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IN THE SUPREME COURT OF NEW ZEALAND A. 432/79

AUCKLAND REGISTRY

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Special Consideration

IN THE MATTER of the Declaratory Judgments Act 1908

- a n d -

IN THE MATTER of a Memorandum of Lease bearing date the 18th day of August 1971

BETWEEN FOREBEACH PROPERTIES LIMITED

PLAINTIFF

A N D THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED

DEFENDANT

Hearing: 7 February 1980

Judgment: 25 MAR 1980

Counsel: F.W.M. McElrea and W. Manning for Plaintiff
D.J. White for Defendant

JUDGMENT OF CASEY J.

The Plaintiff leases an office building from the Defendant and seeks a declaration about the meaning of a clause in the Memorandum of Lease dealing with valuation on a rent review. The building contains five storeys of office space situated over three open car park areas below the street, which also contain enclosed areas for laboratories and services. The term is 17 years from 18 August 1971, with provision for adjustment of rent at 8 and 13 years, based on 8.5% of a capital valuation of market price at those dates, made on the basis (inter alia):-

> "that all floor space in the demised premises used for laboratories or other purposes (other than toilet facilities, stairways and areas housing mechanical services) is valued as if it were office space." (Cl. c(ii)).

"Demised premises" means the land and all

buildings, erections and improvements thereon. (Clause 10).

The Defendant maintains that the "floor space" referred to in the above clause includes the open car parking levels below the building; the Plaintiff submits that only floors within enclosed areas should be valued as office space. The difference in rental could be substantial - I was told as much as 20%. The Court is asked to make an order under the Declaratory Judgment Act 1908 determining the correct construction of the words I have quoted from Clause c(ii).

Both sides rightly accept that my task is to ascertain what the parties meant by the words they have used in this particular lease, and to declare the meaning of what is written in the document itself. If they are plain and unambiguous, that must be an end of the matter, unless they lead to some absurdity. Both maintained that the ordinary meaning of "floor" clearly supported their respective and quite opposite views - suggesting at least its ability to bear a number of meanings, which is confirmed by the definitions cited to me from the Shorter Oxford English Dictionary (3rd Ed.) Vol. 1, 718. The primary meaning it gives is "The layer of boards, brick, stone etc. in an apartment on which people tread; the under surface of the interior of a room. Hence, any analagous surface." Many of the cases to which I was referred were in the special area of factory or other safety legislation. Perhaps the most helpful comment is in the judgment of Lord Kissen in Sullivan v. Hall Russell & Co. Ltd. (1964) SLT 192 at p. 193:-

> "I think that the normal and ordinary meaning of a floor is the lower surface of an enclosed space, such as a room or similar place. It can, in ordinary use of language, also be used to describe certain surfaces on which people walk or stand or on which objects are placed and which are designed or constructed or adapted for people to walk or stand on or to hold objects. A natural cave may have a floor,

> although no work of construction or adaptation has been done to its lower surface. A floor can be constructed in the open air, but it will depend upon the whole circumstances whether floor is an apt word to describe a constructed surface in the open air. I do not think that, in its ordinary meaning, the unmade earthen surface of an open yard can be a floor."

Other judicial definitions have emphasised its ordinary meaning as an area covered in, within walls or indoors, corresponding with its primary dictionary meaning, but as I have noted, that can be extended to any analagous surface.

Mr McElrea referred me to the definition of "demised premises" in the lease as including the land and buildings, and by adopting the approach taken in some authorities, he submitted that the asphalted surface of the surrounding car park could be a "floor"; consequently, to apply the literal meaning of the words in the lease would lead to a manifest absurdity. I am not prepared to stretch in this artificial way the meanings adopted in the special circumstances of the cases he cited. On any ordinary use of words, the parking area outside the boundary of this building is an asphalted yard, not a floor. I see little point in a detailed discussion of the cases put to me; none of them deal with this precise question, which depends initially on the meaning to be given to "floor" in the context of this modern commercial building. I am satisfied that it can include the formed surfaces of its open car parking areas; even though they are not enclosed by walls, they can fairly be described as floors.

The next question is whether the parties meant this by the expression "floor space" used in the document. As I have remarked, "floor" can have a number of meanings in relation to a building:- i.e. a storey or level, or an open area adapted or intended for some purpose, or an area enclosed by walls - the latter being accepted in a number of cases as the more normal use. Neither Counsels' nor my researches have discovered any judicial or dictionary

definition of "floor space". In this situation I can look at the lease as a whole and at evidence of surrounding circumstances known to the parties at the time the document was executed in order to ascertain the meaning of the words they have used. Affidavits were filed by Mr Beca (of the Plaintiff Company) and Mr Taylor (a Planning Officer) and I had the benefit of a view. The City Council required the provision of car parks as a condition of planning approval and it is clear that the areas concerned were designed and intended to be used for this purpose when the lease was executed. All stairways, toilet and mechanical service areas are enclosed by walls within the building, as are the laboratory and associated rooms on the upper parking area.

I think "floor space" means something different from "floor", making it clear at least that the parties were not referring simply to levels or storeys of the building. It conveys the impression of an area of floor therein. Clause c(ii) would convey a significantly different sense if it referred simply to "all floors" in the demised premises used for laboratories or other purposes etc. This distinction leads me to consider the ordinary popular sense of "floor space" in relation to a modern multi-storied city office block. I am sure that in the ordinary usage of society the expression would be understood as primarily referring to the floor areas available for the principal use for which the buildings were intended. In this case the ordinary description of the ancillary areas for parking would be "parking space". I think the same distinction is made in ordinary speech for other types of buildings. I doubt whether anyone would normally think of a built-in garage as included in the "floor space" of a house or flat, and a similar view would doubtless be taken of parking space in shop or industrial buildings. "Floor space" would however, be an apt description for the usable area of a specialist parking building, tending to reinforce my understanding of its meaning.

I think this is borne out by a consideration of

the wording of Clause c(ii). Although he has his reservations, Mr McElrea does not seriously contend that the expression "used for laboratories or other purposes" is wide enough to establish a genus for the ejusdem generis rule to apply; but he submits that it lends support to his view of the parties' intention to use "floor" in its primary meaning of an enclosed space within the building. He also points out that the excluded areas (toilets, services and staircases) are also internal, indicating again the parties' concern with floor as an enclosed space. By themselves, of course, these exclusions are equivocal; Mr White relies on them to invoke the rule "expressio unius" to indicate car-parking floors are included. However, the Plaintiff's approach is more fundamental in pointing to these examples as lending colour to the sense in which "floor space" is used in the document.

I accept that the inclusion of car parking areas as floor space in Clause c(ii) would not lead to absurdity of the sort warranting a departure from the normal meaning of words. The parties have already acknowledged by this clause that the "deemed" floor space is not office space, and a landlord might conceivably stipulate for a basis of revaluation on these very broad terms in a "lease-back" building (as I am informed this is), in order to balance the static interest rate throughout the term. However, I agree with Mr McElrea that the meaning I think the words bear in this context accords better with the likely intentions of the parties when they entered into the lease - although I emphasise it is not those intentions which governed that meaning. I can readily understand a landlord's desire to get the maximum return for space which is normally capable of being used for office accommodation. But a tenant who is asked to pay an office rental for space designed and intended for car parking in a commercial building can hardly be blamed for thinking he is imposed upon. I am therefore reassured in my adoption of this meaning by the sensible result which I think it entails.

Having regard to the way the case has been

argued, I can best answer the question posed in the Summons by holding that Clause c(ii) on page 2 of the lease does not include the areas used for parking on the three lower levels of the building, nor their access ramps. Leave is reserved to either party to apply for a more specific definition if this should be necessary.

The Plaintiff will have costs of $500 plus disbursements to be fixed by the Registrar.

M.J. Casey J.

Solicitors:

Russell McVeagh McKenzie Bartleet & Co, Auckland, for Plaintiff
Young Swan McKay & Co, Wellington, for Defendant