IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) APPLICATION NO. 336/91

IN THE MATTER of the land known as TUTAKIMOA S.14D1, AVARUA

A N D

IN THE MATTER of the Deed of Lease dated 27 May 1980 from the Landowners (the Lessors) to the National Bank of New Zealand Limited (the Lessees)

Mr Campbell and Mr Lynch for the Landowners
Mrs Browne for Westpac Banking Corp
Date of Judgment : 5th MARCH 1993

JUDGMENT OF DILLON J.

BACKGROUND

A Deed of Lease dated 27 May 1980 was entered into between the Native Landowners and the National Bank of New Zealand Limited over an area of 38 perches for a term of 60 years as from 1 April 1979. The area of land is described in the lease as all that parcel of land comprising thirty eight perches (38 p) more or less being all of the land known as TUTAKIMOA SECTION 14D1 in the Tapere of Tutakimoa, District of Avarua, and comprised in a Partition Order made by the Land Court on the 25th day of September 1934 and being more particularly delineated on Survey Plan S.O. 539 attached thereto.

The Lease provided as follows :

Witnesseth that in consideration of the sum of twenty thousand dollars ($20,000.00) to be paid by the Lessee/s to the Lessor/s and of the covenants and conditions on the part of the Lessee/s herein contained and by law implied, the

Lessor/s doth hereby lease unto the Lessee/s all that parcel of land described in the First Schedule hereto (hereinafter referred to as "the demised land") to hold the same unto the Lessee/s for the term of sixty (60) years computed from the 1st day of April 1979 yielding and paying therefor :

(a) For and during the first five years of the said term the rental of five hundred dollars ($500.00) per annum.
(b) For and during each succeeding period of 5 years of the said term an annual rental as shall be agreed upon by the Lessor/s and Lessee/s 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 5 years;

Such rental to be payable in advance on the 1st day of April in each and every year of the said term subject to the following terms and conditions.

The term of the lease commenced on 1 April 1979. The Landowners on 6 June 1980 agreed that it would not require payment of the first year's rental as the Lessee had been unable to take possession of the leased area. However the Landowners on the same date required the Lessee to commence payment of rental from the 1st day of April 1980 and pay the sum of $20,000.00 immediately.

On 24 November 1987 the National Bank of New Zealand Limited assigned its interest in the said land to European Pacific Banking Company Limited. The amount of the consideration was $1,000,000.00.

On 2 October 1988 the European Pacific Banking Company Limited assigned its interest in the land to the Westpac Banking Corporation. The amount of the consideration was $3,500,000.00.

It is clear that the consideration paid by the European Pacific Banking Company Limited to the National Bank of New Zealand Limited in 1987; and the 3 1/2

times increase in the consideration paid by Westpac Banking Corporation to the European Pacific Banking Company Limited the following year has influenced the dispute which has now been created over the assessment of an appropriate rental for this small area of land adjoining the Bank premises and which in the main is used as a car park.

However to dispose of this irrelevant consideration Counsel for the Landowners concedes that the considerations paid by the Banks on the two assignments were for not only the leases but also the Banks "business". The question of consideration payable by the Banks on the respective takeovers and assignments of the Leases is irrelevant and I disregard it.

MR R.P. BRILL

The landowners have based their submissions on a valuation prepared by Mr Brill, a surveyor previously practising in Rarotonga but at the time of the Court hearing in Rarotonga temporarily, since then he was practising in Riffa, Bahrain. Mr Brill claimed expertise as a valuer as a result of his training at Otago University in New Zealand as a surveyor. He conceded that in all his time in Rarotonga viz seven years, he had never previously given evidence in Court as a valuer or on matters relating to the valuation of land in Rarotonga. Mr Brill's evidence was recorded prior to the hearing because of his pending return to Bahrain.

As previously stated the Landowners relied on a valuation prepared by Mr Brill in 1991. This was put in evidence and stated as follows :

"C.I. Topographical Services Ltd
Phone (682) 21-025
Fax (682) 20-969

P.O. Box 692
Rarotonga
COOK ISLANDS

DATE : 21 March 1991

VALUATION OF LAND - UNIMPROVED VALUE

1. Land Description

Tutakimoa Section 14D1 — Tutakimoa Tapere, Avarua District

(see attached diagram)

2. Land Area Under Valuation

961 square metres (38 perches)

3. General Physical Description

The property is that currently occupied by the Westpac Bank in Central Avarua. It is a rear site with 4 metres of frontage on to the Main Road which carries all services required for easy development. The access to the site is about 30 metres long.

The land is flat with a slight fall inland. It is currently occupied by the Westpac Bank building itself which extends over the front 10 metres of the land, and several ancillary buildings used by Westpac, including drainage facilities.

4. Basis of Valuation

The majority of the development in the locality is of a commercial nature, thus the present day valuation has been determined on the basis of the block being sold as a section for development on the open market.

The value of property is derived on a normal sixty year lease and 5% per annum rental basis, willing buyer, willing seller assumed.

As this area is accepted as being the central business district, the value of the land must also be derived from the frontage available combined with the depth of the site based on "unit foot values" calculated from values accepted on nearby sites and/or sales figures available.

In this valuation we have used a combination of Jerret's formula and the "2/3 - 1/3 rule" to compare values of nearby sites.

It is of some concern that we found little consistency with previously fixed valuations accepted by Court when we analysed these to develop a unit foot value for this area. In any event we have accepted mean derived from the following existing valuation data :

- that of Part Section 14C fixed by Court in 1980
- that of Part Section 889 fixed by Court in 1985
- that of Part Section 205A1 as sold in 1985.

To adjust values for differing dates we have assumed a percentage cumulative increase in value per annum which is 2% below the average All Groups Inflation figures as listed by the Department of Statistics.

Valuation

(a)	1990 Value	$65,000.00
(b)	1985 Value	$49,000.00

Valued by :

R.P. Brill
Registered Surveyor"

While this valuation describes the methods adopted by Mr Brill viz "a combination of Jerret's formula and the "2/3 - 1/3 rule", there are no calculations; no information; and in fact a complete lack of any detailed methodology as to the 1985 and 1990 values stated - they just suddenly appear without any basis other than a "mean" derived from three stated values - two as fixed by the Court in 1980 and 1985 and one relating to a sale in 1985.

The Court had hoped that the examination of Mr Brill at the pre-trial hearing on 12 August 1992 would have clarified some of these uncertainties. Instead further difficulties were highlighted - e.g. :

1. Mr Brill stated he did a number of valuations in 1988 or 1990 in the Avarua area from which he selected three. All this information was on his map in Bahrain and was not available to the Court.

2. He conceded that he took no account of the Foodland property next door; he could give no details of the J.P.I. property; he disregarded the Standard Charters property; and he could give no details of the C.I.D.B. property.

3. He claimed that the Bank section as at 1984 was more valuable than the Harry Scott section which had been valued in 1983.

4. He was surprised that the Standard Charters section is of much less value than the Harry Scott section; and was unaware of the $100,000 consideration involved.

5. He conceded that most of the section was used as a car park.

6. He claimed the Lessee in this case should pay a higher rental than Standard Charter; Harry Scott; or J.P.I.

7. He conceded the Court had no way of checking his calculations or the method he claimed to have used.

8. He claimed that the rentals for Standard Charter; J.P.I.; and Scott are incorrect and inferentially his calculated rental is the only one that is correct.

These difficulties that I have highlighted and others to which I have not referred did not assist the Court in assessing what is the valuation of this property and an appropriate rental to be fixed. I don't make that observation in any disparaging way of Mr Brill. His difficulty was his plan and all his calculations were in Bahrain and not available to him or Mrs Browne or the Court. It would seem also that he was far too restrictive in his selection of comparative valuations especially when he took no account of immediately adjoining properties which one would have thought were very relevant.

VALUATIONS

A number of valuations have been referred to in the course of the Court hearings and detailed submissions by both Counsel. I summarise these as follows :

Scott	1983	40,000	2,000	34 pchs
St Charters	1989	24,000	1,200	80 pchs
Foodland	1980	70,000	3,500	81 pchs
J.P.I.	1986	36,000	1,800	32 pchs
Bounty	1989	12,000	600	40 pchs

In order to arrive at a rental value in 1984 I must disregard the Standard Charters Lease - a lump sum payment of $100,000 was paid on that lease. The Harry Scott

lease and the J.P.I. lease are, I believe, relevant and comparable. Mr Brill took no account of the J.P.I. lease adjoining this land. The Scott lease has a frontage of 14 metres; the J.P.I. has a substantial frontage; this section has an alley way frontage of only 4 metres. Yet with comparable areas and substantial frontages to the J.P.I. and Scott sections and valued at $36,000 and $40,000 as at 1986 and 1983 respectively, Mr Brill fixes his value for this section at $49,000. Clearly his valuation does not compare or equate. His answer to that problem was that the other valuations were wrong and his was correct!

Another comparative view of the valuations proposed by Counsel for this section suggests the following :

Brill	1985	49,000	2,450	38 perches
	1990	65,000	3,250	
Browne	1984	(15,000)	750	
	1989	(18,000)	900	
Landowners	1979	20,000	1,000	

By way of explanation the capital value in brackets relating to Mrs Browne's assessment of the rental has been assessed only. Counsel for the Landowners has conceded (Page 3 of his submissions) that "the Landowners submit that the sum of $20,000 represents the value of the land as at 1979". Further "they submit that this was the market value of the property as at 1979", i.e. $20,000. Mr Brill has increased the value of the section from $20,000 to $49,000 in five years, i.e. more than double, without any evidence of values throughout Rarotonga doubling in that five year period.

The rental proposed by Mrs Browne was based on a valuation of $35,000 in 1984 and $50,000 in 1989, then with certain adjustments calculated to take into account an initial payment in 1979 of $20,000 referred to as goodwill and a further payment of $12,000 following the acquisition of the property by Westpac. I shall deal with those two payments shortly. The valuations proposed by Mrs Browne are in line with and correspond to valuations of adjoining properties. They

take into account this section has no frontage but only an accessway of 4 metres. They relate to the sale of the freehold to the Catholic Church in 1990 for $30,000 of an area of 20 perches with a related road frontage; and they take into account rentals and related values of adjoining properties which Mr Brill failed to recognise. In all those circumstances I accept the valuations of $35,000 for 1984; and $50,000 for 1989; and reject the valuations proposed by Mr Brill for the reasons already stated.

THE PAYMENT OF $12,000 TO THE LANDOWNERS IN 1989

Mrs Browne has introduced this payment to the Landowners as a necessary allowance and therefore reduction of the rent payable for the 1989 - 1994 period.

I have no doubt from the evidence placed before me that this was a one-off payment negotiated by Mr Mitchell, the Landowners solicitor in 1989, and Mr Bandinet. On the takeover by Westpac, European Pacific Banking Company Limited failed or neglected to obtain the consent of the owners in accordance with the specific terms of the lease. It is normal conveyancing procedure for the vendor to obtain all necessary consents. Because this was not done the landowners were entitled to negotiate for the default. However, because of the default by European Pacific, the Landowners should not be penalised with this reduction in rent. One could say Westpac should not be penalised either, but then the Court has no details of those negotiations.

I have no difficulty in disallowing any allowance being made in the rent calculations for the $12,000 paid to the owners for the default of European Pacific.

THE GOODWILL PAYMENT OF $20,000 TO THE LANDOWNERS IN 1979

From the evidence presented to the Court I am satisfied the $20,000 was a goodwill payment that was to be reflected in the future rent calculations.

Counsel for the Landowners submits the payment should be ignored. Counsel for the Bank suggests $20,000 should be deducted on every review of rental. Both proposals are unfair and unreasonable, and I reject both of them. I set out the following calculations using Mrs Browne's proposed valuations :

1979/84	$20,000 @ 5% = $1,000 - paid $500 p.a. - not paid 500 x 5 years	= $2,500
1984/89	$35,000 @ 5% = $1,750 - paid $500 p.a. - not paid 1,250 x 5 years	$6,250
1989/93	$50,000 @ 5% = $2,500 - paid $500 p.a. - not paid 2,000 x 4 years	$8,000
	Total	$16,750

This figure of $16,750 is an appropriate allowance for the goodwill payment of $20,000 paid in 1979. From 1 April 1993 the full rent of $2,500 p.a. shall be paid to the owners based on a valuation fixed at $50,000. The rentals outstanding on the valuations fixed for 1984 and 1989 have been included in the calculations referred to above. There will be no further allowances to cover the initial goodwill paid.

The owners are entitled to costs. These are fixed at $750.00 payable by Westpac.