

IN THE PRIVY COUNCIL

No. 8 of 1973

O N A P P E A L

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

I N T H E M A T T E R of A DETERMINATION
MADE BY A FAIR RENTS BOARD AT BRISBANE STREET
SYDNEY ON 13TH OCTOBER, 1971

B E T W E E N

10 BORAMBIL PTY. LIMITED (Applicant)
Appellant

- and -

FRANCIS O'CARROLL (Respondent)
Respondent

CASE FOR THE RESPONDENT

A. INTRODUCTORY

Record

20 1. The issue in this appeal involves the proper
construction of a provision (Section 17B) in the
Landlord & Tenant (Amendment) Act 1948 (as amended)
("The Act") of the State of New South Wales.
Knowledge of the history of this legislation is
relevant to the proper construction of provisions
inserted by amending Acts.

30 2. The Act substantially re-enacted the National
Security (Landlord & Tenant) Regulations made under
the defence power of the Commonwealth of Australia
and operated to regulate the amount of rent that
could be charged in respect of "prescribed
premises" and also to restrict a landlord's liberty
to terminate a tenancy and his power to evict a
tenant. The "mischief" to which the legislation
was directed was the shortage of accommodation
resulting from the 1939-1945 War.

40 3. The relationship between Part II of the Act
(dealing with fair rents) and the Commonwealth
Regulations and the general purpose of Part II of
the Act were considered by Barwick C.J. in
Rathbone v. Abel (1964-5) 38 A.L.J.R. 293,
although the actual decision in that case was
negatived by subsequent amendments to the
legislation.

4. Prior to the amendments referred to hereafter, the general scheme of Part II of the Act which deals with "fair rents" was

a) Under Division 2 the rent payable in respect of prescribed premises was, with exceptions not presently relevant, fixed at the rent payable on the prescribed date (as defined) unless a determination of the fair rent had been made under Division 3.

b) Under Division 3 either a lessor or lessee may apply for a determination of the "fair rent" (Section 18 (1)) and either may apply for a variation of that determination (Section 32). In exercising its powers to determine the fair rent of premises (Section 20) a Fair Rents Board is directed to have regard to the matters specified in Section 21 of the Act. 10

These provisions and those in Part III operated to restrict the power of the owner of premises to increase the rent at the expiration of the term of a tenancy or of any period of a periodical tenancy, an increase which could have been effectively enforced, apart from the Act, by the alternative of eviction or notice to quit. 20

Page 64

5. In Belmore Property Co. (Pty.) Ltd. v. Allen (1950) 80 C.L.R. 191, the High Court of Australia held that the Act empowered a Fair Rents Board to increase, as well as to decrease, the contractual rent of premises to which the Act relates; that is to say to increase the rent during the term of the tenancy fixed by the contract of the parties. 30

6. In 1964, the Act was amended by Act No. 62 of 1964 which inserted Division 2A into Part II. In general terms, the effect of the amendment was to permit the lessor and the lessee to agree upon a rent for premises to which the Act related for a limited period, and the agreed rent became the fair rent of the premises during the period of the agreement. 40

7. In 1965, the Act was further amended, by Act No. 26 of 1965, by the repeal of Division 2.

**B. THE IMMEDIATE BACKGROUND
TO THIS APPEAL**

Pages 1
and 2

8. This appeal arises out of an application to determine (that is to say to increase) the

fair rent and therefore the rent payable by the lessee to the lessor of a building in the City of Sydney comprising some 84 residential flats.

9. A determination of the fair rent of the premises had been made by a Fair Rents Board on 1st November, 1967 in accordance with Division 3 of Part II of the Act. By virtue of Section 23 of the Act that determination operated to fix the fair rent and the rent of the premises at \$15,725.10 per annum until a subsequent variation is made in pursuance of Part II of the Act.

Page 3
Pages 37-8

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10. The Act was further amended on 13th December, 1968 (in so far as is relevant) by:

a) The insertion into Part II of the Act of Division 4AA which, in general terms, enabled a lessor to apply to the Fair Rents Board for a determination of the fair rent of premises in accordance with that Division where the "attributable earnings" of the lessee, as defined, exceed the sum of \$4,000 per annum.

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b) The insertion into Part II of the Act of Division 2B which contains only one section, namely Section 17B, which operates (in so far as is relevant) to fix the fair rent and the rent of premises which were the subject of a lease for a fixed term on 13th December, 1968 at the amount fixed by a prior determination of the Fair Rents Board in force on and immediately prior to that date.

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11. Division 2B is expressed to govern the situations to which it relates notwithstanding any other provision of the Act.

12. On the 13th December, 1968 the Respondent was in possession of the premises under and in accordance with the provisions of a "lease" for the term of his lifetime computed from the 18th day of March, 1952.

Page 39

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13. Thus, after the amending Act of 1968, the fair rent and therefore the rent of premises to which the Act applied could be fixed by Division 2B or under and in accordance with Division 3 or Division 4AA. The broad differences are :-

Record

- a) Division 2B fixed the rent for the balance of any fixed term at the amount of the "fair rent" at the time when the division came into operation, or at the contractual rent provided for from time to time by the lease whichever was the greater.
- b) Division 3 enabled a fair rent to be fixed, but based upon the value of the premises as at 31st August, 1939 or the date on which the premises were erected, whichever be the later. 10
- c) Division 4AA enabled a fair rent to be fixed, but based upon the "current value rental" of the premises at the date of the determination.

C. RESPONDENT'S SUBMISSIONS

14. The Respondent respectfully submits that:
- a) the Court of Appeal was correct in upholding the Respondent's submission that the premises were the subject of a lease to the Respondent for a fixed term. 20
 - b) the Court of Appeal was in error in rejecting the Respondent's submission that the relationship between the parties was not that of lessor and lessee, and should have held that the Respondent was in possession of the premises by virtue of an estate of freehold.
 - c) by reason of (a) or (b) the Appeal ought to be dismissed 30

D. LEASE FOR A FIXED TERM

15. The Respondent submits that the phrase "lease for a fixed term" in Section 17B in Part 11 Division 2B of the Act:
- a) is not limited to a lease for a fixed number of years.
 - b) is used in the Act in contradistinction to a tenancy the total duration whereof is not fixed by a prior agreement between the parties as for example a periodical tenancy or a tenancy at will. 40
 - c) Refers to a lease the term whereof is defined by agreement of the parties to

the lease, that is to say it is defined either by reference to the calendar, or to some event certain to happen so that by looking only at the event and at the contractual term of the lease one can predicate whether or not the term of the lease has come to an end.

- 10 d) Ought to be construed in a manner consistent with that adopted by the English Court of Appeal in Moss v. Elphick (1910) 1 K.B. 846 in the context of the Partnership Act.

pages 58, 59
and 63

- 20 16. In Pannucci v. Motor Body Assemblers Pty. Limited (1958) S.R.390, the Full Court of the Supreme Court of New South Wales construed the phrase "lease for a fixed term" in the context of Section 86 of the Act. The Respondent submits that in using the same phrase in subsequent amendments to the Act, the legislature should be taken to have intended that the phrase should bear the meaning ascribed to it by the earlier decision of the Court.

Page 58

E. ESTATE OF FREEHOLD

- 30 17. The jurisdiction of the Fair Rents Board to make a determination either under Division 4AA or Division 3 of Part II of the Act is dependant upon the relationship of the parties to that application being that of lessor and lessee.

18. "Lessor" and "Lessee" are defined in Section 8 of the Act as meaning the parties to a lease. "Lease" is defined in the same section as including every contract for the letting of any prescribed premises.

19. The Respondent submits that:

- 40 a) At common law the grant to a person of a lease for his life created a freehold estate whether a payment in the nature of rent was reserved or not.
- b) The definition of "Lease" in the Act ought not to be construed as embracing a relationship which under the general law gave rise to a freehold, rather than a leasehold estate.

Record

Page 51

c) Whilst under Section 53 of the Real Property Act, 1900 (as amended) in order to obtain registration of a lease for life, the document sought to be registered must be in the form of the Eighth Schedule to that Act (i.e. in the form of a Memorandum of Lease), this requirement as to form does not affect the substantive nature of the estate thereby created, nor does it convert a document registered under that Section into a lease for the purpose of the Landlord & Tenant (Amendment) Act 1948 (as amended) if it would not otherwise fall within that definition.

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F. CONCLUSION

20. The Respondent therefore respectfully submits that this appeal should be dismissed with costs because the Fair Rents Board had no jurisdiction to determine the application for the reasons submitted herein and the other reasons referred to in the judgment of the Court of Appeal.

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RUSSELL BAINTON

