IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(Land Division)

NO: 77/97

IN THE MATTER OF Section 390A Cook Islands Act 1915

AND

IN THE MATTER OF PUNAMAIA SECTION 190E NO.2 AVARUA

AND

IN THE MATTER OF Deed of Sublease dated 18 December 1973 vested in the Airport Authority

Decision of Greig C.J.
Dated the 16th day of April 2003.

1. This is an application made by the Airport Authority dated 3 March 1997 in respect of an Order made by the Court on 16 January 1997 fixing the capital value as at 1 November 1993 of the leasehold interest in a Deed of Sublease dated 18 December 1973. The application in terms sought an Order amending the Order of 1977 without specifying the terms of such amendment and without specifying the grounds on which the application was based other than in the general terms of section 390A.

2. The matter has been marked by confusion and delay in substance and procedure which has affected the consideration and the decision.

3. This application has not it seems been referred to the Chief Justice before now when the file was submitted to me with a report dated 28 March 2003 prepared by Norman Smith J after a hearing on 18 March 2003. I should note that there has been no confusion or delay on the part of the Judge. His report has elucidated the background of this matter in a clear and concise way. At this stage I formally make an order for reference to the Judge of the Land Division for a report. That order does not require a further report but clarifies and authorises the report now made.

4. I deal now with the background of this matter. In doing so I am basing my narrative on the report of Smith J. The starting point is the Court confirmation, on 14 February 1969, of a lease of part of the land comprising 2a. 1r. 30p. for a term of 60 years from 1 November 1968. This is the Headlease. The Headlessee gave a sublease dated 18 December 1973 of 4137 square metres to Trailways Hotel (Rarotonga) Limited for the balance of the term of 60 years less one day at an annual rental for the first 10 years of $200.00. That sublease was transferred by Trailways to Financial Enterprises Limited on 24 October 1980. This is the F E sublease.

5. By a Deed of Sublease dated 9 October 1974 Trailways subleased part of its sublease comprising 3002 square metres to Her Majesty the Queen In Right Of New Zealand

for the remainder of the term of 60 years less one day at an annual rental for the first 10 years of $100.00. This sublease was transferred to the Airport Authority by Deed of Assignment dated 29 December 1989. This is the Airport sublease.

6. Both the F E sublease and the Airport sublease provide for review of the rental for each successive period of 10 years "calculated on the basis of Five Dollars per centum of the Capital Value of the said parcel of land, after deducting therefrom the value of all improvements effected acquired or paid for by the sublessee or sublessor thereon, following valuation to be made as at the first day of November in the year immediately following the expiration of each period of ten years of the term hereby granted....." The rental was in any event not to be less than the rental for the first period of 10 years. There were further provisions as to the method and terms of valuation.

7. It would appear then that the F E sublease rent was to be reviewed as from 18 December 1983 on a valuation to be made on 1 November 1984. It may be however that the term this sublease began on 1 November 1973. The Airport sublease rent was to be reviewed as from 9 October 1984 on a valuation to be made on 1 November 1985.

8. In fact the F E sublease was reviewed in 1985 by the Court. An order dated 1 April 1985 fixed the value of the land at $15000.00 and the rental at $750.00 per annum "as at 1st November 1983".

9. The next review was heard by the Court in September 1996. The reference throughout the record of the hearing and the decision of the Judge dated 16 January 1997 is to the F E sublease. The applicant for review was the Airport Authority. It was represented by Mrs Browne. The only other party at the hearing was the landowner represented by Mr Lynch. Financial Enterprises was not present or represented. It was stated that the sublease was vested in the Airport Authority. That is an assertion repeated by Mrs Browne in her submissions in this application. There is no reference to any documentation in support of that. There was no mention of the Airport sublease in this 1996 hearing or the judgment.

10. The decision on the review fixed the unimproved value of the land at $60,000.00 and the rental at $3000.00 per annum from 1 November 1993. The basis of that decision was the rental of the house at $180.00 per week or $9360.00 per annum and the comparative increase in the rent between the first and the second periods namely $200.00 and $750.00 which the Judge viewed as a four fold increase approximately.

11. It is this decision which is now challenged under section 390A. Although Mrs Browne did not specify the grounds of that challenge in her written submissions, already mentioned, she alleged that the reference to the house rent was wrong. She states that the rent was $140.00 per week and she can produce evidence in support of that. Further she submits that the formula of applying a comparative rule to the valuation was flawed. There does seem to be some danger in applying an increase in one ten year period to the next without evidence that such an increase is relevant and is applicable to the current situation.

12. The procedure under section 390A is not an appeal procedure and is not a general review procedure. It applies when in the words of the section there has been a mistake, error or omission whether of fact or law however arising whereby 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 would not have done but for that mistake error or omission or there has been an erroneous decision on a point of law.

13. There are two aspects to this case. The first is the matters raised by Mrs Browne. The second is the apparent confusion between the F E sublease and the Airport sublease. Both of these give ground for misgiving as to the decision and its bases. I consider that there is sufficient doubt to require that the question of the proper value and rent

for the period in issue should be reheard so that the confusion and doubt can be dealt with fully and clearly. I make an order that the order made on 16 January 1997 be set aside and cancelled and that the application to review the rental and the value of the land under the subleases or whichever applies be reheard.

Laurie Greig CJ