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IN THE PRIVY COUNCIL

No.8 of 1973

ON APPEAL FROM THE COURT OF APPEAL OF
THE SUPREME COURT OF NEW SOUTH WALES

IN THE MATTER of a determination made by
a Fair Rents Board at Sydney on the
13th October 1971

B E T W E E N :

BORAMBIL PTY LIMITED Appellant

- and -

FRANCIS O'CARROLL Respondent

CASE FOR THE APPELLANT

Record

1. On the 18th March, 1952 the appellant and the respondent entered into an agreement in writing whereby the appellant agreed to lease to the respondent for the term of the respondent's life the whole of the land in Certificate of Title Volume 6420 Folio 47, being the land known as and situate at 3-5 Greenknowe Avenue, Potts Point, Sydney in the State of New South Wales upon the terms and conditions contained in the said agreement.

pp. 82-3

2. A building called "Texas Flats" consisting of a penthouse and 84 self-contained flats is erected upon the said land. The respondent has since 18th March, 1952 carried on the business of letting the flats with the exception of one flat, which is used as an office.

pp. 20-1

pp. 38-9

3. The said premises are "prescribed premises" within the meaning of the Landlord and Tenant (Amendment) Act, 1948 to 1968 (hereinafter referred to as "the Act"). On 1st November, 1967 a fair rent of the premises was determined at \$15,725.10 per annum by the Fair Rents Board in Sydney.

p. 40

p. 3

pp. 37-8

4. In August, 1969 John Victor Atkinson on behalf of the appellant made application to the Fair Rents Board in Sydney for a determination of the fair rent of the said premises in accordance with the provisions of Division 4AA of the Act. This division enables fair rents, in appropriate cases, to be fixed by reference to

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Record

the current value of the premises, instead of the 1939 value, which is the basis of determination made otherwise under Part II of the Act.

p. 15 5. The application came on for hearing on 27th October, 1969. The application was part heard on this day and it was adjourned to another date for further hearing.

Ex.9 pp. 81-4 6. In the meantime, pursuant to a decree of the Supreme Court of New South Wales in Equity dated 8th May, 1970 the appellant by memorandum of lease which bears date 13th October, 1970 did lease unto the respondent the said land in Certificate of Title Volume 6420 Folio 47 to be held by the respondent "As tenant for the term of his lifetime years computed from the 18th day of March, 1952" at the yearly rental of \$10,400.00 subject to the covenants, conditions and restrictions contained in the said memorandum of lease. 10

Ex.8 pp. 70-80

7. On 13th October, 1971 the Fair Rents Board resumed hearing the application under Division 4AA of the Act. At the close of evidence the Board heard submissions by Counsel on behalf of the respondent. In so far as it is relevant to this appeal, Counsel for the respondent submitted that the Board did not have jurisdiction to determine the application for the following reasons: (a) that the memorandum of lease dated 13th October, 1970 was not a lease within the meaning of the Act and (b) that if the Board were to hold that the said memorandum was a lease within the meaning of the Act, it was "a lease for a fixed term" within the meaning of Section 17B of the Act, which section is in the following terms: 20 30

17B. Rent under certain fixed term leases. Where any prescribed premises (not being prescribed premises referred to in section 32B of this Act) were the subject of a lease for a fixed term the fair rent and the rent of the premises or of the premises together with the goods leased therewith shall, notwithstanding any other provision of this Act, be, as on and from the date on which the assent of Her Majesty to the Landlord and Tenant (Amendment) Act, 1968, was signified and while the lease remains in force - 40

- (a) where the rent was fixed by a determination made before the Twenty sixth day of November One thousand nine hundred and sixty eight, and in force immediately before that day - the rent fixed by that determination; or
- (b) where the rent payable immediately before that day was fixed under section 17A of this Act - that rent,

10 or if the contractual rent provided for from time to time by the lease is greater than the rent referred to in paragraph (a) or (b) of this section, that contractual rent.

8. Section 17B was inserted in the Act by the Landlord and Tenant (Amendment) Act, 1968 (Act. No.58 of 1968, to which Her Majesty gave assent on 13th December, 1968). The said amending Act was introduced into the New South Wales Parliament on 26th November, 1968.

20 9. In so far as it is relevant to this appeal the Board held as follows:

- (a) that on 1st March, 1967 the fair rent of the premises was determined at \$15,725.10 per annum and that determination was in force on and immediately prior to 26th November, 1968. pp. 37-8
- (b) that the memorandum of lease dated 13th October, 1970 was a lease within the meaning of the Act. p. 30
p. 39
- (c) that the premises did not fall within the prescribed premises referred to in Section 32B of the Act. p. 30
p. 39
- 30 (d) the premises were not the subject of "A lease for a fixed term" within the meaning of Section 17B of the Act. pp. 30-1
p. 40

10. The Board thus having determined that it had jurisdiction so to do, thereupon determined a fair rent of \$59,444.00 per annum for the premises, to be effective as from 18th July, 1971. p. 35

40 11. The respondent appealed from the decision of the Board by way of stated case dated 29th February, 1972 to the Court of Appeal of the Supreme Court of New South Wales. The two points of substance argued before the Court of Appeal were those referred to in paragraph 7 hereof. pp. 36-42

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pp. 43-4

12. The Court of Appeal gave and delivered its judgment on 20th September, 1972 wherein their Honours allowed the appeal and remitted the case to the Fair Rents Board with their expression of opinion.

13. Their Honours held that the memorandum of lease dated 13th October, 1970 was a lease within the meaning of the Act. Their Honours were of the view however that as it was a lease for life it was "a lease for a fixed term" within the meaning of Section 17B.

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p. 57

14. Jacobs, J.A. (as he then was) with whom Holmes, J.A. agreed, held that within the context of Section 17B the word "fixed" means "fixed between the parties to the lease as the term thereof". His Honour was also of the view that the reasoning of the English Court of Appeal in Moss v. Elphick (1910) 1 K.B.846 in respect of certain sections of the Partnership Act could well be applied in the present context.

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p. 62

15. Moffitt, J.A. expressed the view that the word "fixed" in Section 17B refers to a term defined by the agreement of the parties, so that it is either defined by reference to the calendar or by reference to some event certain to happen, the occurrence of which is ascertainable by reference to the agreement.

16. On 11th December, 1972 the Court of Appeal granted the appellant final leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal. The respondent did not seek leave to appeal from any part of the judgment.

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SUBMISSIONS

17. The appellant submits that the sole question on this appeal is whether the memorandum of lease dated 13th October, 1970 is or is not "a lease for a fixed term" within the meaning of Section 17B of the Act.

18. The appellant respectfully submits that the Court of Appeal erred in holding that the lease to the respondent for life was "a lease for a fixed term" within the meaning of Section 17B.

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19. The appellant submits that it was the intention

of the Legislature when enacting Section 17B to exclude from the ambit of the existing fair rent provisions of the Act premises which are the subject of a lease for a term of certain duration. It was the intention of the Legislature in such cases that, by reason of the certainty of the term the contractual rights of the parties should not be disturbed by the determination of a fair rent higher than to which the parties had agreed

10 20. It is submitted that in the case of a lease for life where the term is necessarily uncertain, it is consistent with the policy of the Act that a rent might be determined by the Board higher than that to which the parties agreed.

20 21. The appellant submits that the reasoning of the English Court of Appeal in *Moss v. Elphick* (1910) 1 K.B. 846 in respect of the construction of the phrase "fixed term" in relation to a partnership agreement is inappropriate to the construction of the same phrase in relation to a lease. The application of such reasoning by the New South Wales Court of Appeal in the present case has resulted in an anomalous result in that a lease for life is said to be a lease for a fixed term of uncertain duration.

22. The appellant submits that "a lease for a fixed term" within the meaning of Section 17B of the Act means a lease of certain duration by reference to the calendar and accordingly does not include a lease for life.

CONCLUSION

30 23. The appellant respectfully submits therefore that the Court of Appeal should have held that the determination of the Fair Rents Board was not erroneous in point of law and dismissed the appeal.

24. The appellant respectfully submits that the appeal should be allowed and the respondent be ordered to pay the costs of the appellant before their Lordships' board and the Court of Appeal.

D.B. MILNE

K.J. CARRUTHERS

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LIGHT & FULTON,
51 Victoria Street,
London SW1H 0EZ
Solicitors for the Appellant