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

**APPLICATION NO. 01/01**

**IN THE MATTER** of Section 390A of the Cook Islands Act 1915

**AND**

**IN THE MATTER** of **TUORO SECTION 87A3A, ARORANGI**

**AND**

**IN THE MATTER** of the Deed of lease dated 2nd November now vested in JOAN ELIZABETH ROLLS

Mrs Browne for Applicant

**DECISION OF CHIEF JUSTICE L GREIG**
**Delivered the 27 day of November 2001**

1. This is an application dated 9 April 2001 to amend the order of the High Court fixing the market rental of the land Tuoro Section 87A3A Arorangi. The application is made pursuant to s. 390A Cook Islands Act 1915.

2. The land is subject to a lease dated 2 November 1982 between Mereana Taripo as lessor and Denis Hawkins and Miriama Hawkins as lessees. The interest of the lessees is now vested in Joan Elizabeth Rolls.

3. The lease is for a term of 60 years from 1 December 1982 at the annual rental of $100 for the first 10 years of the term. the lease provides for review of the rent as follows:

> *"For and during each succeeding period of ten years of the said term annual rentals as shall be agreed upon by the Lessor and Lessees or failing agreement at such annual 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 as at the commencement of each such period after excluding all improvements effected to the said land by the Lessee, and the terms conditions and provisions of this Deed, but to be not less than the rental for the preceding ten years."*

The lease was confirmed by the Court on 13 Dcember 1982.

4. On 5 October 2000 the lessee Joan Elizabeth Rolls applied to the Court under No. 477/99 for an order pursuant to s.409(g) of the Act to determine and fix the capital value or current market rental of the land as at 1 December 1992.

5. It seems that there was some difficulty in communication with the landowner because her address was unknown to the lessee or her solicitor. For whatever reason the application did not come before the Court until 9 March 2001. Mrs Browne for the lessee told the Court that there had been no communication with the landowner. The landowner or lessor was not present and was not represented at that hearing. I note that as far as appears on the Court documents the landowner lessor has not been involved or represented in any of the Court proceedings including this application for review.

6. The lessor's application to the High Court was put on the basis that there was no agreement but that the rent should be fixed on a comparison with other comparable land in the neighbourhood. To this end Mrs Browne proposed an annual rental of $1500 from 1 December 1992 as a ten yearly review.

7. The Judge, as recorded in the transcript, commented on the 10 year term and the likelihood of inflation affecting the rental over the period. He suggested that there should be some allowance made, as he put it, "for some 'catch up'." He concluded by fixing the rent at $1750 per annum from 1 December 1992. There seems to have been no evidence or information before the Court as to the effect, if any, of inflation to the "catch up" between December 1992 and the date of this hearing in March 2001.

8. The next step was the application for rehearing in April 2001. The grounds expressed in the application repeated the words of s.390A that the Order was made through a mistake of fact in that the Court has in effect done or left undone something which it did not actually intend to do or leave undone or something which it should not but for that mistake or error have done or left undone. No details were given as to the nature or circumstances of the claimed mistake of fact.

9. The matter was called before me on 10 May 2001. Mrs Browne advised the Court that discussions were proceeding with the family. I adjourned the application

to be brought on upon notice. I did not then or later refer the application to the Judge for report.

10. On 20 August 2001 the Judge made a report to me. In that he referred to a letter from the landowner which it appeared gave agreement to a rent of $250 per annum from 1 December 1992 to 30 November 2002 and a rent of $900 per annum from 1 December 2002 to 30 November 2007. A review was to take place at that later date.

11. The Judge was of the opinion that if that agreement had been before the Court in March 2001 the rental would have been fixed accordingly. He recommended an amendment of the Order made to accord with that agreement.

12. The documents before the Court which are the foundation of Mrs Browne's claim for an agreement are as follows:

    1. An undated unsigned page typed and addressed to Mrs Browne stating:-

        "Please find enclosed instruction for our rent review from Mrs Emily Taripo Smith."

    2. A photocopy of what appears to be page 2 of 4 pages of a fax message sent on 15 August 2001. It purports to come from Emily Te Rahi Taripo Smith from an address in Auckland. The salutation in the letter is "Dear Joan". The body of the letter contains this:-

"In answer to your proposal:

(i) To pay additional $150.00 retroactively from 1992 to the next review date due 30.11..02 is agreeable to all parties.

(ii) The ground rent $100.00 that is due is agreeable as stated in your letter for Nov 2001 to Nov 2002.

(iii) Following this we would like the ground rent increased to $900.00 annually which will be reviewed in 5 years and could be increased, then we are looking at inflation and unforeseen future."

3. A photocopy of what appears to be page 3 of 4 pages of the same fax sent on 15 August 2001. It is a copy of an undated letter from the lessee to Emily Taripo Smith containing a proposed agreement which in typed form is as follows:

"The following is, as we discussed on the telephone, what we proposed to you to satisfy the past due rent review of 30.11.1992;
The annual ground rent, as it stands, is $100 per year. We propose to pay an additional $150, retrospectively from 1992 to the next rent review which is due 30.11.2002. Plus the standing ground rent of $100 per year coming due in Nov. 2001 and Nov. 2002. This amounts to $1700, plus land court and/or solicitors fees, which we will pay. And looking to the future, we would like to organize the annual

rental for the next 10 years; 30.11.2002 to 30.11.2012. In this manner for the first 5 years, 30.11.2002 to 30.11.2007 annual rental of $500. The next 5 years, "30.11.2007 to 30.11.2012, annual rental of $1000."

There are some hand written words on this document. After "30.11.2002 what it first appears – "This rental of $150.00 is fine."

The figures "$500" as the first review are crossed out and "900" is written in above.

The last sentence about the second 5 year review has a line through them.

13. These papers are in the Court file and are no doubt what the Judge referred to in his report. They have not been introduced by any affidavit or other information. Emily Taripo Smith appears not to be the lessor Mereana Taripo. The authority of Ms Smith if any is not clear though there is a cryptic reference in item 2 above to a power of attorney. The documents post-date the order in March 2001 by some time. There is no information to show what knowledge, if any, the lessor or Emily Taripo Smith had about the contents of that order in dealing with a proposal which reduced the rent to December 2002 by $1500 per annum and the rent for the next 5 years by $850 per annum.

14. I do not know if the lessor or her representative are aware of this application to review. There has been no appearance or representation.

15. The only mistake of fact is that the Court in March 2001 was not aware of an agreement said to be made between the parties some

5 months later. That is not a relevant mistake of fact but rather a change in circumstances brought about at the instigation of the lessee after the original order had been made. There might well be an implication that the lessee disappointed at the order made in March then took steps to reach an agreement which might be brought out to replace the order.

16. The provisions of s. 390A of the Act are useful to correct errors and to ensure that what the Court intended or must have intended becomes the true order and decision of the Court. It is not a means to have a second chance or to change an order because of a change of mind or change of circumstances.

17. There has been no relevant mistake of fact in this matter. There are no grounds to review or amend the order made on 9 March 2001. The application is refused.

18. What the parties now do is their business though any agreement for a reduced rent would have to be made so as to withstand any challenge on grounds of equity. I direct that a copy of this decision be sent to Emily Taripo Smith at the address shown in item 2 above.

CJ

**CHIEF JUSTICE**