

Legal Decisions

Lease - Construction of lease terms - Operating expenses - Plaintiff operated supermarket at shopping centre owned by defendant - Whether operating expenses of the centre were adequately identified - Whether defendant required to provide details of salaries and wages paid to employees of the centre's managing agent - Judicature Act 1908. S24C(4).

In The High Court Of New Zealand

Auckland Registry

Commercial List

C.L. 13/93

Between Woolworths (NZ) Limited

Plaintiff

AND AMP Perpetual Trustee Company

NZ Limited

Defendant

Hearing: 22 July 1993

Counsel: L. McEntegart for plaintiff

D.H. Abbott for defendant

Judgment: 22 July 1993

(Oral) Judgment of Barker J

This is a proceeding under S.24C(4) of the Judicature Act 1908 for the determination by a Commercial List Judge of questions of construction in a deed of lease.

The matter has already been before the Court; in a judgment dated 22 April 1992, I refused the application by the defendant for a stay on the grounds of an arbitration clause. The basis for that decision was that the matter at issue between the parties was purely a question of law; with the accelerated procedure under S.24C, the

parties would obtain an early resolution of this point of construction. The affidavits are somewhat extensive, more so than one might have expected on a matter of construction. They have been of relatively little assistance in deciding the matters at issue.

The plaintiff operates a supermarket at the Lynmall Shopping Centre which was owned by Australian Mutual Provident Society ('AMP') but is now owned by a subsidiary of the defendant, AMP Perpetual Trustee Company NZ Limited ('Perpetual'). By consent, the name of the defendant is changed to that entity.

The plaintiff executed a lease of the supermarket on 5 March 1990 for a term of 20 years commencing 1 October 1986. As is usual in leases for shopping centres, the plaintiff, as lessee, is required, in addition to paying rent as determined by the lease, to pay the lessee's proportion of the "operating expenses of the centre". The plaintiff is one of the largest retailers in the centre and has a liability to pay approximately 15% of the operating expenses.

The lease document is very comprehensive and includes a lengthy definition of

"operating expenses of the centre" which definition needs to be reproduced -

"The operating Expenses of the Centre" means the total sum of all rates, taxes (excluding the income tax of the Lessor but including tax payable or collectable under the Goods and Services Tax Act 1985 and all amendments thereto), costs and expenses (including the said Goods and Services Tax on such costs and expenses) of the Lessor properly or reasonably assessed or assessable, paid or payable or otherwise incurred in respect of the Land and the Centre and in relation to the control, management, maintenance and administration of the Land and the Centre or in the use or occupation of the same (but not otherwise the direct responsibility of the Lessor or of the Lessee or of any other lessee within the Centre) and without limiting the generality of the foregoing (except as hereafter provided) shall include:

- (i) That proportion of the total land tax payable by the Lessor as is equivalent to the proportion between the unimproved value of the land and the unimproved value of all the land owned by the Lessor and all other taxes which are or at any other time during the Term charged or levied upon the Land or Centre or upon the Lessor on account thereof but excluding the Lessor's income tax;
- (ii) All rates, charges, assessment, duties, impositions and fees at any time or from time to time payable to any Authority in respect of the

- Land and Centre irrespective of the ownership thereof or paid or payable by the Lessor in consequence of the receipt of rent or other moneys pursuant to these presents, or in consequence of the Lessor having any estate or interest in the Centre or the Land but excluding the Lessor's income tax;
- (iii) All charges for and costs in relation to the supply of water, sewerage, and drainage and not otherwise included in any other charges or assessments made by an Authority;
- (iv) All insurance premiums, excess payments and valuation fees payable by the Lessor in respect of all policies of insurance effected on the Centre and the fittings and fixtures therein (including plate glass in the Common Areas of the Centre) for sums to be insured by the Lessor to full reinstatement value against fire, earthquake, fire consequent upon earthquake, flood, lightning, storm and tempest, water damage, electric fusion, boiler explosion and machinery breakdown and against such other risks as the Lessor may deem necessary or desirable (including consequential loss and loss of rent, public risk, in respect of the Common Areas of the Centre, public liability cover generally and accident compensation levies or any other levies in the nature thereof);
- (v) The cost of providing, operating, maintaining, inspecting, testing, repairing and replacing all services from time to time provided by the Lessor for tenants and occupiers of the Centre including fire protection, emergency or other alarm services or systems and the plant and equipment required for any such services which shall be deemed to include the supplying of all parts and materials required for the purposes of operation, maintenance and repair as aforesaid;
- (vi) All charges for energy, lighting, power, heating and ventilation incurred by the Lessor in connection with the Centre;
- (vii) All charges for air conditioning incurred by the lessor in connection with the Common Areas of the Centre;
- (viii) The cost of cleaning and maintenance of the Centre and Common Areas of the Centre including the cost of repairs and the removal of all waste and garbage from the Centre and Common Areas of the Centre and the Land and the costs of having the Centre treated by professional pest control agents for the control of all rodents and vermin of whatsoever nature;
- (ix) The expenses of the Lessor in supplying paper towels, soap and other toilet requisites for wash-rooms and lavatories of the Centre;
- (x) All costs for the rental of music amplification or public address equipment if installed;
- (xi) All costs for the maintenance and hire of indoor and outdoor plants, potted shrubs, gardens, planted areas, fountains and artificial water courses and associated plant in or about the Common Areas of the Centre, seating, rubbish bins, tables and promotional stage or stages;
- (xii) All costs for the provision of security services to the Centre;
- (xiii) All reasonable costs (inclusive of wages, emoluments, allowances, superannuation contributions and administrative charges) associated with the effective operation and maintenance of the Common Areas of the Centre and the management, administration and control of the Centre;
- (xiv) Without limiting the generality of the foregoing provision all fees payable to the managing agents for the general management of the Centre including the cost of the provision of channelled music including royalties relating thereto, expenses associated with the running of any children's play area, childminding centre, mothers' room and other facilities for customers of the Centre, the cost of policing and regulating traffic in the common parking area, the driveways therein and roads giving access thereto, fees and all premiums payable to specialist contractors and/or the wages paid (including sick-leave, holiday and long-service pay) to permanent and temporary staff employed and the cost of materials used by the landlord and/or the managing agents in or about the maintenance and servicing of the air-conditioning equipment, or any other aspect of maintenance in the Centre;
- (xv) Such other costs and expenses including professional fees as may from time to time arise and be properly and reasonably assessed charged, chargeable, paid, payable or otherwise incurred by against or upon the Lessor in relation to the ownership management and maintenance of the Centre and the Common Areas of the Centre;
- (xvi) Such sum in each Lease Year as the Lessor may reasonably decide to set aside as a fund to recover repairs and maintenance of a substantial but infrequent or irregular nature of the Centre **PROVIDED ALWAYS** that any expenditure of the nature aforesaid shall only be deemed to be an operating expense as otherwise herein provided to the extent to which the fund shall not be sufficient at the time when such expenditure is actually made.
- PROVIDED THAT** in assessing the amount of any outgoing, cost or expense of which any Lessee is required to pay a percentage the Lessor may allocate to particular lessees' outgoings, costs or expenses reasonably identifiable in the Lessor's opinion as incurred in respect of such lessees and exclude the same from the operating Expenses of the Centre for which other lessees are liable."
- Under clause 3.07 of the lease, a lessee's proportion of the operating expenses is payable annually after the lessor has provided an estimate of the operating expenses. As soon as practicable in every year, the lessor is to provide a statement of the actual operating expenses of the centre in the previous year and compare them with the estimate; an adjustment is then made.
- The plaintiff for some time has been concerned at the operating expenses levied against it, particularly an item under the heading "management and administration". Initially, the defendant refused to disclose a "management fee structure", even though tenants were being asked to pay in the region of \$500,000 under this heading. A more reasonable approach was taken later in 1992 and a greater breakdown eventually supplied.
- On 20 November 1992, the plaintiff was advised by AMP Shopping Centres Pty

Limited ('AMPSC'), an Australian subsidiary of AMP that, under the heading "management and administration", the lessor paid to the managing agent of the centre \$535,000; of this sum \$20,000 was for research and traffic studies; the balance was subdivided into staff costs on site \$322,000, office space \$37,500 and the balance as contributions to operating costs of various AMP interests; e.g. a pro-rata apportionment of salaries and costs including travel expenses for executives from Australia, accounting and management costs and computer costs. The total of the projected expenses came to \$508,500 which was not far from the balance of the fee (after allowing for the \$20,000) of \$516,000. The plaintiff is still unhappy with what it sees as the lack of specificity in the information provided by the defendant about the operating expenses and it brought proceedings asking whether the defendant is required, if requested, to provide it with a breakdown of the charges levied under the heading "operating expenses of the centre"; if necessary it sought to be able to enquire down to the detail of the salaries and wages paid to employees of the managing agent which runs the centre on behalf of the defendant.

I pause here to interpolate that the managing agent is AMP Investments Limited ('AMPI') which is another wholly owned subsidiary of AMP Society. AMPI administers the shopping centre on behalf of AMPSL and AMP.

The first point to determine is what information should be supplied to lessees by the lessor in terms of its obligations at the end of each financial year to supply "a statement" of the actual operating expenses of the centre for the lease year. Although there is reference in some parts of the definition to the word "reasonable" as applied to "operating expenses", e.g. clause (xiii), I have little hesitation in accepting the submission of Mr McEntegart that the term "operating expenses of the centre" must mean the **reasonable** operating expenses of the centre. I should have thought this a fairly obvious implied term; in the context of a multiple-tenanted property, there is the authority of the English Court of Appeal in *Finchbourne Ltd v Rodrigues* (1976) All ER 581; there the plaintiffs were the owners of a block of flats and the tenants had the responsibility to pay certain running costs as certified. Cairns LJ said at 586 -

"However, I will express my opinion briefly on the second point. Is there an implication that the costs claimed are to be "fair and reasonable"? It is contended that no such implication is necessary to give business efficacy to the contract. Passages from the speeches in the House of Lords in the recently decided case of *Liverpool City Council v Irwin* (1976) 2 All ER 30 are referred to as the most recent statement of the principles on which terms can be implied. Taking the strictest of tests on that matter, I am of opinion that such an implication must be made here. It cannot be supposed that the plaintiffs were entitled to be as extravagant as they chose in the standards of repair, the appointment of porters etc. Counsel for the plaintiffs said that there would come to a point without any implied term where the costs might be so outlandish as not to come within the description of the seventh schedule at all. In my opinion, the parties cannot have intended that the landlords should have an unfettered discretion to adopt the highest conceivable standard and to charge the tenant with it. Stress is laid on the provision that, insofar as the fees payable to the managing agents were included, it was expressly provided that it was to be a "reasonable and proper fee". There was a special reason for drawing attention to this, seeing that the agents themselves were to be the certifiers. It is not, in my view, a case where the expression of one amount to an exclusion of the other. In my opinion, the Judge arrived at the right conclusion on both points. I would dismiss the appeal."

There is also an arbitration clause in the lease. Counsel were agreed that, if a tenant contended that the lessor was charging too much under "operating expenses of the centre", then there would be ability for the tenant to go to arbitration to have this contention examined.

In the context of the lease of a shopping centre with a large number of outgoings, the question comes down to deciding what detail of those expenses is a tenant entitled to seek from the landlord. I add also that in this case there is practice, not required by the lease but one which the landlord has freely taken on, for an auditor to provide a certificate each year at the time when the demand for the actual operating expenses is made. The auditor certifies that the amounts claimed for various operating expenses are correct; that they are within the named general categories of expenses and that the

payments have been made. The auditor cannot decide as to whether the quantum certified as paid is in fact a reasonable quantum. However, I should have thought that the existence of the auditors would be a safeguard to the tenants for most of the items under the definition about which there can be little argument, such as the bare costs of occupation; i.e. rates, insurance, land tax etc.

Also, one would have thought there could be little argument about the numerous other items required for running the centre, such as the cost of music, air conditioning, even going to such mundane items as the cost of supplying paper towels and soap in the centre washrooms. It would be unreasonable for the Court to specify in great detail the sort of information that should be supplied. A tenant is clearly entitled to something more than just a sterile statement of the amount of the operating expenses. This has been recognised by the defendant in providing a breakdown. One would have thought that over most items in the breakdown there cannot be much argument; but when there is a rather bland item for a large amount, such as "management and administration" that is almost an invitation to any tenant, on the lookout to keep down costs, to make some enquiry.

As a guide to the parties, I consider that a tenant is entitled to have detail of all the various items which are specified as "operating expenses of the centre" in the lease. For many of them no reasonable tenant would want to make an enquiry; for major items one would think there could be justification for doing so. There can be, as the cases show, occasions of some kinds of expenditure by a landlord which are not recoverable from the tenant, such as the legal expenses incurred in pursuing a defaulting tenant.

Sella House Ltd v Mears (1989) 1 EGLR 65 shows that, in the absence of an express provision in the lease, a landlord cannot pass on to other tenants his costs in pursuing a defaulting tenant. Likewise, in *Boldmark Ltd v Cohen & Anor* [1986] 1 EGLR 47, a landlord of a block of flats could not pass on his interest charges incurred in providing money for various service items, which items were subsequently recoverable from the tenants. There has to be some mechanism to enable a tenant to decide whether it is going to be worthwhile to go to the bother of arbitration to challenge the claim for operating expenses or whether the costs claimed are reasonable.

A complication arises in this case which really triggered the second question. As I indicated AMPI as the managing agent is paid a fee by Perpetual for managing the centre; that fee includes a number of items which might otherwise be the subject of a separate charge under the definition clauses in the lease. I cannot see that a landlord should be prevented from making an arrangement such as this whereby some items of "operating expenses of the centre" are included in a global sum paid to the managing agent and not listed for subsequent reimbursement by the tenants. Of course, there cannot be any duplication of items. It does mean that the manager and other staff of the centre, including office and marketing staff, are employees of the managing agent and not of the lessor. However, the test from the point of view of the lessor, is whether the fee paid to the managing agent is such as should be reasonable, bearing in mind its constituent parts.

Mr McEntegart submitted that the lessee was entitled to know the exact salaries paid by the managing agent to its staff; but, as Mr Abbott submitted, the managing agent may decide to pay a high salary to a particular person for perceived ability in a particular sphere; this may be included or subsumed by the managing agents' fee. The test is whether the managing agent's fee is reasonable, presumably compared with fees paid in other shopping centres of similar size and whether all the "operating expenses of the centre" are reasonable. Provided there is no duplication within the managing agent's fee of items outside that fee, then I cannot see that the lessee is necessarily entitled to know such details, as the quantum of individual salaries. Obviously, there will be some profit component which in this case covered the items relating to reimbursement of the various AMP interests for costs of travel and computers.

The evidence suggested the management fee was reasonable. I have no way of knowing whether that was so, nor is it appropriate for me to express a view in an interpretation proceeding such as this. It was said that the fee charged by AMPI is comparable to that charged by real estate agents in an earlier year and to that charged by managing agents in other centres. It will be for the plaintiff to assess whether that is so and whether the charges in toto, including the managing agents' fee which includes the items mentioned, is reasonable. If it is not so reasonable, then

the plaintiff may wish to go to arbitration. I deal with the point made by Mr McEntegart, based on the *Finchbourne* case, that because AMPI is a wholly owned subsidiary of AMP which controls the defendant as well, that it is not a true "managing agent" and that a "managing agent" as envisaged by the lease document had to be somebody entirely independent. The *Finchbourne* case covers a totally different set of facts. There the landlord called himself a firm and purported to act as agent as a separate individual. In fact he was one and the same person. Both the trial Judge and the Court of Appeal were hardly impressed with that conduct. Here, the evidence suggests that although the defendant and AMPI are both subsidiaries of the same organisation, there is nothing to suggest any unprofessional conduct of the sort indicated in the *Finchbourne* case; nor that the management fee being charged is anything other than what the market would stand and would be paid to anyone else.

There was evidence by affidavit of the operating expenses of another shopping centre. There the agents were more forthcoming about the salaries paid to the staff; in addition they charged a management fee in addition to their staff salaries.

So it may well be there is little difference, other than in the method of calculating the charges.

One can understand the attitude of the plaintiff which is saying that it is paying for outgoings and should be entitled to know for what it is paying. I hope that this litigation and the judgment may assist the parties in having some reasonable understanding of the problems of each of them. It is good to note that the rather intransigent attitude shown by earlier persons associated with the defendant has now ceased; there has been supplied the information indicated in this judgment.

I do not know whether in view of this indication the parties wish me to make formal declarations. I shall do so if requested. Counsel are at liberty to provide memoranda as to form of judgment.

In the circumstances, particularly in view of the fact that the parties have a continuing working relationship, I make no order as to costs.

Solicitors: Simpson Grierson Butler
White, Auckland, for plaintiff
Shieff England, Auckland, for defendant