is on the island. Comparative rentals do not mean the rentals have to be in the same location.

Submissions for the applicant

[11] The applicant's submissions can be summarised as follows:

- (i) The Court should look beyond "a stone's throw" comparison and look right around the land of Rarotonga to discover comparable property when

conducting a rent review when the market rentals of comparable land is the basis for such a review.

- (ii) This being the case the comparison already submitted to the Court being Onemaru 83E1B2 Lot 9 is a strong comparable for this Court to consider.
- (iii) Also a decision of the Court dated 15 April 2013 in respect to Onemaru Lots 1 and 2 each containing 796 square metres and fixing the rental as at 2010 at \$1350 or \$1.69 per square metre is significant.
- (iv) The Court also in 15 April 2013 also fixed the market rental of Tuaana 91R2A comprising 3600 square metres as at 2011 at \$4222.80 per annum or \$1.17 per square metre.
- (v) It is submitted by Mr Moore that Mrs Browne's only argument as to Onemaru Lot 9 would not be a valid comparable was that its location was on the other side of the island from the Makea and Murray leases.
- (vi) Mr Moore also supported the assessment made by Mr Eggleton.
- (vii) Mr Moore proposed the following:

Makea lease

2003 adjusted at 5% per annum being 96 cents per square metre = \$989.26.

2008 adjusted at 5% per annum being \$1.30 per square metre = \$1355.09

Murray lease

2011 adjusted at 5% per annum being \$1.59 per square metre = \$1594.87

Submissions for the respondent

[12] The written submissions of counsel for the lessee are dated 31 January 2012 have not been added to and the Court relies on these submissions.



[13] In summary the submissions are as follows:

- (i) The comparison given by Mr Moore in relation to Onemaru Section 83B129 is not relevant because of its location being on the opposite side of the island.
- (ii) Reference is made to the decision of Savage J dated 8 July 2010 in respect to part Enuakura Section 205A1, Avaraua, which looked at similarity in location, size and being within the same rental band. In that case counsel says that the comparative sections which were drawn to the Courts attention were sections in the same location.
- (iii) Counsel also referred to the decisions of Smith J of 14 March 2001 being Puatiki Section 84B, Arorangi which referred to the formula for determination of rental at 5% of the value of the unimproved land and said that this is the manner in which the Courts in Rarotonga have customarily determined rentals on review and this Court sees no reason to depart from this system. In that case counsel says that the properties compared the properties were adjoining or the in the vicinity of the subject lease.
- (iv) Also in judgment of Savage J on 11 October 2011 dealing with an application to determine current market rental in respect to Vaikeri and Rautai S190Q2B, Avarua which is on the seaward side of the road almost opposite the Makea and Murray leases this is considered an appropriate comparative rental. The rental for this property was fixed as follows: 1983 as at \$275.00, 1988 as at \$350.00, 1993 as at \$450.00, 1998 as at \$550.00, 2003 as at \$650.00 and 2008 as at \$750.00.
- (v) As a result counsel submits that the Makea lease as at 1 December 2008 should be fixed at \$660.00 and for the Murray lease should be fixed at \$750.00.



Discussion

[14] In respect to fixing a fair and reasonable rental for properties I consider the approach which currently exists of providing the Court with as many comparables as possible with supporting submissions at times results in arbitrary and inconsistent results.

[15] As I have previously stated I do not purport to be an expert in valuation and would prefer to defer to evidence and recommendations of such an expert when determining market rentals. Previously some Judges have attempted this approach and others have not. However it is my view that the approach taken by Mr Eggleton will not only result in fair and reasonable assessment of market rental but will also provide a consistency of approach from this Court and a consistency of decision making.

[16] In Mr Eggleton's approach, the comparatives that will be taken into account will be those factors to be considered when determining the capital value or market value of the property. These factors as set out by Mr Eggleton include location, topography, access and the utilities available to a property. Once the capital value is assessed by taking into account these factors then 5% of the capital value can be attached to any property at any location around the island to determine what is fair and reasonable.

[17] As stated by Mr Eggleton the 5% is considered as being reasonable in all the circumstances of this case. This is supported by Judge Smith decision in 2001 in relation to Puatiki Section 84B, Aorangi where he says the 5% formula is the manner in which the Courts in Rarotonga have customarily determined rentals on review and the Court sees no reason to depart from this system.

[18] Mr Eggleton was questioned in Court by both counsel and maintained that his approach would provide a fair and reasonable result for comparable rental across Rarotonga.

[19] As indicated earlier I support such an approach and agree with Mr Eggleton that this would provide a fair and reasonable rental for properties at any point around the island and on any piece of land. It would also provide some degree of certainty for

2.

Lessors and Lessees and also bring valuation expertise into the calculation which has at times been lacking.

[20] As a result I adopt Mr Eggleton's recommendation and determine the rental for the above properties as follows:

(a) Section 190T2A (Makea lease):

| | |
|------|-------------------------------------|
| 2003 | Capital value \$20740 rental \$1037 |
| 2008 | Capital value \$29036 rental \$1452 |
| 2013 | Capital value \$36295 rental \$1815 |

(b) Section 190T2B (Murray lease):

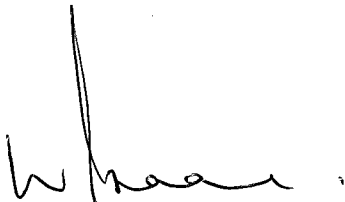
| | |
|------|--------------------------------------|
| 2011 | Capital value \$28000 rental \$1400. |
|------|--------------------------------------|

Costs

[21] Mr Moore for the applicants has asked that costs be reserved. Should Mr Moore wish to progress an application for costs he is to file submission within 21 days of this decision and Mrs Browne is to respond within 14 days.

[22] A copy of this decision to go to all parties.

Dated at Wellington this 29th day of August 2013.



W W Isaac
JUSTICE