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

APPLICATION NO: 300/2011

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 PUOROMEA SECTION 49D, AVARUA
AND IN THE MATTER	of a Deed of Lease dated 24th May 1972 and a Deed of Sublease dated 20th August 1979 now vested in COOK ISLANDS TELECOMMUNICATION ASSETS LIMITED

Appearances: Mr D R McNair, for the landowners
Mr L D Miles, for the Cook Islands Government Property Corporation
Mrs T Browne, for the Cook Islands Telecommunication Assets Limited

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RESERVED JUDGMENT

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1. Puoromea Section 49D at Avarua is a commercial (non retail) premises, having an area of 3062 m² and occupied by Mrs Browne's client.

2. The Head-lease that is the basis for this litigation provides at clause II:
"The Lessor doth hereby lease unto the Lessee the said [Land] .....To hold the same unto the Lessee for the term of SIXTY (60) YEARS computed from the first day of October 1971 yielding and paying therefore:

   (a) For and during the first five years of the said term an annual rental of EIGHTY DOLLARS ($80.00)

   (b) For and during each succeeding period of five years of the said an annual rental as shall be agreed upon by the Lessor and Lessee or failing agreement at such rental as shall be fixed by arbitration (to be based on current market values of comparable unimproved land) in accordance with the Arbitration Act 1908 but in no case to be less than the rental payable for the preceding period of five years."

3. No agreement has been reached between the landowners, by their committee on the one hand and the parties assuming responsibility for paying rental on the other.

4. This Court is given jurisdiction to deal with this matter by s409B of the Cook Islands Act 1915 which reads as follows:

"409B Land Rental Arbitration – Notwithstanding anything in any lease, contract or other document conferring rights in any person to land or an interest in land the Land Court may upon application by any interested party and upon sufficient cause being shown, hear, determine and fix the capital value of any land or interest in land or the current market rental of any land or interest in land."

5. Rental for the land was last fixed by Dillon J in October 1993. This was for the periods:

1986-1991 $2,000;

1991-1996 $2,500.

He also fixed the capital value in each case at, I note, twenty times the rent. In other words and perhaps looked at in another way, rental was being fixed at 5 percent of capital value.

I am asked to fix the rental for four periods starting in 1996 and ending in 2016.

6. Mr McNair's clients asks me to look at immediately comparable sections and premises and to fix the rental for Puoromea Section 49D by allowing an increase directly comparable to the percentage increases allowed on those sections by Orders of this Court.

He points to the section next door, Puoromea Section 49E. The land use is the same and increases of 30% in capital value and rental were allowed in each period. Although the periods are slightly different and therefore somewhat out of step, they are relevant and helpful.

A section adjacent to Puoromea Section 49E, being the HSBC office building, showed a rental increase of 37.5% for the period 1995 to 2000 and for the period 2000-2005, 36.36%.

7. Mr McNair asks that I round the figure off at 30% increase for each of the years, which would produce rentals of:

1 October 1996 to 1 October 2001	$3,250;
1 October 2001 to 1 October 2006	$4,225;
1 October 2006 to 1 October 2011	$5,492; and
1 October 2011 to 1 October 2016	$7,140

8. The other parties take a rather different view. Mr Miles points out that if the increase as sought is granted, it would produce wildly different rates per square metre between the comparative sections and the subject premises. Those differences could be between 21% and up to 35%. I suppose this calls into question the accuracy of a number of decisions made for rentals such as these. This is hardly surprising given the way matters have usually proceeded on these hearings.

9. Mr Miles calculates that the comparable rent for the outstanding periods, based on a per square metre basis, using the rates fixed for HSBC and Puoromea 49E should be:

1 October 1996	$2,800;
1 October 2001	$3,200;
1 October 2006	$4,000; and
1 October 2011	$5,000.

10. The facts in this case are not in dispute. What is in dispute is what should be properly taken or inferred from the facts. The calculations have been made using judgments where Judges have, I am afraid, had very little real evidence to go on.

There seems to be no reality check as to what is or was happening in the market. No evidence was given of any comparable transactions in the market place between a willing landlord and a willing prospective tenant. The supply and demand issue is simply not addressed. No evidence is given as to the buoyancy, confidence or otherwise in the economy in a general sense or the economy as it relates to businesses that occupy comparable premises in a comparable market. Certainly no evidence is given from a valuer.

If the Court is asked to fix market values or market rentals, one would expect to hear particular evidence relating to the market and the time may well have come where the Court will not be prepared to deal with matters such as this without more satisfactory evidence. I am very conscious that allowing a 25 percent increase in each case effectively doubles the rent after three reviews. I am somewhat dubious that the market would in fact advance on a straight line basis in any event.

11. The parties are not far apart in money terms. It is common ground that there should be a rental increase and the amount at issue is small. Mrs Browne tells me that an offer to increase the rental by 25 percent, in each case, has been made. Mr McNair, for the owners, seeks 30 percent for the first three periods and 35 percent for the last. After reviewing the whole of the file and all the submissions I fix the increase at 28 percent for each period the result therefore being:

1 October 1991 to 1 October 1996	$2,800;
1 October 1996 to 1 October 2001	$3,200;
1 October 2001 to 1 October 2006	$4,096;
1 October 2006 to 1 October 2011	$5,243; and
1 October 2011 to 1 October 2016	$6,711

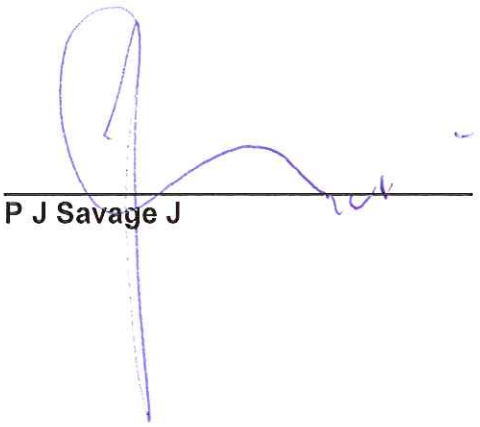
12. The application as framed seeks that I fix the capital value or the market rental of the land. It seems to me looking back over a number of decisions and having regard to the terms of the lease, that there is little point in me fixing the capital value of the land. It tends to be simply calculated, as I said, by multiplying the rent by 20. If there is any special reason why capital value should be fixed, then counsel should notify the Registrar and I will deal with the matter in the October 2013 sittings of this Court. If no application is received in that regard the application is dismissed.

13. There are two other matters that I should refer to. There is a concurrent application pursuant to s492 of the Cook Islands Act 1915, which for some reason has not been referred to me and I ask the Registrar to list that matter before me during the October sittings of this Court in 2013.

14. There is also an issue of costs. Mr McNair in particular, was required to attend Court for at least 3 hours, to no good purpose, because Mr Miles, for some unknown reason, did not appear. He seeks costs. I reserved that matter and Mr Miles was to be notified that costs were at issue and that he had the right to make submissions, should he so wish. He has made no submissions. I fix costs against Mr Miles client

in the sum of $450. This is not intended to be punitive but rather to reflect the increased cost to Mr McNair's clients occasioned by the delay.

Dated at Rotorua, New Zealand, this 30th day of August 2013.



P J Savage J