IN THE HIGH COURT
HELD AT RAROTONGA
(LAND DIVISION)

Application No. 125/96

IN THE MATTER of Section 409B of the Cook Islands Act 1978/9.

BETWEEN **AITUTAKI LAGOON HOTEL LIMITED**, a duly incorporated company having its Registered Office at Rarotonga

Applicant

A N D **THE PROPRIETORS OF AKITUA INCORPORATION**

Respondent

Miss K.L. Percy for the Applicant
Mrs T. Browne for the Respondent
Date of Judgment: 21 December 1996

JUDGMENT OF DILLON J.

I have today received the Notes of Evidence from the hearing of this application on 2 October 1996. The delay in producing this decision in those circumstances is understandable - but nevertheless is regretted.

This is an application to determine the rent payable under a lease between the Applicant and the Respondent in respect of 27 ac 3 rds 30 pchs more or less being the land known as the Motu Akitua in the Island of Aitutaki. The original lease was dated 16 November 1981. Provision for five yearly reviews of rental were set out therein as follows :

> "(a) For and during the first five years of the said terms an annual rental at the rate of ONE HUNDRED DOLLARS ($100.00) per acre per annum;

(b) 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 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 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 annual rental payable for the preceding five years."

That original lease was varied by a Deed dated 21 August 1990 and the provision for rental reviews materially altered by the following provisions :

> "**HAVING** regard to the returns to be realised from this amendment to the Lease, the Lessor agrees that the ground rental payable shall be reduced with effect 1 November 1989 from the rental otherwise payable to $5,000.00 per annum (though this reduction shall not be interpreted or construed as affecting the capital value of the said land). That rental shall be reviewable at the times, using the procedure and on the other terms of the Lease but notwithstanding the terms of the Lease such increases shall be calculated by application of the percentage increases (over the relevant period) of the Rarotonga All Group Price Index or any other comparable index from time to time maintained by the Government of the Cook Islands **EXCEPT** where it can be demonstrated to the reasonable satisfaction of the High Court that the percentage rate of change in the values of unimproved land in Aitutaki over the relevant period are substantially different from that of any general index. If the High Court is so satisfied then it shall apply the percentage rate of change in the values of unimproved land in Aitutaki over the relevant period. The parties mutually agree that having regard to the imposition of the payment of a percentage of Resort Income in advance of the reduction of ground rental the minimum payments provisions of clause 12(2) of the Leases (as amended) shall not take effect until the lease year commencing 1 November 1989."

The agreed rental payable under the lease as varied was $5,000.00 p.a. commencing from 1 November 1989. The second five year term expired on 31 October 1991. This application therefore is to review and determine the rental for the period 1 November 1991 to 31 October 1996.

The Applicant submits that based on the formula in the Deed of Variation the rental should be increased by $545.00 to be a total of $5,545.00. That rental equates to an unimproved value of the land at $110,900.00.

In reply the Respondent suggests that the rental should be $7,859.00 which relates to an unimproved value of the land at $157,180.00.

The formula for the five yearly review of rental as provided for in the Deed of Variation has been clearly stated - it is :

> ".... the percentage increases (over the relevant period) of the Rarotongan All Group Price Index ... "

Statistics produced by the Applicant from the Government Statistician establish that the percentage change for the relevant period was 10.9%. Applying that percentage the rental increase is $545.00 or a total of $5,545.00 as submitted by the Applicant.

It is, however, necessary to consider whether the exception to that clause has application to the present circumstances. Miss Percy submitted that :

> "The exception contained in the varied rent review clause does not apply. There is insufficient relevant data to support a demonstration of substantial difference between the percentage rate of change in Aitutaki unimproved land values over the relevant period and the percentage increase of the Rarotonga All Group Price Index."

I now turn to consider the exception provisions of the Deed of Variation, i.e. the exception to the percentage increase of the Price Index when compared to the percentage rate of change in the unimproved value of land on Aitutaki. Mrs Browne accepts that her suggested alternative rental can only be justified if calculated under the formula set out in the "exception" provisions of Clause 2. She agrees that she is required "... to demonstrate that the value of unimproved land in Aitutaki is different from the G.P.I. percentage change." However she is required to do more than that. She must not only demonstrate a difference but that the percentage is "substantially different".

To justify the rental proposed by the Respondent Mrs Browne refers to the Rapae, the only other Hotel on Aitutaki. There is of course the still to be built Aitutaki Resort and Mr Eggleton's valuation associated with it. However, as Mrs Browne concedes that rental cannot be assessed or compared because some of the owners have taken up their interests in a shareholding of the Company.

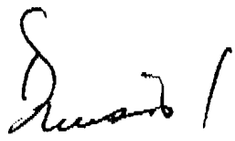
Now returning to the Rapae Hotel on which Mrs Browne relies. Its area is 7 ac 2 rds 26 pchs. As compared with the Akitua area of 27 ac 3 rds 30 pchs. The rental of the Rapae was fixed in 1982 at $1,916.00 which equated to a valuation of $38,320.00. It was on the market subsequently for US$500,000.00. However, it was not sold for that price - and in her submissions Mrs Browne conceded that Mr de John was not able to complete his proposed purchase at $NZ500,000.00. Sadly there are no comparable or comparative sales or rental examples on Aitutaki which can assist the Court in comparing the Percentage Price Index with the percentage unimproved values and so enable an assessment to be made as to whether there is a substantial difference in the two.

Miss Percy submitted that any comparison had to be limited to the 2 year period only, that is 1989 to 1991. I do not accept that. If values were available outside 1989 and 1991 they could be adjusted and made comparative and relevant to whether any difference in the two percentages were substantial. In this instance the information of a possible sale of the Rapae Hotel does not assist the Respondents; nor does the collapsed sale to Mr De John.

Apart from this unavailability of any supporting evidence to challenge the Price Index of 10.9%, some consideration must be accorded the background reasons for the 1990 variation of the proposals embodied in the original 1981 lease. The rental was reduced by the variation to $5,000.00 on 1 November 1989. However, the Respondents instead were to receive 1.5% of the Hotel's income which on average has since averaged $15,000 p.a.

That advantageous alternative return to the owners in lieu of the comparatively small reduction in the rental previously received emphasises in my opinion the importance and significance of establishing that land values on Aitutaki are substantially different from the price index. Because there are not the comparative properties from which to extract the relevant information, the Respondents have been unable to establish that the unimproved land values on the Island are substantially different to the Price Index. Nor does the area differential, where Akitua is four times the area of the Rapae assist either the Respondent or the Court to challenge the 10.9%.

For the above reasons the rental is fixed at $5,545.00 for the period 1 November 1991 to 31 October 1996 inclusive. The obligation for the review of rental is always on the Lessee. For so much of the above rental that has not been paid to the Respondents during this period interest at 12% p.a. shall be added and payable. There will be costs in favour of the Respondents in the sum of $250.00.



Dillon J.