

A. Hudson Pty. Limited

Appellant

v.

Legal & General Life of Australia Limited

Respondent

FROM

THE SUPREME COURT OF NEW SOUTH WALES

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE 1986

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*Present at the Hearing:*

LORD KEITH OF KINKEL

LORD TEMPLEMAN

LORD GRIFFITHS

LORD OLIVER OF AYLMEYTON

LORD GOFF OF CHIEVELEY

*[Delivered by Lord Templeman]*

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The appellant tenants, A. Hudson Pty. Limited, seek to set aside a rent review valuation. They succeeded before the Equity Division of the Supreme Court of New South Wales (Waddell J.) and failed before the Court of Appeal of New South Wales (Mahoney, Priestley and McHugh, JJ.A).

By a lease dated 2nd April 1980 commercial premises at Miranda were demised to the tenants for a term of 10 years beginning on 31st March 1980 at a rent subject to review every two years on the basis of:-

"The current annual open market rental value of the demised premises based on a lease between a willing lessor and a willing lessee granted with vacant possession and taking no account of any goodwill attributable to the demised premises by reason of any trade or business carried on therein by the lessee and in all other respects (except as to rent payable) on the terms covenants and conditions of this lease."

In default of agreement the rental value of the demised premises was directed to:-

"... be referred for the decision of a qualified valuer ... acting as an expert and not as an

arbitrator and the decision of such qualified valuer ... shall accordingly be final and binding on the parties to this lease."

Pursuant to the review clause, the rent payable from 31st March 1982 was referred to Henderson & Horning Pty. Limited ("the Valuers") and by a Report dated 10th June 1982 after setting out matters relevant to their valuation they made the following:-

"Assessment.

In determining the market rental value we have had regard to the rents being achieved for other larger premises and have concluded that 'the current annual open market rental value of the Demised Premises' as at 31st March, 1982, was ONE HUNDRED AND FORTY ONE THOUSAND AND TWO HUNDRED DOLLARS (\$141,200.00) per annum calculated as:

Ground Floor	13,100 square feet	\$ 91,700 p.a.
	@ \$7.00	
Lower Ground Floor	11,000 square feet	\$ 49,500 p.a.
	@ \$4.50	
		<u>\$141,200 p.a.</u>

Equivalent to an average rate of \$5.86 per square foot per annum for an area of 24,100 square feet."

As appears from that Report, the demised premises consist of a lower ground floor and a ground floor which by the terms of the lease are to be used only for the purposes of a "Builders and Handymans Supply Store". As to the ground floor, the Valuers' Report noted correctly that "an area of about 314.4 square metres ... has been removed by the lessee with the lessor's consent". The Report stated that "this area has been included in the rentable area of this floor for the purposes of this assessment". It is common ground that it suited the tenants at the beginning of the lease to extend the air space above part of the lower ground floor in order to accommodate lengths of timber which exceeded the height of the lower ground floor and to sacrifice 314.4 square metres of selling area in the ground floor. It also appears from the Assessment that the Valuers with full knowledge of what had happened chose to attribute \$4.50 per square foot for the whole of the lower ground floor irrespective of the height of the lower ground floor and chose to attribute to the ground floor the overall rate of \$7.00 per square foot ignoring the fact that as to 314.4 square metres a part of the area was used for the benefit of the lower ground floor.

The tenants now object to the valuation because they say that the ground floor area which had been removed for the benefit of the lower ground floor

amounting to 314.4 square metres should not have been taken into account in assessing the rent or should not have been taken into account at the rate of \$7.00 per square foot. But the Valuers could not ignore the area of 314.4 square metres merely because the tenants preferred to use that area as air space for the benefit of the lower ground floor rather than a selling space for the benefit of the ground floor. The Valuers were entitled to consider the rent obtainable from a willing lessee having regard to the actual use of the disputed area of 314.4 square metres and having regard also to the possible use which a willing lessee might make of the premises after restoring the 314.4 square metres to the ground floor area. The Valuers, after correctly setting out all the facts, concluded with the Assessment to which objection is now taken.

On behalf of the tenants Mr. Cullen said all that was possible to say in criticism of the Valuers' Report and endeavoured from the contents of the Report and from alleged omissions from the Report to demonstrate that the Valuers must have been mistaken in attributing \$7.00 per square foot to a ground floor which included 314.4 square metres of air space used in connection with the lower ground floor. Their Lordships are not persuaded that the Valuers made any mistake in fact or in law. They valued the premises in the light of the fact that 314.4 square metres had been removed from use in the ground floor and adapted for use by the lower ground floor to suit the purposes of the tenants. There being no discernible mistake in the valuation their Lordships are not concerned to consider the kinds of mistake which might justify interference by the court with the valuation of an expert.

Mr. Cullen also sought to raise an argument which was available but was not deployed in the courts of New South Wales, namely that the Valuers took into account an increase in rent which might have been obtained if the tenants had sought and obtained permission from the landlords and permission from the local planning authority for a change of use of the demised premises. But their Lordships do not deduce from the Report that the Valuers exceeded the bounds of determining the rent which a willing lessee would pay for the demised premises on the terms of the lease.

In general their Lordships consider that it would be a disservice to the law and to litigants to encourage forensic attacks on valuations by experts where those attacks are based on textual criticisms more appropriate to the measured analysis of fiscal legislation.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.





