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PROPERTY

- Leasing Update

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ONE SIZE DOES NOT FIT ALL: THE NEW BOMA STANDARD 2010 FOR OFFICE BUILDINGS

By Angela Mockford

The Building Owners and Managers Association International (BOMA) recently released: *Office Buildings: Standard Methods of Measurement and Calculating Rentable Area (2010)* ("**BOMA 2010**"). This publication is the latest in a succession of BOMA Standards, which have been widely used for the measurement of the rentable area of office premises since 1915.

The new publication contains many revisions and additions to the previous BOMA standard of 1996: *Standard Method for Measuring Floor Area in Office Buildings* ("**BOMA 1996**"). We are about to give you a glimpse into what's new.

Major Changes from BOMA 1996

Both standards were designed to create what is colloquially referred to as the "gross up". The most significant change from BOMA 1996 is that BOMA 2010 includes more than one option for calculating the "load factor" (being essentially the multiplier applied to a tenant's area to attribute to the area of the tenant's premises a share of the common area). Method A (the "legacy method", contained in BOMA 1996), allows users the option of calculating the load factor on a floor-by-floor basis. Method B (new in BOMA 2010, called the "Single Load Factor" method) allows for the calculation of a single load factor to be shared by the entire building. The total rentable areas of a building are the same regardless of whether Method A or B is chosen. However, in citing BOMA 2010, reference must be made to either Method A or Method B, and they cannot be combined.

Method A results in some floors having a higher "load factor" than others, because the building amenities and service areas are located in certain areas; a higher load factor can be unattractive to tenants, and ultimately make the floor less "leasable". Prospective tenants generally prefer floors having a higher percentage of usable space to common

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area. Simply put: tenants don't want to pay a lot for what they share. Accordingly, floors with a lower load factor lease more quickly and sometimes at better rates, even though from the vantage point of a landlord concerned about lease-up, these floors may not be the ideal location for a prospective tenant. When the floors with lower load factors are full, the remaining floors (with higher load factors) arguably become harder to lease. Method B controls the way rentable area is allocated amongst the floors so that all tenants, regardless of floor, are allocated the same percentage for calculation of their share of building amenities and service areas using a new concept called "Base Building Circulation", a minimum common area required for access to and use of such amenities and service areas.

Also of interest is the "capped load factor". The capped load factor is determined on a floor-by-floor basis, and is particularly useful for historical buildings that often have very high load factors. The cap serves to adjust high load factors down into a leasable

CASE HIGHLIGHT

Emcan Bakery Equipment & Supply Ltd. v. DMI Property Management Inc.

[2010] OJ No 2315, 2010 ONSC 2329

Facts

On August 2, 2007, a bakery entered into a lease with a landlord. On November 9, 2007, the bakery entered into a General Security Agreement with Emcan Bakery Equipment & Supply Ltd., under which the bakery purchased equipment from Emcan, but Emcan retained ownership of the equipment until the full purchase price was paid.

The bakery fell into arrears of rent under the lease and also ceased making payments on the equipment from Emcan. The total financed value of the equipment was $64,861.40, including GST. The amount still owing on the equipment was $24,000 plus interest. Ignoring the calculation of interest, the bakery's contribution to the equipment to date was $40,861.40. The arrears of rent totalled $25,049.73.

The landlord sent a bailiff to appraise the goods and chattels of the bakery, which amounted to $20,825.00 for everything, including the Emcan equipment. DMI, the property manager, conducted an auction shortly thereafter and agreed to sell the goods and chattels of the bakery, including the baking equipment from Emcan, to Toronto Bakery Equipment for $12,100.00.

Emcan commenced an action against DMI, the bailiff, the bakery, and the landlord. It sought a declaration that Emcan was entitled to remove and possess the bakery equipment.

Issue

The issue at bar was whether the landlord had the right to take possession of the goods and chattels at the leased premises, including the equipment bought from Emcan but not fully paid for, and sell it, and apply the proceeds of sale to the arrears of rent and the costs of distress.

Holding

The court found that the landlord had no such right and that the distraint was unlawful.

Analysis

The court relied on the decision in Atlantic v. Starmark, [1997] OJ No 2474, which was based on a similar fact scenario. The court held that Starmark could acquire the item at issue (a painting booth) upon payment of the outstanding balance of the purchase price. The court stated:

> It permits a landlord to distrain the interest of a tenant in goods owned by a third party, but in the possession of a tenant under a conditional sales contract. Since the tenant's interest includes the right to possess the goods, the landlord can take possession of them, and hold them, but does so subject to the rights of the owner. Similarly, if the landlord sells such an item ... , the sale is subject to the rights of the unpaid vendor.

The court therefore held that the partially paid vendor, Emcan, was entitled to possession of the equipment. As property in the equipment had never passed to the tenant, the landlord had no right to take possession of and sell the equipment. The landlord's interest pursuant to its right of distress for unpaid rent was equal to the bakery's interest in the equipment; the landlord could acquire the equipment by paying Emcan the amount owing on it ($25,000.00) within 10 days.

market range for the building.[1] Excluding building service areas from the calculations is not permitted; instead, the building owner, in its sole discretion, can cap the load factor using a "market load factor" (the capped load factor in any event cannot exceed the actual load factor calculated under Method A or Method B); or the building owner can cap the rentable area of an occupant area by multiplying the occupant area by the capped load factor (the capped rentable area in any event cannot exceed the actual rentable area calculated under Method A or Method B). However, BOMA 2010 neither "recommends" capping nor expresses any view on how to set the "market load factor".

Expanded Definitions and Measurement Methods

BOMA 2010 contains 53 definitions – an addition of 35 definitions over BOMA 1996. BOMA 2010 also revises some of the BOMA 1996 definitions. For instance, in BOMA 2010, "Major Vertical Penetrations" now excludes "voids", which have their own definition, and "Tenant" becomes "Occupant". BOMA 2010 also contains new rules for determining the measurement boundaries. BOMA 2010 has, in addition, expanded on the 7-step measurement method of BOMA 1996. BOMA 2010 provides a *sub-step* classification system to determine the interior gross area of a building and its floors. After classifying the type of space (e.g. "Occupant Areas" (formerly known as "Office Area" and "Store Area"), a user can consult detailed charts and illustrations to establish the position of the boundary line, and determine the interior gross area of the space. This interior gross area is then utilized in the calculation of the R/U ratio, which leads to the calculation of the R/O ratio, and the load factor, and ultimately, the end goal, "rentable area". It is a rigorous process.

Bells and Whistles

What is most exciting about BOMA 2010 is its availability as an interactive PDF that includes the use of hyperlinks. Users can link to any one of the 45 colour illustrations cited within the text, as well as to zoom in on points of interest and take a closer look at the subtleties of the diagrams. The wide use of colour throughout the illustrations improves their overall graphic resolution and assists the eye in visualizing dimension. BOMA 2010 also contains a number of other helpful inclusions such as built-in answers to frequently asked questions (which feature was previously available as a supplementary document to BOMA 1996).

Adjusting to BOMA 2010

While BOMA 2010 boasts more content, better illustrations and greater sophistication as compared to BOMA 1996, the earlier version may still remain the preferred choice for many. In fact, the labyrinth of measurement concepts and interconnected definitions contained in the 64 pages of BOMA 2010 could leave the casual user pining for the old (slimmer) BOMA 1996 guide. The user of BOMA 1996 needed to master only a handful of definitions (such as "Gross Measured Area", "Dominant Portion", and "R/U Ratio") in order to navigate the methods and equations; but the brevity of BOMA 1996, which admittedly left some terms open to interpretation (but allowed for more easy calculation), has been sacrificed in BOMA 2010 in the name of precision. BOMA 2010 removes some ambiguity in the use of the measurement standard, but in doing so, requires the user to become acquainted with more definitions and ultimately, to spend additional energy reaching the desired goal – determining rentable area. A technical user will no doubt find BOMA 2010 more conducive to accurate calculation, and over time, the new standard may prove to be a more streamlined system offering greater clarity than BOMA 1996. However, for the user accustomed to BOMA 1996, the new version will take much getting used to.

Which to use: BOMA 1996 or BOMA 2010?

With all of this to consider, which standard is the better for you? The answer largely depends on whether you are a landlord or a tenant. BOMA 2010 Method B offers a number of advantages for landlords, brokers and building owners, over BOMA 1996 and BOMA 2010 Method A. The application of Method B's single load factor method will likely simplify leasing calculations as well as improve the chances of renting out harder to lease floors. It should allow landlords to reduce the undesirability of floors with

higher load factors because the standard allows harmonization of all floors into one equal load factor. Conversely, it may be advantageous for a tenant to choose BOMA 1996 or BOMA 2010 (Method A) should its prospective floor happen to be one with a lower overall load factor (as compared to other floors in the same building).

At the end of the day, since BOMA 2010 provides multiple options within its methods for determining the load factor of a floor (and ultimately the rentable area of a premises), and since some landlords and tenants are able to negotiate for the use (however advisable or inadvisable that may be) of old BOMA standards, such as BOMA 1996, and even BOMA 1980, landlords and tenants should always be careful to specify their preferred BOMA Standard of measurement up front in the preliminary lease document (be it a letter of intent or an offer to lease), rather than leave it to argument.

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[1] Lindsay Tiffany, "Setting New Standards" The Boma Magazine (November/December 2009) at 31. Online: < http://www.boma.org/news/bomaorgmagazine/pages/default.aspx> or <http://issuu.com/lprats/docs/bomamagnovdec09 >

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Angela is a commercial landlord or tenant's best asset. With over 12 years of experience in commercial leasing, she takes a modern, practical and cost-effective approach towards the negotiation of relationships between landlords and tenants. For Angela, it's all about getting the deal done on time and on budget – without sacrificing quality, the relationship, or the client's best interests. Her strengths include negotiating and drafting all manner of lease documentation, developing or improving standard forms for clients, and advising in cases of lease interpretation disputes – all with an eye on the bottom line.

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