IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Suit No. 16 of 2011

Darcey Deigairuk

Plaintiff

v

RONPHOS

Defendant

JUDGE:	Justice John W. von Doussa
WHERE HELD:	Nauru
DATE OF HEARING:	14 , 15, 16, 20 and 21 August 2012
DATE OF JUDGMENT	22 August 2012
CASE MAY BE CITED AS:	Darcy Deigairuk v RONPHOS
MEDIUM NEUTRAL CITATION:	[2012] NRCS 16

Catchwords:

Lease – Unpaid rent – Whether valid relinquishment of portion of leasehold premises – Variation by mutual agreement – Damage to property – Claim to rent for an accretion Legal principle as to accretion *Terra Holdings Limited v Sope and the Government of Vanuatu [2012]* VUCA4 – Accretion not apply where seaward boundary altered by artificial reclamation work – Dispute as to quantum of rent owing.

APPEARANCES:

For the Plaintiff	David Aingimea (Pleader)
For the Defendant	Ruben Kun (Pleader)

Von Doussa J:

1 The plaintiff claims from the defendant RONPHOS, as the statutory successor to the liability of the former Nauru Phosphate Corporation (NPC), unpaid rental which he alleges is due to him under a lease entered into 2000 with an effective date commencing 1st April 2000 (the lease). NPC and RONPHOS are together simply referred to as the defendant.

2 The lease is admitted in the pleadings. At one point during interlocutory proceedings the defendant suggested it was not to be treated as the lessee. That contention was inconsistent not only with admissions in the defence but with pre–action correspondence between the parties. The liability of NPC and RONPHOS as lessees under lease was not denied at trial.

3 The pleadings and correspondence between the parties placed on the court file before trial asserted many different money sums as accruing due either to the plaintiff under the lease or to the defendant from the plaintiff as a result of alleged payments, over payments and advances made by the defendant, many of which were not admitted. The nature of the evidence anticipated by the pleadings and the correspondence suggested that the court would have difficulty reconstructing accounts between the parties that could satisfactorily reflect their broad and imprecise assertions. The court therefore settled with counsel before evidence was called four precise issues for determination by the court.

4 The four issues, broadly described, are:-

a. The purported relinquishment of three single quarters houses from the lease. The defendant by letter dated the 30th August 2006 to the plaintiff stated that it relinquished that part of the lease. The statement of claim alleges that the terms of the lease do not permit partial relinquishment. The plaintiff claims continuing rent for the area in question up until he sold the land to a third party, effective from 5th November 2010.

b. Damages for the poor condition of the houses when the defendant purported to return them to the possession of the plaintiff. The loss is not quantified in the pleadings.

c. Additional rent for the use of approximately 3400 square metres of land adjoining the seaward boundary alleged by the plaintiff to be an accretion attaching to the leased land (Portion 194). The amount in issue from 2000 to 2010 is approximately $117,000.

d. The defendant claims credit for the sum of $80,736 being the face value of two cheques drawn on NPC and delivered to the plaintiff in November 2003 as two years advance rent for the years January 2005 to December 2006. These cheques could not be encashed at the time of their presentation to the bank, the plaintiff says because the drawer apparently had insufficient funds with the bank. The plaintiff alleges he was told by the bank that the cheques would be credited to his account and later cashed when NPC had funds to enable this to happen. The plaintiff says he never received cash or any real value. The Act establishing NPC was repealed on 30th June 2005. The Bank of Nauru, where the funds were apparently transferred from the NPC account to the plaintiffs account has now gone into liquidation.

5 I shall deal with these questions in term.

Purported relinquishment

6 This issue turns on the terms of the lease. The land subject to the lease is described in a schedule as NPC MQ's and SQ's AIWO PORTION 194. MQ refers to married quarters and SQ to single quarters. Clause 1 of the lease provides:

The terms of this lease shall be (20) years commencing from 1st April 2000 and ending on 31st March 2020. The lease may be renewed for further periods as the parties may mutually agree.

7 Clause 1 must be read subject to clause 8 which provides:-

This lease will terminate at the conclusion of its 20 year term.

The parties may mutually terminate this agreement before the expiry of its term, by giving each other one month's notice in writing.

8 In short, notwithstanding clause 1, the lease can be cancelled by either side giving one month notice at any time. Here, the defendant did not seek to cancel the whole lease. It sought to relinquish the lease over part of the land only. The notice given by the defendant did not purport to rely on clause 8, and it did not give one month notice of intention to depart from the terms of the lease.

9 The peremptory tone of the defendant's letter of the 30th August 2006 stating that the defendant relinquishes part of a lease on its face constituted a repudiation of the lease.

10 The plaintiff case is that the defendant of its own motion, and without reference to him, simply announced out of the blue in its letter of 30th of August 2006 that it was relinquishing part of the lease. The defendant however puts forward a quite different explanation through its principal witness, Tazio Gideon, the Administration Manager of the defendant. Although Mr Gideon did not deal directly with the plaintiff in August 2006, he was generally aware that the plaintiff was dealing the defendant's Land Lease Department. A business record prepared by an officer of that department, since deceased, records that it was the plaintiff who requested that the three single quarters be relinquish from the lease as he wanted to let them himself. The letter of 30th August, and another pro-forma document to the same effect given to the plaintiff on 31st August 2006, simply followed the language of earlier relinquishments of leases that had occurred when RONPHOS took over the operations of NPC in mid-2005. The language used in the communications with the plaintiff was followed, it seems, so as to give an appropriate appearance of formality to the relinquishment. The plaintiff's evidence about his communications with the defendant about the relinquishment was vague and imprecise. In the circumstances I prefer the case presented by the defendant, supported as it is, by contemporaneous notes of the officer concerned. If the lease was varied by mutual agreement, as I find it was, that finding disposes of the

first aspect of the plaintiff claim.

11 However, if the court were to decide the case on the basis that the defendant's letter of 30th August 2006 truly reflected a unilateral decision by the defendant to relinquish the three single quarters, I consider that the plaintiffs claim would fail nonetheless.

12 If the letter of 30th August 2006 is treated as a unilateral statement of the defendant's intention, it amounted to a repudiation of the lease as the defendant was stating that it no longer intended to be bound by the terms of the lease. There would have been three courses then open to the plaintiff. He could have accepted the repudiation, rescinded the lease, and sought to recover possession of the whole of the land in Portion 194. Alternatively he could have held the defendant to the terms of a lease and sought to recover rent for the total area of land. In the further alternative, he could have agreed with the defendant that there would be a variation of the lease so as to effect the relinquishment sought by the defendant.

13 I accept the argument of counsel for the plaintiff that the plaintiff did not at the time understand the legal niceties of the situation. Nevertheless the defendant's conduct clearly indicates that he did not treat the defendant's letter as a repudiation of the whole contract. He did not seek to recover possession of the whole Portion 194. He went along with the wishes of the defendant, and accepted periodic payments of rent for part of the land. Further, he complained in January 2007, if not sooner, that the single quarters had been return to him in a damage condition, and sought to have them reinstated, saying he would otherwise sue for damages. At about the same time, he entered into a house lease with the defendant whereby the defendant leased back from him SQ 4 by way of separate transaction. Later again, the plaintiff entered into an arrangement with a third party to occupy SQ 3 and 4.

14 These facts indicate that the plaintiff accepted that the lease had been varied, and he accepted that the three single quarters had been returned to him.

15 Counsel for the plaintiff argues that there could be no valid variation of the lease as ministerial consent was not obtained pursuance to section 3(3) of the Lands Act 1976. I

do not accept that submission. The requirement under that provision is for permission to enter into a lease. I do not think that it prevents the parties later agreeing to vary a lease by reducing the area to which the lease relates.

16 The plaintiff's case made no mention of a further variation or relinquishment of land from the original lease. However it is clear from the defendant's evidence that there was another major relinquishing of land from the lease when possession of part of the land was transferred to the direct control of Utilities (now known as Nauru Utilities Corporation). I accept the defendant's evidence that this occurred with the knowledge and involvement of the plaintiff. The original area of Portion 194 was 0.90386 ha. As a result of the two so called relinquishments an area of 0.10675 ha containing SQ3, SQ4 and SQ5, and a further area of 0.43018 ha for Utilities was removed from the lease leaving a balance of 0.36673 ha for which the defendant remained liable to pay rent.

17 For these reasons the claim based on an unlawful relinquishment of land from the lease fails.

Damages for the poor condition of SQ3, SQ4 and SQ5.

18 The plaintiff's evidence was so vague and incomplete on this aspect that I do not think the plaintiff has established anything but minimal damages.

19 The plaintiff concedes that there was no damage to SQ4 which was being occupied by a tenant when it was relinquished from the lease.

20 The plaintiff alleges SQ3, which had been occupied by a government department who used it for storage purposes, had some damage. He described the damage as a broken wall, a missing door and missing louvers. Damage of this kind would go beyond fair wear and tear. No further detail was given and no estimate of cost of repairs was put forward. The plaintiff did not undertake repairs himself and did not expend any money on carrying out repairs. The evidence gives no proper basis to assess damages. Counsel for the plaintiff invited the court to take a broad brush approach and to allow some arbitrary amount for damage to SQ3. The court does so, and allows the plaintiff

$500.

21 The plaintiff tendered photographs of a damaged house. These photographs related to SQ5. The defendant's case is that SQ5 had become derelict before 2000. At no stage during the currency of the lease was SQ5 used by the defendant. Portion 194 had been leased to NPC for decades before 2000. It seems that the SQ5 fell out of repair and became uninhabitable during that period. Counsel for the plaintiff suggested that as the house had deteriorated during an earlier lease to the defendant by a forebear of the plaintiff, the plaintiff should now get compensation for the state of the house. I do not agree. The plaintiff's entitlement only arises under the terms of the current lease. Any claim for damage occurring before 2000 should have been made by the earlier lessor, and for all we know it may have been. It is too late now to try and resurrect such a claim.

22 The plaintiff's claim under the present lease for the damages to SQ5 fails because the evidence does not show the condition of the property at the commence of the lease which is necessary in order to establish that there was further deterioration in the building between 2000 and 31st August 2006.

23 The claims for damages to SQ3, SQ4 and SQ5 fail, save for the small award of $500.

Claim for rent for an accretion.

22 The parties throughout the case have used word "accretion" ambiguously to mean any new area of land that has come into the being by whatever means so as to move the high water mark boundary in a seaward direction. In this case the high water mark adjoining the seaward boundary of Portion 194 was moved further seaward by a process of reclaiming an area of some 3400 square metres constituting a strip of new land running approximately parallel with the former high water mark.

23 The reclamation was carried out many years before 2000, apparently by NPC depositing rocks and soil on the land below the high water mark. Thereafter NPC erected buildings and a cantilever on the reclaimed land which is now used by the

defendant in its operations.

24 The official survey which fixes the boundaries of Potion 194 in accordance with the Survey Act 1961 shows the seaward boundary as being a straight line drawn between the two points where the opposing boundaries of Portion 194 intersect with the high water mark. The adoption of a straight line as the boundary, according to the evidence of the Director of Land Survey, Mr Porthos Bop, is intended to approximate the high water mark along the seaward boundary of Portion 194. The adoption of this straight line method to mark the seaward boundary, accords with s 8 of the Survey Act 1961 which provides that in making a survey a line shall be measured by the most direct method that is reasonably practicable.

25 Mr Bop considered that the reclaimed area adjoining Portion 194 should be considered as an extension of, and as part of, Portion 194 and hence as land owned by the plaintiff and leased to the defendant. When asked for his reason for this conclusion Mr Bop said it was just "common sense". Common sense can offer a useful starting pointing in working out many legal problems, but in this case determining ownership of the reclaimed land attract more complex legal doctrines.

26 Counsel for the defendant, on the other hand, in written submissions contends that the seaward boundary of Portion 194 is fixed by proclamation under the Sea Boundaries Act 1997, and as such can only be altered by proclamation of the President under s 9 of that Act.

27 As will appear, I consider that the answer to the question, who owns the reclaimed land, is not to be resolved by the approached suggested by either party.

28 At the outset it should be said that what follows must be read subject to this qualification. Issues of ownership of, and interests in, land below the high water mark involve the Republic of Nauru, and the Republic is not a party to this action and has not participated in the argument of the case. In this case it is only necessary to determine whether the plaintiff has establish an entitlement to ownership rights to the reclaimed land which are to be treated for the purposes of the lease as within Portion 194. The

decision in this case goes no further. For reasons which follow I hold that the plaintiff has no ownership rights in the reclaimed land. Interesting questions remain beyond this case about the ownership of the reclaimed land, and the right of the defendant to continue its operations on it. But those issues do not arise for decision in this case. For those called upon to consider them, the leading case of *Attorney-General v John Holt and Company (Liverpool) Limited* [1915] A C 599 is likely to prove most useful.

29 To understand the legal regime which governs ownership and other rights over land below the high water mark it is necessary to start from the historical perspective of the common law, and to note the emergence of international law under which the territorial boundaries of coastal states (including island states) are now determined.

30 One time it was thought that under the common law the boundaries of a nation, that is its territorial limits, were confined to land above the low water mark. The common law notions seem always to have been contentious, but over the last century or more have been overtaken by international treaties and practice among nations. For a broad discussion of the historical development of international law on territorial seas, see *New South Wales v The commonwealth (the Seas and Submerged Land Case)* [1975] 135 CLR 337. This case also discusses the provisions of the 1958 Geneva Conventions and in particular the **Convention on the Territorial Seas and Contiguous Zone, 1958**. The 1958 Geneva Conventions were in turn overtaken by the adoption by the United Nation of the **United Nation Convention on the Law of the Sea**, done in Geneva on 10th December 1982. That same day the Convention was signed by Nauru. That convention came into force internationally in 1994 and was formally ratified by Nauru on 23 January 1996.

31 The UN Convention on the Law of the Sea, in Article 2 declares that the sovereignty of a coastal state extends beyond its land territory and inland waters to an adjacent belt of sea described as the territorial sea. Article 5 provides that the normal base line for measuring the breadth of the territorial sea is the low water mark along the coast. Article 6 provides that in the case of islands situated on atolls or of island having fringe reefs, the baseline for measuring the breadth of the territorial sea is the seaward low

water line of the reef. Article 8 provides, generally, that waters on the landward side of the base line of the territorial sea form part of the inland waters of the state.

32 The Sea Boundaries Act 1997, on which counsel for the defendant relies, enacts into the domestic law of Nauru the international law concepts of the UN Convention on the Law of the Sea. In s 2 of the Sea Boundaries Act the baseline of Nauru means the seaward low water line of the reefs surrounding the Island of Nauru, and s 3 provides that the internal waters of the Republic comprise all the waters on the landward side of the baseline. It is this baseline and other international boundaries lying in the sea beyond it that can only be changed by Presidential proclamation under s 9 of the Act.

33 The baseline fixed by the Sea Boundaries Act is the low water line of the reefs surrounding Nauru. The internal waters of Nauru, over which Nauru has full sovereignty and over which the domestic laws of Nauru operate, are the waters inland from the base line. However the Sea Boundaries Act does not prescribe the landward boundary of the inland waters, and for this reason the Sea Boundaries Act does not assist the defendant's case.

34 Where the inland waters end and land for the purpose of the Lands Act 1976 starts is not determined by the UN Convention or by the Sea Boundaries Act. It lies within the sovereignty of the coastal state to make the domestic laws, and if appropriate to recognise customary laws and practices, which govern rights to ownership and use of the seabed under inland waters, and to define the boundaries of land over which its subjects may hold property interests. The court has not been referred in this case to any statutes or other applicable law in Nauru that defines the landward limit of the internal waters. As a matter of practice in Nauru, as in many coastal states, for the purpose of domestic law the seaward boundary of land is fixed at the high water mark. The corollary is that land below the high water mark is land belonging to the state and is subject to its control, unless the domestic law provides otherwise. Domestic law may provide for the grant of title or lesser interests in the land and seabed below high water mark. A recent example of a case in the Pacific where the domestic law has recognised customary rights in lands below the high water mark may be found in *Terra Holdings*

Limited v Sope and the Government of Vanuatu [2012] VUCA 4.

35 The true legal doctrine of accretion, or to be more precise, the doctrine of accretion and dereliction, recognises the seaward boundary of land fixed by reference to the high water mark may move to accord with a movement in the high water mark. Accretion in the legal sense occurs where through the slow and gradual action of wind, waves and tide sand and silt is deposited that increases the height of the land so that the high water mark moves seaward. Dereliction describes the reverse effect of wind, waves and tides on the shoreline so that the high water mark recedes. In both cases the critical determinant is that the process is a natural one that takes place slowly and gradually – in a practical sense to be imperceptible in its process. The rationale of the doctrine is said to be found in notions of general convenience and security so that the owner of foreshore land who enjoys a seaside frontage does not lose that benefit through the processes of nature. The doctrine applies even where the title is measured in square metres, or where the measurement of the land is delineated or coloured on a plan in a way that does not include any part of the seashore: see generally *Attorney-General v John Holt and Company Limited (Liverpool) Limited*, especially at 612. The facts of that case bear similarity in many respects to the facts of this case.

36 The doctrine of accretion has no application where the seaward boundary is altered by artificial works such as reclamation. In *Attorney-General v Holt* the Privy Council observed at 615:

> *Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered be reclamatory work upon it remains as before. i.e. in cases like the present, with the Crown.*

37 Here there is no dispute that the reclaimed area is an artificial one. Thus the legal doctrine of accretion has no application. The seaward boundary of Portion 194 remains as it was surveyed and certified in the plan attached to the lease. The claim

for additional rent for the use of the reclaimed land must fail. In any vent it is to be noted that it was NPC (or its predecessor) that carried out the reclamation, not the plaintiff or his forebears.

38 The Court was referred to the Reasons for Judgement in *Eoe v Secretary of Justice* [2008] NRSC 18 as authority supporting the plaintiff's case on his "accretion" claim. The Reasons for Judgement are short and were delivered *ex tempore*. In the course of the Reasons the Court observed that a piece of land marked "B" on a plan had been accreted. The court said: "In the absence of authority to the contrary I hold that the landowners (of the adjoining Portion) own 'B' ." It appears from the Reasons that ownership of "B" was not the issue for decision, and the observations of the Court about accretion were not a necessary part of the judgement and therefore do not constitute part of the *ratio* of the decision. More importantly, however, it is not disclosed by the Reasons whether the land in "B" had gradually built up through natural action of the elements, or was an artificial reclamation. If it were the later, it is clear from the Reasons that the Court had not been referred to legal authority on the doctrine of accretions, and had it been, even to Halsbury's Laws of England, 3rd Ed, Vol 39 at paras 777-782, it could be expected that the a different conclusion would have been reached about "B". *Eoe v Secretary for Justice* does not assist the plaintiff's case.

The defendant's claim for $80,736 discount

39 The plaintiff's case about the credit claimed by the defendant was both incomplete and confusing. It was hardly surprising when late in the defence case it emerged that about half of the disputed amount related to rent advanced to the plaintiff on other leases between the parties. However, in relation to whatever leases the advance was made, the defendant's complaint remains – he got no real credit. The advance of $80,736 (or rather two advances totalling that amount) was made in November 2003 in respect of rent for the two years from 1 January 2005 to 31 December 2006. On the plaintiff's case as opened he was offered this advance as an incentive by the defendant's chairman.

40 The plaintiff's evidence about the reason for the advance was confusing. He said it was to ensure that the defendant secured the use of several houses he owned on other land. How this was to occur, and whether it ever did, and how it related in a temporal sense to the November 2003 advance was not explained.

41 In his evidence in chief the plaintiff said that when the advance was offered he said that he wanted cash, but was given a cheque and told he could cash it at the bank. When he presented the cheque he says he was told by the bank that NPC had insufficient funds, so the cheque would be put in his account and could be cashed when the NPC's financial standing with the bank permitted.

42 When an accounting statement from the defendant which shows there were two cheques drawn some days apart in November 2003 was raised with the plaintiff he acknowledged that there were two cheques, not one. In cross examination he then said that each cheque was presented on a separate occasion. He also added that at the time of receiving the first cheque he did not ask NPC for cash, but did so at the time when the second cheque (for $10,848) was handed to him, when he was told to take the cheque to the bank to be cashed.

43 The picture is further confused by the evidence of Tazio Gideon, and that of the defendant's financial accountant, Sharlene Gadabu. Their records show that the chairman instructed that an advance was to be made to the plaintiff at his request for the 2005 and 2006 years. Their records also show that at an earlier time the plaintiff had received an advance of rent for the 2004 year. The evidence of these witnesses seriously undermines the plaintiff's evidence that he was unexpectedly offered an incentive of advanced rent in November 2003.

44 It is common ground that the financial situation of NPC, the Bank of Nauru and Nauru generally was parlous around the end of 2003. Both Mr Gideon and Ms Gadabu say that NPC had a credit line with the Bank at the time, and cheques were not drawn unless the facility at the Bank was sufficient to cover them. Mr Gideon added that if an NPC cheque was presented that exceeded the NPC facility, the Bank

would dishonour the cheque. This did not happen with the cheques in question. Rather, it seems, the plaintiff received credit into his account with the Bank for the amount involved. This suggest that if the plaintiff was unable then or later to draw cash the lack of liquidity was that of the Bank, not NPC.

45 The plaintiff did not give evidence about the state of his account with the Bank in and around November 2003, nor about attempts, if any, that he made to draw cash from his account. The court offered him the opportunity to reopen his case to give this information, but the offer was declined.

46 The evidence simply fails to disclose how credit entries from the two cheques in the plaintiff's account were used by him, and whether or not he gained a benefit from the cheques.

47 If the situation surrounding the cheques was as the plaintiff said in evidence, it remains a mystery why he did not return the cheques, or at least the second one, to NPC, rather than allow them to be banked into his account, and why he did not decline the offer of an advance against future rent when he could not get cash.

48 All this strongly suggests that the plaintiff willingly accepted the cheques and their deposit into his account, and knowingly accepted them as an advance against future rent.

49 This conclusion is strongly reinforced by the fact that the plaintiff raised no complaint about the cheques and his inability to get cash until he did so in correspondence with the defendant on 21 August 2009, some 6 ½ years later. And then he gave a different explanation for the advance, namely that it was a special request by NPC management "in its endeavour to reduce the ballooning amount owing to me during that time".

50 In the result I consider that the defendant is correct in its argument that the plaintiff accepted the cheques as good consideration for the advance of two years rent, and if he got no value for them his remedy now lies against the Bank, and in turn the

Republic of Nauru under the guarantee contained in s 4 of the Bank of Nauru Act 1976. There may still be difficulty in enforcing that remedy, but in that respect the plaintiff is in the same position as several thousand other depositors with the Bank.

51 The court's conclusion on the four specific questions posed for determination now enables the parties to settle their accounts.

Final Account

52 Mr Gideon informed the court at the close of the case that the defendant was reviewing all its payments to the plaintiff as his preparation for the trial had made him suspect that there were errors in the defendant's calculation of plaintiff's entitlement. This led to the case being adjourned and the court reconvened on three further occasions to consider additional financial statements prepared by the defendant. The final set of accounts produced on 20 August (exhibit D6) seeks to summarise all the lease payments that fell due from 2000 onwards on five different leases, and all the payments that had been made. The payments credited as payments made include the disputed cheques for $80,736.

53 I accept the exhibit D6 financial statements as a correct summary of the defendant's records of lease payments made to or on behalf of the plaintiff. The defendant has raised a complaint that not all the recorded payments show to whom they were made. That deficiency is probably to be explained by the long interval of time between the payments being made and the present questions being raised. The inability at this time of the defendant to identify to whom payments was made does not mean that the payments were not made to the plaintiff, his wife or to someone else at his direction.

54 The defendant also complains that rental to him on Portion 194 was calculated on the basis that half the Portion was committed to use for housing which attracted a rate under the schedule to the lease of $2.40 per square metre per annum, and half for profit making purposes which attracts a rate of $3.60. When SQ3, SQ4 and SQ5 were relinquished a different area calculation was applied under which about eight ninths

of the Portion was treated as committed to profit making. Counsel for the defendant contends that the early rental should be recalculated on that ratio.

55 I do not accept that argument. The earlier half and half ratio was offered by the plaintiff in a letter bearing date "5/11/01" when he questioned why at the outset of the lease he was getting rent only at the housing rate. His evidence is that he got advice from the survey office and then wrote to the defendant complaining about the rate that was being applied, and offered to accept the half and half division. It seems that this offer was accepted by the defendant which then applied the half and half formula for rent thereafter. There was no need for the parties to go through the formality of amending the lease and signing the amendment. The lease already contained the schedule of rates. It was just a matter of sorting out areas so that the rates could be applied. The acceptance of the offer evidenced by the defendant applying the new rate bound the plaintiff. That occurred back in 2001. It is far too late now to be seeking to reopen that half and half agreement.

56 However, I consider two further adjustments should be made to the exhibit 6 statement. The first, in consequence of the plaintiff's "5/11/01" letter, is to back date the half and half ratio to the start of the lease in April 2000 as I consider that was what the letter offered, and therefore what the defendant accepted. That adjustment makes a difference in the plaintiff's favour of $8,588. The second is in relation to a period from January 2010 to 1st October 2010, a period of 9 months. Page 5 of the exhibit D6 statement shows that during this period the annual rent was reduced from $28,688 (which I think the defendant somewhat generously allowed the plaintiff after the three single houses were relinquished on all the remaining land in Portion 194 instead of limiting the profit making part to one half under the half and half agreement previously referred to) down to only $13,206. That was the rate that applied after the Utilities land was withdrawn. That event did not happen until 1st October 2010. This requires an adjustment in the plaintiff's favour over 9 months, which I calculate as $11,612.25.

57 Exhibit 6 shows the net balance due to the plaintiff in November 2010 when he sold

Portion 194 as $4,451.51. Adding the above adjustments, the amount of rental due to him at that date was $24,651.76. I add the sum of $500 for the damage to SQ3 to give a total at that date of $25,151.76.

58 The plaintiff seeks interest at the court rate of 8%. There have been times during the currency of the lease when moneys were owing to the plaintiff, and other times when the plaintiff had substantial payments in advance. It is not practicable, or even possible on the information before the court to undertake a calculation of interest that reflects all these ups and downs. I propose therefore simply to award interest on the sum of $25,151.76 from 5 November 2010 to date, which I calculate at $3,610.83

59 In the result I consider the amount presently due to the plaintiff is $28,762.59.

60 Counsel for the plaintiff at the end of the trial wished to check that correct rates had been applied by the defendant on the other leases that were brought into account in the exhibit D6 statements, but he later informed the court that there was no issue for further consideration on that score.

61 There will therefore be judgement for the plaintiff for $28,762.59 inclusive of interest.

62 On the question of costs, the plaintiff failed on the four substantial issues identified at the outset of the trial (save for the minimal assessment of damages for SQ3), but much time was thereafter spent whilst the defendant's statement of account with the plaintiff was sorted out. I think justice will be done if there is no order for cost for or against either party.