

## LEGAL DECISION

**MODERN MERCHANTS LTD v GILLARD & ORS**

(CA, 18/9/1997; Keith, Gallen and Doogue JJ, CA 8/97), where MML appealed unsuccessfully from the HC's refusal of a declaration that, where the formula in the lease for determining the percentage of outgoings to be paid by the tenant in a shopping mall differed from that derived from s 6 of the Unit Titles Act 1972 (the mall having been converted into a series of unit titled areas after the lease had been entered into), the lower 1972 Act formula applied, the CA held that (I) the terms of the lease prevailed, and there was nothing in the lease that could allow the Act's formula to be applied, nor (ii) did the change in tenure justify a renegotiation of the lease.

IN THE COURT OF APPEAL  
OF NEW ZEALAND  
C.A. 8/97

BETWEEN MODERN MERCHANTS LIMITED

Appellant

AND

GEORGE MICHAEL  
GILLARD,

BEVERLEY MARY  
GILLARD,

SHERYL EVELYN  
DRINKWATER and

MARGARET GRACE FRANK

Respondents

Coram: Keith J  
Gallen J  
Doogue J

Hearing: 15 September 1997

Counsel: G.S.A. Macdonald  
for appellant

H. Fulton for respondents

Judgment: 18 September 1997

**JUDGMENT OF THE COURT  
DELIVERED BY DOOGUE J**

This is an appeal as to the meaning of certain terms in a deed of lease dated 27 April 1992. Under that lease the appellant is liable to pay, in addition to the regular rent, a variable rent which is defined at clause 2.01(d) as meaning:

... a percentage of the aggregate of variable outgoings as defined in Clause 2.01(e), the percentage payable by the Lessee being calculated on the basis the basis of the propor-

tion that the floor space of the premises (excluding the mezzanine floor) bears to the total lettable floor space in the Centre as certified from time to time by the Lessor's architects...

"Aggregate of variable outgoings" is defined in clause 2.01(e) as meaning:

the total amount expended by the Lessor (excluding capital expenditure but including Goods and Services Tax or other tax of like nature) in respect of the whole of the Centre including any additions thereto ...

[on such matters as rates, insurances, lighting and cleaning of common areas]

When the appellant entered into the deed of lease relating to a shop within the South Mall Shopping Centre (described as "the Centre" in the lease and this judgment), it was owned by a company, South Mall Limited. Subsequent to the lease being entered into, the lessor sold its interest in the Centre to another company, Ladstone South Mall Limited, which in turn subdivided the Centre into unit titles under the Unit Titles Act 1972. As a result, the Centre is now divided into some 26 unit titles, with the respondents owning the title leased to the appellant. Each unit was assigned a unit entitlement based on their relative values as required by s.6 of the Unit Titles Act 1972, and the respondents contribute to the expenses and outgoings of the statutory body corporate as pro-

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vided for in s.15 of that Act in accordance with that entitlement.

The respondents since they took over the particular unit on or about 7 June 1995 have had to meet 7.62% of the expenses and outgoings of the Centre based on valuation ratios. However, under the lease, literally interpreted, the appellant continues to be liable to pay to the lessee 11.8979% of rates and insurances and 8.689% of all other outgoings. The appellant objected to having to pay more than the 7.62% of the expenses and outgoings of the Centre being paid by the respondent. As a result, the respondents brought proceedings in the High Court seeking a declaration that they were entitled to the variable rent in accordance with the provisions of the lease literally interpreted. The appellant disputed that contention and said that the respondents were only entitled to that proportion of the expenses and outgoings relating to the premises paid by them because that was the underlying intention of the lease. The essence of the appellant's contention is that that was the objectively ascertainable purpose and intent of the variable rent provisions under the lease and that the proper construction of it requires the appellant to reimburse the respondents those amounts actually contributed by the respondents to the outgoings of the body corporate and nothing more. Neither in the High Court nor in this Court has there been any argument for the implication of any fresh terms and none has there been any suggestion that the

lease was frustrated.

In the High Court Smellie J held that the correct interpretation of the provisions of the lease was the literal interpretation. The Judge noted the lease specifically defined the terms "lessor" and "person" in the following language:

"Lessor" shall mean and include the Lessor its successors and assigns [clause 2.01(I)]

"Person" shall include a corporation, words importing the singular number or plural number shall include the plural number and singular number respectively ... [clause 2.01(k)]

The Judge put emphasis upon the words of the lease that the aggregate of the variable outgoings meant the "total amount expended by the Lessor ... in respect of the whole of the Centre" combined with the definitions of "lessor" and "person". He saw no basis for interpreting the lease other than pursuant to those terms. He could see no ambiguity in the terms which required him to look beyond them and saw the respondents' obligation vis-à-vis other lessors or the body corporate as a separate issue from the appellant's obligation under the lease.

The appellant argues that the provisions in the lease relied on to support the Judge's interpretation of "lessor" do not support it, but in that the appellant is wrong. The deed of lease spelt out that South Mall Ltd was the lessor and that it was registered as proprietor of an

estate as lessee in the whole of the property constituting the Centre and it and the appelland had agreed that the appellant would take a lease of the particular shop. The lessor leased the shop to the appellant in accordance with the provisions of the lease, the essential terms of which have already been referred to. Although the Centre is now owned by a number of unit trusts and the appellant's liability to pay rent may be to the owner of the particular shop unit, its calculation is not affected by the provisions of the Unit Titles Act. No issue of privity of contract nor privity of estate arises in respect of the application of the provisions of the lease for the purposes of interpreting what proportion of the variable outgoings are to be paid by the appellant pursuant to the lease.

The appellant's liability for variable rent under clause 2.01(d) is defined in respect of the ratio of floor space the shop bears to the total lettable floor space in the Centre not the respondents' entitlement under the Unit Trusts Act, a ratio based on values in accordance with s.6. The term "lessor" in the definition of "aggregate of variable outgoings" in clause 2.01(e) must be read for the purpose of that clause as defined in the lease, which requires it to be read in terms of ownership of the Centre as a whole and not ownership of the particular shop. Simply because the owners' entitlements under the Unit Trust Act have been fixed upon some other basis than floor space ratios does not mean there can be any

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justification for changing the basis upon which the appellant is to meet outgoings in respect of its shop. There is nothing in the lease which entitles the appellant to have its share of the outgoings calculated upon any different basis from that stated in the lease. When the lease is clear and precise in its terms, relating the variable rent to the floor space proportion of the shop to the whole of the Centre, there is no justification for the Court to seek to apply any other basis for calculation. As noted by the Judge, the appellant's argument really requires a rewriting of the provisions to be based upon its reading of the terms of the lease. It is simply not known what led the respondents or other unit trust owners in respect of the Centre to pay what they did for their units and the entitlements relating to them. It is clear that any suggestion by a unit title holder that any other lessee at the Centre should pay more than required under the provisions of clauses 2.01(d) and (e) in reliance upon that unit title holder's entitlement under the Unit Trusts Act would be likely, understandably, to be resisted by the lessee. When the lease can be applied in its terms without any lessee being any better or worse off than if the Centre continued to have a single owner there is no justification for a strained meaning which would have the variable rent assessed not in terms of the lease but by something outside and different to its terms.

The change of circumstances in respect of the ownership of the

Centre may provide a justification for the appellant seeking to renegotiate the terms of the lease upon its expiry. It cannot provide a justification for the appellant not abiding by its terms.

The declaration in the Court below will be upheld, namely that the appellant is required to pay 11.8979% by way of variable rent under clause 2.01(d)(I) and 8.689% for the purposes of clause 2.01(d)(ii).

The respondents are entitled to their costs, which are fixed in the sum of \$3,000.00, together with their reasonable disbursements inclusive of reasonable travelling and accommodation costs of one counsel. In the event of disagreement the disbursements are to be fixed by the Registrar.

Solicitors: Phillips Fox,  
Auckland, for appellant

Miller Poulgrain, Thames,  
for respondents

