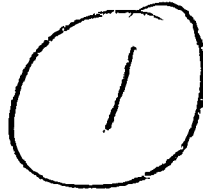


judgment no. 1, 1974



8 OF 1973

IN THE PRIVY COUNCIL

ON APPEAL from the Court of Appeal of the Supreme Court of New South Wales in Term No. 162 of 1972

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

BETWEEN:

BORAMBIL PTY. LIMITED

Applicant (Appellant)

AND:

FRANCIS O'CARROLL

Respondent (Respondent)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 4 JAN 1975
25 RUSSELL SQUARE
LONDON, W.C.1.

APPEAL BOOK

SOLICITORS FOR THE APPELLANT

Joseph P. Sarah & Company
64 Castlereagh Street,
SYDNEY

SOLICITORS FOR THE RESPONDENT

Nicholl & Nicholl,
9 Bligh Street,
SYDNEY

IN THE PRIVY COUNCIL

8 OF 1973

ON APPEAL from the Court of Appeal of the Supreme Court of
New South Wales in Term No. 162 of 1972

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

BETWEEN:

BORAMBIL PTY. LIMITED

Applicant (Appellant)

AND:

FRANCIS O'CARROLL

Respondent (Respondent)

APPEAL BOOK

SOLICITORS FOR THE APPELLANT

Joseph P. Sarah & Company
64 Castlereagh Street,
SYDNEY

SOLICITORS FOR THE RESPONDENT

Nicholl & Nicholl,
9 Bligh Street,
SYDNEY

ON APPEAL from the Court of Appeal of the Supreme Court of New South Wales in Term No. 162 of 1972

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

BETWEEN:

BORAMBIL PTY. LIMITED

Applicant (Appellant)

AND:

FRANCIS O'CARROLL

Respondent (Respondent)

INDEX OF REFERENCE:

No.	Description of Document	Date	Page
-----	-------------------------	------	------

DOCUMENTS INCLUDED IN THE RECORD

1. Transcript of Evidence before Mr. L.J. Nash, S.M., in the Fair Rents Court, Sydney
27th October, 1969
13th October, 1971

CASE FOR THE APPLICANT

ATKINSON - John Victor

Examined	1
Further Examined	17
Cross-Examined	18

CASE FOR THE RESPONDENT

O'CARROLL - Terrence John

Examined	4
Examined on Voir Dire	5
Further Examined	12

O'CARROLL - Francis

Examined	19
Cross-Examined	22
Re-Examined	27

2. Decision of Mr. L.J. Nash, S.M. 13th October, 1971 28

No.	Description of Document	Date	Page
3.	Case Stated by Mr. L.J. Nash, S.M.	29th February, 1972	36
4.	Reasons for Judgment of the Court of Appeal	20th September, 1972	43
	Jacobs, J.A.		45
	Holmes, J.A.		61
	Moffitt, J.A.		62
5.	Order of the Court of Appeal	20th September, 1972	65/68
6.	Order granting Final Leave to Appeal to Her Majesty in Council	11th December, 1972	69

DOCUMENTS NOT INCLUDED IN THE RECORD

1. Transcript of Submissions by
Counsel before Mr. L.J. Nash, S.M. 13th October, 1971

LIST OF ORIGINAL EXHIBITS SENT WITH
TRANSCRIPT RECORD OF PROCEEDINGS

<u>Exhibit Mark</u>	<u>By whom tendered</u>	<u>Nature of Exhibit</u>	<u>Page</u>
8	Appellant	Memorandum of Lease dated 13th October, 1970	70
9	Appellant	Decree of Myers, J. in Supreme Court of New South Wales in Equity made 8th May, 1970	81

FAIR RENTS COURT

SYDNEY

} No. 44A/2922/69

} 27th October, 1969

'TEXAS' - 3/5 Greenknowe Ave., Potts Point.

APPEARANCES:

MR. MACKERRAS instructed by Joseph P. Sharah
and Co. for the lessor.

MR. BAINTON instructed by Nicholl & Nicholl
for the Lessee.

10

BEFORE MR. NASH STIPENDIARY MAGISTRATE.

Recorded in shorthand by direction.

THIS DEPONENT BEING DULY SWORN STATES (EXAMINATION
IN CHIEF):

MR. MACKERRAS: Q. Is your full name John Victor
Atkinson? A. Yes.

Q. And do you reside at 30 Epping Highway,
North Ryde? A. Yes.

Q. Are you a real estate agent, real estate
valuer and fair rents advocate by occupation?
A. Yes.

20

Q. Did you sign the application before the
Board? A. Yes.

Q. Might the witness look at the original appli-
cation. Is that your signature on the application?
A. Yes.

(Application tendered by consent admitted
and marked Exhibit 1.)

Q. Mr. Atkinson, are you familiar with the Fair
Rents Boards constituted in Sydney? A. Yes, I am.

30

Q. Are you familiar with the subject premises,
3/5 Greenknowe Avenue, Potts Point? A. I am.

Q. Are you able to say that this Board is the
nearest Fair Rents Board to those premises?
A. Yes, I do.

Q. Can you tell his Worship what those premises
comprise? A. Comprise 83 self-contained flats,
one a penthouse and one office flat.

Q. Did you, having signed the application that commenced these proceedings, did you serve that application? A. Yes, I sent it by prepaid post on 20th August, 1969.

Q. A prepaid post letter addressed to the respondent? A. That is correct.

Q. I think you are aware there is a mortgage on the premises? A. Yes, I advised the mortgagee of the hearing on 5th September.

10

Q. And the mortgagee is Australia and New Zealand Bank Limited? A. Yes.

Q. Do you produce a carbon copy of the notice to the mortgagee? A. I do, that is a carbon copy.

(Carbon copy of notice tendered and by consent admitted and marked Exhibit 2.)

Q. And before the proceedings were commenced, did you serve a certain notice upon the respondent?
A. I did.

Q. Do you produce a carbon copy of the notice together with a copy of an enclosure with that notice? A. I do, yes.

20

Q. And how did you serve it upon Mr. O'Carroll?
A. I sent it by prepaid post.

Q. Addressed to him? A. To 3/5 Greenknowe Avenue, Potts Point on the 24th July.

Q. Is that the document, the quarter size document which you produce, a carbon copy of the notice itself? A. That is right.

Q. Is the foolscap size document which you produce a copy of the enclosed with that notice?
A. It is a similar one from the Rent Controller I attached to it.

30

(Above documents tendered; no objection; admitted and marked Exhibit 3.)

Q. Can you tell his Worship on what day you posted the original of that document? A. On the 24th July 1969.

Q. I think you are employed by A.H. Taylor Pty. Limited, Real Estate Agents of 448 Parramatta Road, Petersham? A. Yes.

40

Q. That is the same address as is shown on the top of that notice? A. That is right.

Q. Are you the officer of A.H. Taylor Pty. Limited who looks after this matter? A. That is right.

Q. Has A.H. Taylor Pty. Limited ever received any reply to the notice that was sent? A. No.

Q. Do you produce an extract from the Valuation Roll under the Valuation of Land Act, 1916, as amended, relating to the subject premises? A. I do. 10

(Above document tendered; no objection; admitted and marked Exhibit 4.)

Q. Have you calculated what would be the current value rental appropriate to the premises, assuming any order is made? A. Yes, I have.

Q. Do you produce a statement setting out your calculation? A. I do.

(Statement tendered.) 20

MR. BAINTON: If it is tendered as mathematics I do not object but on any other basis - so long as it is understood it is simply mathematics I do not object to it.

(Above document admitted and marked Exhibit 5.)

MR. MACKERRAS: Q. Are you aware that a fair rent determination was previously made between the parties relating to these premises?

(Objection.) 30

MR. MACKERRAS: I won't press it. Might I have access to the earlier file.

BENCH: Objection allowed, not being pressed.

MR. MACKERRAS: I tender your Worship a notice of determination of the fair rent dated 1st November, 1967.

(Above document tendered; no objection; admitted and marked Exhibit 6.)

MR. MACKERRAS: That is the evidence of this witness. 40

MR. BAINTON: One of the directors of the applicant company was served with a summons to produce some documents. Might I call him at this stage.

BENCH: He might be called.

TERRENCE JOHN O'CARROLL

Called:

MR. BAINTON: Q. Is your full name Terrence John O'Carroll? A. Yes.

Q. Secretary of the applicant company Borambil. A summons was served on you to produce some documents. Do you produce the summons served and the documents? A. I have not got it with me now, it is on the Bar Table. 10

Q. What about the documents? A. They are not here. It is in train. I have not been able to lay my hands on them this morning. I had thought they would be here now and apologise they are not.

Q. You will let us know when they arrive?
A. Yes, certainly.

MR. BAINTON: I cannot take that any further. I would not wish to cross-examine Mr. Atkinson until I had access to the documents. 20

BENCH: It may stand down and I give leave to have him called when desired for the purpose of cross-examination.

(Witness stood down.)

MR. MACKERRAS: In my submission it is desirable that Mr. Atkinson's cross-examination be completed before I call any other witness. Would your Worship adjourn for a short time while I ensure that the summons is complied with so far as it may be. 30

BENCH: I will take a short adjournment.

(Adjournment.)

MR. MACKERRAS: I have received certain instructions that matters raised in this summons and your Worship I am instructed to produce certain minute books commencing with Tuesday 18th December, 1956 and I am instructed that no earlier minute book is able to be found. That covers (a) and (b) of the summons. Paragraph (c) of the summons your Worship I am instructed that no such document exists. Perhaps I should also mention I am further instructed as appears from the last minute in the minute book that Terrence John O'Carroll is not now the 40

T.J. O'Carroll, x,
4. stood down.

secretary of Borambil Pty. Limited. I am instructed to produce certain documents as if the summons had been properly directed to the secretary of Borambil Pty. Limited and properly served on the company.

MR. BAINTON: I don't regard that as a satisfactory answer. This summons is in the nature of a subpoena and I would deal with it as if it were a subpoena and ask Mr. O'Carroll some questions on the voir dire.

10

BENCH: That being the case he can be called. Step down Mr. Dickinson.

TERRENCE JOHN O'CARROLL
Sworn, examined, deposed:
Examination on Voir Dire:
(To Mr. Bainton):

MR. MACKERRAS: I would object to my friend calling any evidence.

BENCH: It is only for examination on the voir dire.

MR. MACKERRAS: He is not entitled to do that. He is entitled to call this gentleman as a witness in his own case.

20

BENCH: This is on the question of the answer to the summons. He is not prepared to accept your explanation of what has been produced and he wants the man examined as to compliance with the summons. Any examination will be strictly on the voir dire, on the production of the documents.

MR. MACKERRAS: I base this solely on the question of production of documents.

30

MR. BAINTON: Q. Your full name and address?

A. Terrence John O'Carroll, Flat 1, 71 Cowper Street, Randwick.

Q. I think you either are, or until very recently have been the secretary of Boarambil Pty. Limited? A. Until very recently I was the secretary and I was under the impression till a few minutes ago I was still the secretary and in fact that is not true.

Q. Whether that impression is correct or not you were appointed secretary many years ago?

40

A. Yes.

Q. And acted as such until a few moments ago when you found out you weren't secretary? A. I don't admit I acted as such until a few minutes ago

T.J. O'Carroll, x on
5. voir dire

T.J. O'Carroll, x on
voir dire

because I was under that impression but I have not performed any deeds as secretary for several months.

Q. You have been a director of the company for quite a number of years? A. That is true.

Q. Who has, over the last two years, had custody of the records of Borambil Pty. Limited?

A. To the best of my knowledge and belief our accountant, F.J. Wild and Francis, Pitt Street, Sydney.

10

Q. They have been the accountants for the company since its incorporation? A. I don't know that.

Q. Have they been its accountants for more than 15 years now? A. I very much doubt that.

Q. They were the company's accountants at the time of some proceedings in the Equity Court in this State involving the building?

MR. MACKERRAS: Objection.

20

MR. BAINTON: I withdraw it.

BENCH: Question withdrawn. Objection is allowed.

Q. You have enquired as to the whereabouts of the earlier minute book? A. Yes.

Q. You have enquired of Ryan and Evans?
A. Indirectly.

Q. Have you made any special enquiries? A. I have telephoned my father who would be the logical choice to ask in the event that Ryan and Evans did not have it.

30

Q. What was the indirect enquiry? A. I asked my father to ring them as I had been unable, despite repeated telephone calls from this building to raise them.

Q. This summons was served on you on the 19th September last year wasn't it? A. That is true.

Q. So you have had six weeks to find this minute book? A. Yes.

Q. What steps have you taken to find them?

A. Being under the impression they were at the hotel at Kings Cross I went there to find them and

40

T.J. O'Carroll, x on
6. voir dire

sorted them out and failed to find them to my
astonishment.

Q. This morning is the first time you have tri-
ed? A. Yes.

Q. Your attempts since this morning have been
some innocent 'phone calls to your accountants and
one to your father? A. Yes.

Q. Have you made the same endeavours to find the 10
lease? A. To the best of my knowledge and belief
there is no lease.

Q. Agreement for the lease; did you look for
that?

MR. MACKERRAS: I object to that question.

MR. BAINTON: The summons calls for the original of
a lease or a copy of it. The parties to these par-
ticular proceedings are not before a court for the
first time. There have been all sorts of other pro-
ceedings and there is a document in existence which 20
has been tendered on the other proceedings with the
documents annexed to it.

BENCH: I allow the objection.

MR. BAINTON: What I am seeking is an agreement. I
am seeking is an agreement. I am asking does he
know where the agreement is.

BENCH: Objection allowed.

Q. Now Borambil Pty. Limited certainly kept
minute books going back through the ones you produc-
ed? A. I believe so but it is outside my personal 30
knowledge.

Q. Mr. O'Carroll, you were a party to other
proceedings in another court in this State against
the present defendant? A. That is true.

Q. And you say the existence of earlier minutes
are not within your knowledge? A. No, that is
true; they are not within my knowledge. I believe
that they existed since I find it difficult to
understand the company operating without them. I
have no knowledge of them. I have never seen them. 40
They were not prepared at any time when I was an
officer of the company and therefore I can't truly
say I know of them.

T.J. O'Carroll, x on
voir dire

Q. You have never seen them? A. To the best of my knowledge I have not.

Q. Will you make some further enquiries during the day as to the whereabouts of the earlier minute book? A. Certainly.

Q. Are you prepared to make a further summons for the agreement of lease?

BENCH: This is not on the voir dire. The present examination is limited, I allow the objection. 10

(No cross-examination on voir dire by Mr. Mackerras.)

MR. BAINTON: Those are the documents that are produced your Worship. This is a most unsatisfactory situation. These documents have been tendered in other proceedings between the parties and I can go a certain distance now. With respect I would like to have the summons properly answered at least before I conclude my case. 20

BENCH: Can you go part way with Mr. Dickinson?

MR. BAINTON: There is nothing I can ask.

BENCH: You don't want to go on Mr. Mackerras till Mr. Dickinson has been examined.

MR. BAINTON: If that is the case I won't cross-examine Mr. Dickinson.

BENCH: That being so the evidence of Mr. Dickinson is closed.

MR. MACKERRAS: That is my case your Worship. 30

MR. BAINTON: Might I have access to the court's file. I would tender from it the application which is dated 12th May, 1967 and the decision of his Worship Mr. Anderson on it, that being the application and the decision which led to the making of the note of determination which was notified by the document tendered and marked Exhibit 6. It may save my friend a deal of reading. The part of the judgment is the finding of his Worship as to the relationship of landlord and tenant, relating to the lease for life granted to the parties. The fact that the proceedings are current are some indication that the lessee is still alive. 40

T.J. O'Carroll, x on
8. voir dire, stood down

MR. MACKERRAS: I don't object to the application itself nor do I object to the formal conclusion, the formal decision. In other words the words "having regard to ... (reads) ... etc." But I do object to the reasons for the decision.

BENCH: Any basis for the objection to the reasons?

MR. MACKERRAS: The reasons for the decision are not admissible and don't necessarily bind the parties in my submission it is the decision itself which is relevant and covers the matters before your Worship. 10

MR. BAINTON: I would be relying on an issue estoppel. There was a decision last time as to the relationship between the parties. Your Worship expressly made a finding between these parties. It was a question which arises unnecessarily in the course of coming to the determination. It may perhaps be desirable if I add to it, and I will tender the transcript of the evidence not of course as truth of its contents to indicate what matters were canvassed and I tender the document tendered before Mr. Anderson as Exhibit 14. It was proved before his Worship to be a copy of the lease document. 20

MR. BAINTON: That perhaps complete the necessary matters to find the estoppel.

MR. MACKERRAS: I don't object to any of these documents for the purpose, if they are tendered for the same purpose of indicating what were issues before his Worship Mr. Anderson. But I don't concede your Worship that there can be any issue estoppel and I object your Worship to any of the documents for any purpose other than to determine what were the issues before his Worship. Assuming my friend is arguing there is issue estoppel in this Board then leaving that evidence of argument which he is entitled to put before your Worship I don't object to it being put before your Worship, documents designed to show what issue if any there is an estoppel about, but as anything else I object to any and all of these documents and in particular to the documents marked Exhibit 14. It is not signed by anyone. I may have other comments to make before your Worship but in my statement the fact it is not signed by anybody is a sufficient matter. 30 40

MR. BAINTON: I think the relevant evidence will be found in the examination and cross-examination of the respondent to that application, Mr. Frank O'Carroll. I don't think the other parts of the transcript bear upon it.

(Short adjournment.) 50

BENCH: I have had a look at parts mentioned in the exhibit tendered. It is not my opinion that this Board is bound by the doctrine of estoppel so as to apply it to those matters that are raised by the respondent and objected to by the applicant. I allow the objection to its being so estopped and bound by the decisions of Mr. Anderson as to relationship in those other matters submitted.

MR. BAINTON: May it be noted what the objections are.

10

BENCH: It was quite clear from the statement made by Mr. Mackerras.

MR. BAINTON: I am in doubt about it but I would like to see the record.

BENCH: As I thought the transcript is quite clear as to what was submitted and what was objected to. To put it a little more clearly I am of the opinion that there is not an issue estoppel as to the finding of the relationship nor in fact a lease for life was granted and the other matters canvassed in the transcript and the reasons given for his decision by Mr. Anderson.

20

MR. BAINTON: Ordinarily I would ask for the documents to be marked for identification and I assure they adequately identify themselves in the file.

BENCH: Mr. Mackerras had no objection to the file being tendered. The whole file can be tendered and marked Exhibit 7.

MR. BAINTON: I would hate to burden anyone with the whole file, the file relating to the last application made in May 1967.

30

BENCH: Any objection Mr. Mackerras that the matters mentioned by Mr. Bainton be tendered from the file.

MR. MACKERRAS: No objection at all on the basis I outlined before.

MR. BAINTON: That tender would include the document that was Exhibit 14, that we got back.

BENCH: It includes all those matters mentioned in that part of the file containing the application of the 12th May, 1967 and concluding with Mr. Anderson's decision on the fair rent. Exhibit 7. The records show where it is, if you want to put it back in the file.

40

MR. BAINTON: I wish to have it identified as one of the documents that came from the file.

BENCH: Show it to Mr. Mackerras. The documents referred to.

MR. MACKERRAS: It is a photocopy document and could doubtless be photocopied again fairly readily and I have no objection I don't dispute that this is the document which was Exhibit 14 before his Worship Mr. Anderson. I have no objection to it being left in the file should it be returned. Perhaps it may be copied again and we can ensure anyone who can possibly want it has a copy of it.

10

BENCH: I can mark that particular exhibit for these proceedings to be Exhibit 7A. It can be kept here as an exhibit in this application.

MR. BAINTON: I am prepared to tender some other documents.

ON RESUMPTION:

MR. BAINTON: Could we have Mr. Terrence John O'Carroll called.

(Terrence John O'Carroll called, no appearance.)

20

MR. BAINTON: We will waste a lot of time if we do not get the minute book. The best course is for me to ask for an adjournment to produce and that is what I do. There is no doubt in the world but that in March 1952 these parties executed an agreement for the lease of these premises. It has been the subject of Equity proceedings, tendered in one of those proceedings, it ought to be produced. This document undoubtedly exists or has existed. It may have been destroyed but it is the foundation of the relationship between these parties. It is a matter of no slight importance to the respondent. These figures that have been produced, although they do not take into account the respondent pays rates and taxes, shows a very substantial increase is being sought.

30

BENCH: You are not in a position to proceed further with your case without Mr. O'Carroll being here.

MR. BAINTON: I don't wish to have to do it simply for this reason, if I go ahead and ultimately we will get the document, the matters I will have gone on with in the meantime will have wasted the court's time.

40

BENCH: Yes, Mr. Mackerras.

MR. MACKERRAS: My friend should take the matter

as far as he can. This matter is specially fixed for today and it should proceed as far as possible today.

BENCH: I have in mind what is the situation if Mr. O'Carroll refuses to attend on another day. There is no way he can be forced to come here. At this stage I am only interested in whether I should grant an adjournment or not. Seeing the time has been set aside and you are in a position to proceed with certain matters, I think it should proceed as far as it can today.

10

MR. BAINTON: I feel bound to say a lot of the evidence I will be proceeding with now would be quite unnecessary if I get the document.

BENCH: We cannot compel Mr. O'Carroll to be here.

(At this stage Mr. O'Carroll appears.)

EXAMINATION IN CHIEF BY MR. BAINTON:

Q. Have you been able to find the earlier minutes yet? A. No.

Q. Have you made further inquiries? A. Yes.

20

Q. So far they have been unproductive? A. Yes.

MR. BAINTON: I cannot take that any further on the voir dire.

BENCH: I thought you called him to give evidence.

MR. BAINTON: No, I am seeking to recall him on the procedure.

BENCH: Terrence John O'Carroll, you gave evidence earlier in the proceedings? A. Yes.

(Witness retired.)

BENCH: Yes, Mr. Bainton.

30

MR. BAINTON: I would now seek to re-tender certain of the documents on the file on a different basis. The part of the file I would seek to re-tender is the evidence of Mr. Frank O'Carroll on the previous occasion; so much as dealt with the question of this lease, that part of the deposition which records the appearances of counsel for the applicant company and that part of the transcript which records that counsel for the applicant company was not instructed to take objection to Mr. Frank O'Carroll's evidence or the tender of the lease

40

document which became Exhibit 14 and I tender that as an admission against the applicant company.

BENCH: This evidence is already in Exhibit 7.

MR. BAINTON: Yes, but I don't want to be put in a position of not being entitled to rely on it.

MR. MACKERRAS: In my submission I would object to the evidence. If my friend wishes to tender evidence in these proceedings relating to any particular matter of which his client gave evidence, the proper method is to call his client and put his client in the witness box.

10

BENCH: Admittedly the Board is not bound by the rules of evidence but seeing the person is available I think it more prudent he give his evidence on oath.

MR. BAINTON: There is an admission by the company of its truth and it is on that basis I seek to rely.

BENCH: I reject the tender on that basis.

MR. BAINTON: Might I have access to the documents produced in the Court by the Master in Equity. The ones I seek to have first is 1244 of 1957. I tender certain documents out of that file. A suit in which the plaintiffs were Terrence John O'Carroll and Garry Francis O'Carroll. The defendants were inter alia Borambil Pty. Limited, the present applicant. The documents I would tender are the statement of claim and a submitting appearance on behalf of Borambil Pty. Limited, and to make clear the basis of that tender it is probably necessary that I should indicate to your Worship what this suit was about. It was a suit brought for a declaration that the respondent before this Court held a certain interest in this 'Texas' property upon trust for the plaintiffs. The interest in the 'Texas' property which he was alleged to hold on trust for the plaintiff was said to have come about this way; it was said firstly, that the present respondent was trustee of certain trusts, but in February 1942 - this allegation is in paragraph 20 of the statement of claim - it was said that Borambil Pty. Limited agreed to lease to members of a certain partnership which traded under the name of 'Texas', the property known as 'texas' which I can assert without fear of contradiction is identical in the statement of claim as the same property we are now concerned with. The particulars of title are set out in paragraph 19. It was said the property was leased by Borambil for a term of 25 years from the 2nd January 1942 to this partnership; then in paragraph 21 it is said that on or about 30th June

20

30

40

50

1950, the second defendant, that is the respondent here, became the sole owner of the assets of this partnership and accordingly was owner of the 25 year lease. Then in paragraph 24 it is alleged that by memorandum of agreement made on the 18th March 1952 the company, Borambil Pty. Limited, the applicant here, agreed to grant the respondent here a lease of the property known as 'Texas' for the term of his lifetime from the 18th March 1952 at the rental and upon the terms the subject of the covenants contained in a draft lease annexed to the memorandum of agreement. Then the document goes on "The plaintiffs ... (quotes) ... statement of claim". There are various other allegations which do not of themselves specifically assist in this case and then the first matter of the relief claim is it may be declared that the memorandum of agreement mentioned in paragraph 24 of the statement of claim is illegal and void and of no effect and then it is next asked it may be declared the memorandum ought to be set aside and then it may be declared the present respondent here ought to take no interest pursuant to the memorandum of claim. That is probably far enough to show the nature of the suit. To that request the company Borambil Pty. Limited in effect agreed by putting on a submitting appearance and ultimately it would be appropriate to add that to the tender that suit was dismissed; in other words the Court declined to find that this lease was void and of no effect as asked and there is with the papers a document called minutes of degree which is the document embodying that and perhaps for clarity's sake I would add to the tender copy of the Judges' notes. The suit was heard by his Honour Mr. Justice Myers. I tender all those documents as a statement by Borambil Pty. Limited, as admission of this lease for life.

MR. MACKERRAS: Perhaps I might have a look at them. I have not seen those documents before.

Adjournment.

ON RESUMPTION:

MR. BAINTON: I gather your Worship from my friend he has come to the view I should have the adjournment.

MR. MACKERRAS: The situation is roughly before I commit my client to any course of conduct I would like to make further inquiries into a certain matter. I don't think I need to put it more explicitly than that. I have only recently come into this matter and would like the opportunity that anything I do is not contrary to my client's interests and is reasonable in all the circumstances.

BENCH: Perhaps I can take a short adjournment to allow you to discuss among yourselves what date is suitable.

Adjournment.

ON RESUMPTION:

BENCH: I understand the 5th February 1970 is a suitable date.

(By consent adjourned part heard for hearing here on 5th February, 1970 at 10 o'clock.)

JOHN VICTOR ATKINSON

Resworn, examined as under:

MR. MACKERRAS: Q. Is your full name John Victor Atkinson? A. Yes.

Q. And I think you still reside at 30 Epping Highway, North Ryde? A. Yes.

Q. Your occupation is still as before, a Real Estate Agent, Real Estate Valuer and Fair Rents Advocate? A. And Property Manager.

Q. And I think you are now employed by Messrs. S.M. and M. Paino, Real Estate Agents of Randwick as their Property Manager? A. Yes. 10

Q. And you know, Mr. Atkinson, that since these proceedings were last before the Court or rather since the hearing commenced on the 27th October, 1969 certain litigation has taken place in the Supreme Court of New South Wales in Equity? A. Yes.

Q. And as a result of those proceedings, the judgment given by Mr. Justice Myers, I think a certain lease was entered into? A. Yes. 20

MR. MACKERRAS: I call for the lease if your Worship pleases.

MR. BAINTON: This is the lease from the Applicant Borambil Pty. Limited to Francis O'Carroll. It bears a note on the back that it has been registered. Your Worship will appreciate these documents are executed in duplicate, the Lessee keeps one and one is entered in the Register Book.

MR. MACKERRAS: I tender the document, your Worship, as Exhibit 8. 30

(Lease admitted without objection and marked Exhibit 8.)

MR. MACKERRAS: I may say, your Worship, that document is dated I think exactly two years ago today, the 13th October, your Worship will see that it is deemed to be back dated, and I will not be contending that it is not equitable, in other words I would regard myself as precluded from posing any argument upon the fact that document does not exist in its present form when the applicant was made. 40

Q. Mr. Atkinson I show you Exhibit 4, are you aware of any change in any of those relevant matters mentioned there since the last occasion?
A. No.

Q. And has there been any change in your calculation at all, that is Exhibit 5, I think, since the last occasion? A. No.

CROSS-EXAMINATION BY MR. BAINTON:

Q. Mr. Atkinson, on the last occasion you described the premises as containing 83 self-contained flats, one penthouse and what you call one office flat? A. Yes.

Q. I think it would perhaps be more accurate to say that part of the premises should and always have been used for the purposes of an office, it is not a flat, it is an office? A. The rear of it, I understood from what I could see, the residence at the rear of the office, not classed as an office/flat. 10

Q. It may be perhaps just a matter of terminology but part of the premises are and always have been used as an office, other parts of the premises have been used as an office, other parts of the premises have been used wholly as flats? A. When I inspected the only thing I saw was the receptionist desk there. 20

Q. When did you do the inspection? A. About two years ago.

Q. I suppose it is possible at least you didn't see everything? A. Mr. O'Carroll took me for a look around.

Q. The calculation you prepared which became exhibit 5 took no account of the fact that under this lease the Lessee is obliged to pay Council rates, water rates, and to keep the premises in repair; would you like to look at your document Exhibit 5? A. The initial figure wasn't the amounts deducted. 30

Q. Mr. Atkinson, I am not being critical, I am just asking you is that not the fact, it makes no allowance for the fact that the person you describe as the Lessee is required to pay the Council rates, the water rates, and to keep the premises in repair? A. The repair is allowed for. 40

Q. Have another look at it, where is it? A. It is not, it is taken out.

Q. Precisely, that is what I am putting to you, the calculation you make does not allow for the fact the Lessee is obliged under his lease to keep

the premises in repair? A. The figure I used is the statutory figure from the Valuer General's Department.

Q. You say you are now Property Manager?
A. I have been a Property Manager for years.

Q. Would you agree that the annual cost of keeping a building like the "Texas" block of flats in reasonable repair would be likely depending on whether it happens to be yearly external and internal painting or not of the order of \$8,500.00, \$12,000.00 and even more if it was a year in which painting had to be done? A. Well from what I have seen of the property the proper maintenance hasn't been carried out. 10

Q. I didn't ask you that, I am asking you if you can tell me, if you can't say so, whether from your own experience the cost of keeping a building of this nature in repair would be any less than \$8,000.00 a year, and considerably more if it happened to be a year in which painting was done inside and out? A. If a premises of that type was carried out yes, to keep it up to standard and so on, even more. 20

No re-examination.

(Witness retires.)

MR. MACKERRAS: That is my case your Worship.

MR. BAINTON: I tender if your Worship pleases the Decree in the Supreme Court of New South Wales in Equity No. 1564 of 1969. It is probably an unnecessary protection in the light of what my friend said about the lease but I would like to have the benefit of having it there for such estoppels. 30

(Decree admitted without objection and marked Exhibit 9.)

FRANCIS O'CARROLL

Sworn, examined as under:

MR. BAINTON: Q. Your full name is Francis O'Carroll? A. That is right.

Q. You are the respondent in this Application? 40
A. I am.

Q. What is your residential address?
A. 1 Latona Street, West Pymble.

J.V. Atkinson, xx,
ret'd.

Q. I think under the lease document which has just become Exhibit 8 you are obliged to pay the Council rates in respect of the premises "Texas", and you have always paid them? A. I have.

Q. And likewise the water rates, and you have in fact always been paying the water rates since 1953 I think? A. 1952.

Q. I think the water rates for the 1971 year were \$4,815.00, the Council rates for the 1970 year \$2,702.50 and while you haven't been able to find the rate notice for the 1971 year you have looked up your cheque book and the amount paid in the 1971 year was the same figure \$2,702.50? A. That is right. 10

Q. I think it has been your practice, Mr. O'Carroll, to have a Balance Sheet and Trading Account in respect of the "Texas" business prepared annually? A. That is right.

Q. I think these are the accounts for the 1970 year? A. That is right. 20

Q. I just want to take you to the Profit and Loss Account, the gross rents received and some other items of income are shown on the outgoings are shown on the other side, I just want to direct your attention to the Council rates and water rates, you have already said you paid those in respect of the land? A. That is right.

Q. And the other item is repairs and replacements which for that year happen to be \$8,481.16 and the previous year \$12,366.00, are they repairs, renewals and so forth of the nature that you are called upon to do under the lease? A. No, not the entire amount. 30

Q. I don't want to tie you at the moment to exact figures, can you give us an idea of what proportion of these are attributable to repairs under the lease against repairs you take upon yourself?
A. I am waiting for those figures to arrive.

Q. They are being calculated precisely are they? A. Yes. 40

Q. I think the premises that are known as "Texas" are a large block with a number of flats, a penthouse, and an office? A. That is right.

Q. How many flats used for residential purposes? A. 83 lettings.

Q. Then there is what is described as a penthouse, that is used for residential purposes?

A. That is right.

Q. And there is an area that you have always used as an office? A. That is right.

Q. Can you describe that area to us? A. Well -

Q. Where is it and how big is it? A. It is on the ground floor in the foyer and it is set up as a flat but it has got a rounded counter on the outside of it and it is used as an office only. 10

Q. When you say it is set up as a flat? A. It has got a bathroom and kitchenette.

Q. But it has I take it never been used for residential purposes, simply for office purposes?

A. That is right, yes.

Q. When I say never, I mean literally never because you have been in the building since it was built? A. That is right.

Q. And there is one other thing, I think you haven't as yet submitted your 1971 Tax Return? 20

A. No I haven't yet.

Q. 1970 Return showed as an outgoing for rent in respect of "Texas" the sum that you have in fact been paying under the last determination of fair rent which was back in 1967? A. That is right.

Q. And there has been an assessment upon that and you have paid your tax on that? A. That is right.

Q. The accounts for the 1971 year which will accompany your Tax Return will show as an allowable deduction annual rent at the same rate, namely that shown in the 1967 determination? A. That is right. 30

MR. BAINTON: Well subject to these figures that is really all I wanted from Mr. O'Carroll.

(Short adjournment.)

(On Resumption Mr. O'Carroll on former oath.)

MR. BAINTON: Q. We now have the breakup of the figures for the last two years and painting and general building repairs, I don't think you have painted throughout the interior in accordance with the lease in the last two years? A. No, I have painted the interior. 40

Q. Some? A. Yes.

Q. I think your accountant shows the figure for the year ended 30th June 1970 as \$3,184.70, for the year ended 30th June 1971 \$7,225.00? A. That is right.

Q. Neither of those figures include a complete seven year re-painting of the interior? A. No.

Q. But they do include some painting? A. Yes.

Q. And neither of them include the exterior oiling of the brickwork that the lease calls for? 10
A. Yes.

Q. I think you have in fact finished doing that last week? A. That is right.

Q. You haven't got the final outlay yet but you can tell us approximately? A. About \$4,500.00.

MR. BAINTON: Might I tender these, the account for the year ended the 30th June, 1971, 1971 and split up by the accountant. There are obviously a lot of other figures I consider as not relevant but it is a convenient summary. 20

(Above accounts admitted without objection and marked Exhibit 10.)

CROSS-EXAMINATION BY MR. MACKERRAS

Q. Mr. O'Carroll, I wonder if I might take that last exhibit again (Exhibit 10), first of all Mr. O'Carroll who is Property Renovations Pty. Limited?
A. It is a company which I formed some years ago but which I sold about two and a half years ago.

Q. And this certificate, or the accountant's certificate shows that the total payments to Property Renovations Pty. Limited for building, for painting and general building repairs were a certain figure? A. That is right. 30

Q. \$3,184.70? A. That is right.

Q. For the year ended 30th June, 1970 and \$7,225.00 for the year ended 30th June, 1971?
A. Yes.

Q. Now do you say therefore that for instance the difference between \$7,225.00 and \$13,854.63, which is the amount shown in the Profit and Loss Account for the repairs renewals and replacements?
A. The 1971 figure. 40

Q. The difference is explained by you on things which you are not required by the lease to do?

A. Yes, that is what I would say.

Q. That is what your accountant has intended to split up to the best of your knowledge? A. That is right.

Q. What would the other things be about?

A. Blankets and sheets and cutlery and crockery and all sorts of items. 10

Q. And do you claim that the whole of the amounts paid to Property Renovations Pty. Limited would be in respect of matters you are required to do under the lease you are covered to repair, to the best of your knowledge? A. It is not included in the seven year term.

Q. It doesn't include for example your seven year painting would it? A. No.

Q. Nor in the particular case does it include your three year oiling? A. Four year. 20

Q. And you say that that expenditure will appear in this current year begun but not yet completed?

A. That is right.

Q. Now Mr. O'Carroll I note in these accounts expenditure for rent of furniture, who is that paid to? A. Well up to the last four years it was paid to Taylor's Furnitures Pty. Limited and since then it has been acquired by another company just recently.

Q. You rent the flats unfurnished don't you? 30

A. No, furnished.

Q. Well that's to say you let out the flats to your sub-tenants furnished? A. That is right.

Q. But the furniture was originally supplied by you was it not? A. That is right.

Q. And did you then sell it to Taylor's Furnishings Pty. Limited? A. That is right.

Q. Is that a company in which you have an interest? A. No.

Q. Is that a financing arrangement to enable you to get money on the security of the furniture? 40

Q. I don't quite follow you Mr. Mackerras.

Q. Why did you sell the furniture to Taylor's Furnishings Pty. Limited? A. Because I got a better price on a leasing basis than what I could on the showroom floor.

Q. Is it to enable you for example to claim for income tax purposes something in excess of some depreciation? A. That is an aspect, yes.

Q. You say that is at least an aspect of why you did it? A. That is right. 10

Q. Then you have a figure here of \$6,125.51 for agent's commission, to whom is that paid? A. To H.A. Macleay Pty. Limited.

Q. Who are they? A. Licensed Real Estate Agents of which I have a shareholding interest.

Q. And the management and service fees of \$16,000.00, to whom is that paid? A. That is paid to, a portion of that is paid to Hotel Management, the majority of it is paid to Taylor's Furniture.

Q. The actual management of the flats on a personal basis is done primarily by yourself is it not? A. As a Director of Hotel Management, yes. 20

Q. And you are the person who sits in the office for most of the time? A. Which office is this Mr. Mackerras?

Q. The office in the premises of which ---? A. I have an office upstairs in the penthouse too.

Q. So are there two offices in the premises? A. I have a room up in the penthouse which I have filing cabinets and that sort of thing. 30

Q. And then there is the receptionist's desk on the ground floor? A. That is right.

Q. Which I think you mentioned in part of what was built as a flat? A. That is right.

Q. Which could be re-converted into a flat? A. It would be pretty difficult I should think.

Q. But in fact it has been used as an office primarily for the management of the building? A. That is right. 40

Q. Mr. O'Carroll, I think you gave evidence on a former occasion that most of the flats in the

building were let under Section 5(A), do you recollect that? A. Yes, I can't remember the exact figure.

Q. You mentioned earlier today that there are 83 flats in the building? A. That is right.

Q. And is that 83 including the penthouse or 83 plus the penthouse? A. Excluding the penthouse.

Q. The penthouse I think is used by you primarily for your own purpose? A. Actually it is, my aunt Mrs. Dunn lives there. 10

Q. Does she pay you rent? A. No.

Q. And of the 83 flats I think you have obtained possession of most of them from controlled tenants at some time or another? A. I think I only have about eleven controlled tenants.

Q. Now I put it to you Mr. O'Carroll that according to the office records of the Rent Control Office No. 5(A) leases have been registered in respect of any part of the premises since 1965? 20
A. Yes.

Q. Was there any particular reason for that?
A. Yes, well actually I am letting flats as holiday flats now for people coming over from Noumea.

Q. So do you claim that many parts of the building are excluded from the operation of the control provisions as holiday premises?

Objection.

Q. There are of course some controlled tenants still there? A. About 11. 30

Q. And when you say you let flats to people coming from Noumea, what rents do you ordinarily get? Perhaps by way of introduction to that question I think firstly there are some bachelor flats and some one bedroom flats? A. That is right.

Q. Are there any two bedroom flats? A. No.

Q. What do you ordinarily let the bachelor flats for? A. \$42.00 a week.

Q. And would they be occupied for nearly the whole year? A. No. 40

Q. And for approximately what proportion of

the year would you get \$42.00 a week? A. I haven't worked out the occupancy rate.

Q. Would it be more than half do you think?

A. Possibly, I mean it all depends on circumstances, it is a fluctuating business.

Q. What about the one bedroom flats, do you let them? A. Actually I charge \$3.00 per day a head you see and single flat by itself in one bedroom flats the same price \$6.00 a day whether it is one person or two persons, but in the bedroom flats they pay this \$3.00 a day or for children \$1.50 a day.

10

Q. So it depends upon the family who happens to occupy the flat? A. That is true.

Q. And when you obtain possession of a flat from a rent controlled tenant I take it that you would ordinarily spend some specific money on renovating that flat, would that be right? A. I would paint the flat out, re-carpet it if necessary.

Q. Would those figures be included in the figures that the accountants have given here for the year ended 30th June 1970/1971? A. No, the carpet, the painting yes and any repairs that might need doing.

20

Q. Do you ordinarily replace enamel sinks with stainless steel sinks? A. I have done in one flat.

Q. Only one flat? A. Yes. I have replaced a terrazo top of another flat which I found was too expensive, I changed to stainless steel to see what the difference in the cost was.

30

Q. And during the year ended 30th June 1971 can you tell his Worship how many flats got shall we say special treatment for that year as a result of falling vacant, would it be two or three or a number, would there be any? A. I am just trying to think, the year ended 30th June, 1971, I might have had two or three.

Q. And during the previous year? A. It is taxing my memory, at a guess perhaps five.

Q. The figure for repairs, renewals and replacements was considerably bigger for the year 1969 than for the year 1970, was there any special reason for that do you recollect? A. I am not too sure, I think 68/69, no it wouldn't be interior guilding, I think that was 1964. No, it could have been we were short of a lot of items and

40

renewals and replacements and that sort of thing and we just stocked up on them, like blankets and that sort of thing.

Q. Comparing again 1970 with 1971, the year 1970 you see the figure is \$12,000 odd for 1969, \$8,000 odd for 1970, then nearly \$14,000 for 1971, the year ended 30th June 1970 seems to be lower than the other two? A. I couldn't offer any explanation Mr. Mackerras, not offhand.

10

RE-EXAMINATION BY MR. BAINTON:

Q. You have said a lot of the flats in the building are now in effect for people who come from Noumea for holidays? A. Yes.

Q. I think you have built up something of a name with people from that country? A. That is right.

Q. How long on the average do those people stay? A. On the average about two weeks.

Q. And you might have one person or two people or a family in one of the flats? A. That is right.

20

Q. How many flats are vacant at the moment? A. I counted yesterday, there are 32 vacant.

Q. And how long do you expect they will remain vacant before your next lot of bookings fill up? A. Our busy season starts in December.

Q. So probably another six weeks or so? A. That is right.

(Witness retires.)

MR. BAINTON: That is the whole of the Respondent's case.

30

MR. MACKERRAS: I don't wish to call any evidence in reply your Worship.

FAIR RENTS COURT

SYDNEY, N.S.W.

)
)
)

13th October, 1971.

BEFORE MR. NASH, S.M.

4AA/2922/69 - "Texas",
3-5 Greenknowe Avenue
Potts Point.

LESSOR: Borambil Pty. Limited
LESSEE: Francis O'Carroll

DECISION OF MR. L.J. NASH S.M.

10

BENCH: The application is an Application under the Division 4AA of the Landlord and Tenant Amendment Act of 1948. The Application was lodged by John Victor Atkinson on behalf of the Applicant Borambil Pty. Limited and has been admitted and marked Exhibit No. 1. Mr. Atkinson identifies his signature in the witness box, identifies his signature in the witness box and his authority to act in the Application as attached to the Application. No challenge is made to the lodging of the Application. I find that a valid Application for the determination under Provision 4AA pursuant to Section 31 M.C.A. was duly made and served by post on or about the 20th August, 1969. Mr. Atkinson gives evidence that this is the nearest Board to the premises mentioned in his Application and there is no evidence to the contrary. I find that this is the nearest Board to the premises. On the evidence for the Applicant and on the Respondent not calling any evidence to the contrary I find that

20

30

28. Decision of
Mr. L.J. Nash, S.M.

Decision of
Mr. L.J. Nash, S.M.

the Notice and Declaration under the Provisions of Section 31 M.B.A. were duly served on the Respondent and that the Declaration was not returned duly completed within the period of 28 days. A copy of such Notice and Declaration has been admitted and marked Exhibit No. 3. I also find that the Application to this Board was made within a period of three months from the giving of the Notice under Section 31 M.B.A. and I also find on the evidence before me that the premises are subject to a mortgage and the mortgage was duly advised as required by the Application to the Board and a copy of this Notice is Exhibit 2. I am also of the opinion that Exhibit 4 shows the assessed annual value of the property in accordance with Section 31 M.A.A., subsection 2(a). It has been submitted that by virtue of Exhibit 8 no relationship of Lessor or Lessee exists between the parties to this Application because Exhibit 8 creates an estate in freehold. Lessor and Lessee for the purposes of the Landlord and Tenant Act are defined in Section 8(1) of the Act and I quote ... (Quotes). From this definition there can be seen that many parties can become Lessor and Lessee for the purposes of this Act. It is a question of, having regard to that definition, of the evidence placed before me does the relationship of Lessor and Lessee exist for the purpose of

Decision of
Mr. L.J. Nash, S.M.

the Application between the parties mentioned in the Application. Exhibit 7 shows that for the purpose of that determination the relationship did then exist, that is a prior determination of the fair rent of these subject premises. Exhibit 8 shows that there is a relationship between the parties by virtue of the lease to the Respondent for the term of his life for the yearly rent mentioned. The Respondent says whilst not living in the premises he does conduct the business of letting, as is set out in Exhibit 8 at the subject premises. Having regard to the submission made to me, the evidence given and the cases referred to it is my opinion that for the purpose of this Application the relationship as defined as Lessor and Lessee exists between the parties to the Application. It was further submitted if the relationship did exist there was a lease for a fixed term within the meaning of Section 17 (B) of the Act and I quote that Section ... (Quotes). There is nothing in my opinion in the evidence to suggest that the premises are referred to in Section 32 (B) of the Act. On the evidence before me I don't think it is disputed that the tenancy for life is an estate in freehold, it is a question of whether a state in freehold is in fact a lease for a fixed term. I have carefully considered the submissions made and the cases

Decision of
Mr. L.J. Nash, S.M.

referred to and it is my opinion that the obiter dictum of Jordan J.C. in the Commonwealth Life Amalgamated Assurance Limited v. Anderson in the N.S.W. Reports Volume 46 at page 49 applies to this case and I quote ... "Tenancies ... at will". It is my opinion then that the lease for life is not a lease for a fixed term and that Section 17(B) of the Act does not apply to the subject Application. 10

It was further submitted that the subject premises were not prescribed premises in that Division 4AA refers to a dwelling house and not the type of premises under consideration which consists of many flats, the penthouse and an office. On the evidence it appears that what is used as an office is in fact a complete flat and is only used for this purpose of an office to suit the convenience of the Lessee. It is my opinion for the purposes of the Application that a multiple of units leased as flats 20 and therefore prescribed premises within the meaning of the Act can when grouped together in the one building and if subject to the one letting as between the Lessor and the Head Lessee become a dwelling house and prescribed premises for the purposes of the Landlord and Tenant Amendment Act of 1948. Exhibit 8 shows that the premises were leased to the Lessee and were subject to the covenants set out in that exhibit and Covenant No. 4(i) states

Decision of
Mr. L.J. Nash, S.M.

... (Quotes). Whilst the fact that the Lessee may see fit to use one of the flats designed and built as prescribed premises for an office. I am not of the opinion that this causes the whole of the premises to cease to be prescribed premises. It could well be that he has breached his Covenants. It is my opinion considering the whole of what has been put before me that these premises under consideration as a whole are prescribed premises within the meaning of the Act. It was further submitted that Division 4AA of the Act has no application to this type of premises. I cannot agree with this submission. It is my opinion that they are, and as long as the requirements of the Division have been carried out, a determination of the fair rent can be made under the Provisions of the Division. In this case as the Lessee did not return the Declaration forwarded to him with the Notice and as required under Section 31 M.B.A. within the prescribed time it is a question for the Lessee to satisfy the Board that his attributable earnings or I should say the attributable earnings of the Lessee were less than the prescribed amount and that is at this stage \$4,000.00. The Lessee in my opinion has not done so, that is has not satisfied the Board that his earnings to be considered are under the sum of \$4,000.00. It has been further submitted that he

10

20

Decision of
Mr. L.J. Nash, S.M.

could not have done so having regard to the type and manner of the letting of the flats under his care and control. Whilst it might be difficult to calculate his attributable earnings for the purpose of this Application what is to be included in this amount is fully set out under Section 31 M.A.A. and it is my opinion that whilst it may be difficult it can be calculated and as I said before the Lessee has not brought evidence to allow me to come to the conclusion that the attributable earnings are less than the prescribed amount. It is my opinion also that having regard to the definition of rent in Section 6 (A), paragraph 2(b) of the Act the rent as defined there should not be taken into consideration in determining the fair rent of the premises under Division 4AA. Nor is it my opinion that I should take into consideration those amounts payable by the Lessee under the Covenants of the Lease to his Lessor. I am satisfied that the requirements of the Division 4AA have been complied with and that the attributable earnings of the lessee are not less than the prescribed amount. That being so I am required by Section 31 M.D.A. paragraph 1 to determine the fair rent of the premises at the current rental value. Current rental value itself is defined in the Section 31 M.A.A., paragraph 1 of the Act and it means: ... (Quotes). There is in

10

20

Decision of
Mr. L.J. Nash, S.M.

Exhibit 4 before me an amount set out showing the assessed annual value of the premises and purports to have been issued under the provisions of the Valuation of Land Act of 1912 and as required by Section 31 M.A.A. paragraph 2(a) I accept this figure as being the assessed annual value, that is the sum of \$53,500.00. To this I am required to add one-ninth of this amount together with a reasonable allowance for any goods or for maintaining services supplied by the Lessor in connection with the Lease of the prescribed premises. No evidence has been put before me as to any allowance to be made in this regard, therefore I am obliged to determine the fair rent at the A.A.V. plus one-ninth and the fair rent of these prescribed premises set out in the application is determined by adding one-ninth to the sum of \$53,500.00 and dividing that by the number 52, being the number of weeks, in order to obtain the fair rent payable on a weekly basis. Here I disagree with the calculations of Mr. Atkinson. I find that one-ninth comes to \$5,944.44 and not \$5,950.00 as set out by Mr. Atkinson. That in my calculations gives a total of \$59,444.44 per annum as the fair rent and on a weekly basis \$181.62.

Does anyone disagree with those figures?

MR. MACKERRAS: I make it \$1,143.00. With respect even though it is possibly weekly by agreement, in the lease from my recollection there is no obligation to divide by 52.

Decision of
34. Mr. L.J. Nash, S.M.

Decision of
Mr. L.J. Nash, S.M.

BENCH: Having regard to the history of the matter and the fact that it was first requested to be re-listed by letter dated June 1971 it is not unreasonable to have the fair rent determination today to commence from a period coinciding with a period mentioned in the lease, that is the 18th March as mentioned there, but I think the 18th July is a reasonable time. I order the fair rent commence from that date. If there is nothing further. I determined the fair rent of the subject premises having regard to Division 4AA of the Landlord and Tenant Amendment Act at \$59,444.44 per annum, to be effective from the 18th July, 1971. 10

Mr. Mackerras asks for costs.

BENCH: There is provision made for the award of costs in this type of application. This matter has been contested and contested at some length and these costs are only asked for today and in my opinion that is most reasonable and I allow costs in the sum of \$100.00. The Lessee is ordered to pay the Lessor's costs in the sum of \$100.00 within 2 months. 20

IN THE MATTER of a determination made by a Fair Rents Board at Brisbane Street, Sydney in a proceeding between BORAMBIL PTY. LIMITED by its agent JOHN VICTOR ATKINSON (applicant) and FRANCIS O'CARROLL (defendant).

The defendant alleging that he was aggrieved by my determination in the above matter as being erroneous 10
in point of law, within the period prescribed, applied in writing to me to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of the Court and entered into the prescribed recognisance to prosecute the appeal with effect and without delay and to submit to the judgment of the Court and pay such costs as may be awarded by the same. In pursuance of the provisions of the Justices Act in such case made and provided, I state and sign the following 20
case:-

1. The following facts were found by me to be established to my satisfaction by the evidence given before me:-

- (a) That an application in writing was made by John Victor Atkinson on behalf of Borambil Pty. Limited for the determination of the fair rent of the premises known as "Texas" 3-5 Greenknowe Avenue, Potts Point in accordance with the provisions of Division 4AA 30
of The Landlord and Tenant (Amendment) Act, 1948 (as amended).

- (b) That the said application was served upon the defendant by post on or about 20th August, 1969.
- (c) That the Fair Rents Board, Brisbane Street, Sydney is the Board nearest to the said premises.
- (d) That a notice and statutory declaration were served upon the defendant in accordance with the provisions of Section 31 M.B.A. of the said Act. 10
- (e) That the defendant neglected or failed to furnish the applicant with the statutory declaration required by the said notice within twenty-eight days of service of the said notice or at all.
- (f) That the application for determination of the fair rent of the said premises was made within a period of three months of the service of the said notice upon the defendant. 20
- (g) That the said premises are the subject of a mortgage.
- (h) That notice in writing of the time, date and place fixed for the determination of the application was given to the mortgagee.
- (i) That the assessed annual value of the said premises is \$53,500.00.
- (j) That on 1st November, 1967 the fair rent of

the said premises was determined at \$15,725.10 per annum.

(k) That the said determination was in force on and immediately prior to 26th November, 1968.

(l) That on 8th May, 1970 the Supreme Court of New South Wales in Equity pronounced a decree in Suit No. 1564 of 1969 such decree being tendered in evidence and marked Exhibit 9. 10

The parties to the said suit were the defendant to the application before me, who was the plaintiff, and the applicant before me, who was the defendant. The said decree was in the terms of Annexure "A" hereto.

(m) That Borambil Pty. Limited and the defendant are parties to a document described as a Memorandum of Lease dated 13th October, 1970 registered No. M37349, such document being tendered in evidence and marked Exhibit 8. 20

The said document was in the terms set out in Annexure "B" hereto.

(n) That the said premises comprise a penthouse and eighty-four (84) self-contained flats one of which is and was used by the defendant as an office, as well as stairways and corridors.

(o) That the defendant carries on the business of letting the self-contained flats other

than that used as an office which form part of the said premises.

(p) That the said Memorandum of Lease contained certain covenants, conditions or provisions not usually entered into by a lessee.

(q) That the Memorandum of Lease mentioned in paragraph 1(m) above remained in force at the time of my determination and governed the relationship between the parties before me in respect of the said premises at all times material to my determination. 10

(r) That the said premises did not fall within the class of premises referred to in Section 32B of the Act.

2. The grounds upon which I made the determination were:-

(a) That the relationship of lessor and lessee within the meaning of the Landlord and Tenant (Amendment) Act 1948 (as amended) existed between the parties to the application because:- 20

(i) The document described as a Memorandum of Lease dated 13th October, 1970 was a "lease" within the meaning of the said Act, and the parties to this application were parties to that document.

(ii) In the previous proceedings for the determination of the fair rent of the said premises the relationship between the parties to this application had been held to be lessor and lessee.

(iii) The defendant carries on the business of letting self-contained flats which form part of the said premises.

10

(b) That the said premises were "prescribed premises" within the meaning of the said Act as they constituted a dwelling house.

(c) That the document described as a Memorandum of Lease dated 13th October, 1970 vested an estate of freehold in the defendant. The said premises were therefore not the subject of a lease for a fixed term within the meaning of Section 17B of the said Act.

(d) That Division 4AA of the Act applies to premises which consist of a number of self-contained flats which are separately sub-let.

20

(e) That in determining the fair rental of premises under Division 4AA of the said Act, a Fair Rents Board should not have regard to any rates or taxes payable by a lessee under the lease, nor should it have regard to the value to the lessor of any covenants, conditions or other provisions of, or relating

to the lease, to be performed by the lessee which are not usually entered into by a lessee.

- (f) That I was satisfied as to the matters referred to in Section 31 M.D.A. of the Act, and that the assessed annual value of the said premises was \$53,500.00.

3. The grounds upon which it is contended that my said determination was erroneous in point of law are:- 10

- (a) That there was no evidence that John Victor Atkinson was authorised by Borambil Pty. Limited in writing or otherwise, to sign or make the application to the Fair Rents Board upon which the said determination was based.
- (b) That the premises the subject to the said determination were not "prescribed premises" within the meaning of the Landlord and Tenant (Amendment) Act 1948 (as amended). 20
- (c) That the relationship which existed between the applicant and the defendant was not that of "lessor" and "lessee" within the meaning of the said Act.
- (d) That if the relationship of lessor and lessee within the meaning of the said Act was in existence between the applicant and the defendant, then the premises, the subject of

Case Stated by
Mr. L.J. Nash, S.M.

the said determination were, at the time mentioned in Section 17B of the Act, and at the time of my determination, the subject of a lease for a fixed term.

- (e) That the provisions of Part 11 Division 4AA did not authorise the determination which I purported to make.
- (f) That in determining the fair rent of the premises the value to the applicant of the covenants conditions and other provisions of the Memorandum of Lease dated 13th October, 1970, to be performed by the Defendant, ought to have been taken into account. 10

The question for determination by the said Court is whether my said determination was erroneous in point of law.

Annexed hereto is a copy of the depositions taken in the case 20

Annexure "A" (Exhibit 9)

Annexure "B" (Exhibit 8)

DATED this 29th day of February 1972.

(Sgd.) Len Nash
.....
Stipendiary Magistrate

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 162 of 1972

CORAM: JACOBS, J.A.
HOLMES, J.A.
MOFFITT, J.A.

Wednesday, 20th September, 1972.

O'CARROLL v. BORAMBIL PTY. LIMITED

JUDGMENT

JACOBS, J.A.: In this matter the Court consisted of 10
my brother Holmes, my brother Moffitt and myself.

I am of the opinion that the appeal succeeds,
that the determination by the Fair Rents Board was
erroneous in point of law and that the case should
be remitted to the Magistrate with this expression
of opinion. The respondent should pay the appel-
lant's costs of this appeal and, if otherwise
entitled, should have a certificate under the
Suitors' Fund Act. I publish my reasons.

I am authorised by my brother Holmes to say 20
that he agrees with the order proposed and with the
reasons and I publish a statement to that effect.

I am authorised by my brother Moffitt to say
he agrees with the order proposed and I publish his
reasons.

Therefore the order of the Court is that the
appeal is allowed, that the determination of the
Fair Rents Board is erroneous in point of law and
that the case be remitted with that expression of

Reasons for Judgment
of the Court of Appeal

opinion. The respondent shall pay the appellant's costs of this appeal but, if otherwise entitled, shall have a certificate under the Suitors' Fund Act.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 162 of 1972

CORAM: JACOBS, J.A.
HOLMES, J.A.
MOFFITT, J.A.

Wednesday, 20th September, 1972.

O'CARROLL v. BORAMBIL PTY. LIMITED

JUDGMENT

JACOBS, J.A.: On 18th March, 1952 an agreement in 10
writing was made between the appellant Francis
O'Carroll and the respondent Borambil Pty. Limited
whereby the latter agreed to lease to the former
the whole of the land in Certificate of Title
Volume 6420 Folio 47, that being land upon which
was erected a block of flats called Texas Flats
situated at 3-5 Greenknowe Avenue, Potts Point.
The Memorandum of Lease was not executed until an
order had been made in Equity for specific perfor-
mance of the agreement and pursuant to that order 20
which was eventually made by consent the company
and the appellant executed a Memorandum of Lease
which bears date 13th October, 1970. By it the com-
pany did thereby lease unto Francis O'Carroll "to
be held by the said lessee as tenant for the term
of his lifetime years computed from the eighteenth
day of March, one thousand nine hundred and fifty-
two at the yearly rent of ten thousand four hundred
dollars (\$10,400) payable as follows by equal

Reasons for Judgment
of his Honour

45. Mr. Justice Jacobs

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

weekly instalments in advance of two hundred dollars (\$200) the first of such weekly payments to be made when vacant possession shall be made available to the lessee and the succeeding payments thereafter on the corresponding day in each week".

Between the making of the agreement in 1952 and the lease of the land in 1970 it would appear that Mr. O'Carroll was in possession of the premises. On 1st November, 1967 a fair rent of the premises was determined at \$15,725.10 and this determination was in force on and immediately prior to 26th November, 1968. The significance of this last date will appear shortly. In August, 1969 John Victor Atkinson on behalf of Borambil Pty. Limited made application to the Fair Rents Board in Sydney for the determination of the fair rent of the premises in question in accordance with the provisions of Division 4AA of the Landlord and Tenant (Amendment) Act, 1948. This application was served on or about 20th August, 1969, that is to say, before the decree for specific performance to which I have referred.

Division 4AA was inserted in the Act by Act No. 58, 1968. It was a Division intended to enable the determination of rents in certain cases on current values of premises instead of on the 1939

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

value. The cases in which the fair rent could be determined on current values were by the Division related to the net income of the lessee and of residents. Provision was therefore made by s. 31 MBA whereby a lessor might by notice in writing served on the lessee of premises or on a resident of premises require that lessee or resident to furnish to the lessor within twenty-eight days after service of the notice a statutory declaration stating net income in the case of the lessee and also in his case the names of all residents of the premises and in an appropriate case the number of boarders and lodgers ordinarily residing in the premises. The lessee is then required to furnish a statutory declaration. S. 31 MCA provides that a lessor of prescribed premises may apply in writing to a Fair Rents Board for determination of the fair rent in accordance with the provisions of the Division. The following section provides that where on such an application the Board is satisfied that the lessor has within a period of three months before the day of the application served notices under s. 31 MBA and that the lessee has neglected or failed within the time prescribed by the notice to furnish to the lessor the statutory declaration required and the Board is not satisfied that the attributable earnings of the

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

lessee were less than the prescribed amount, then the Board shall determine the fair rental of the prescribed premises at the current value rental of those premises. The current value rental is defined in s. 31 MAA. The rent so determined shall then be the fair rent.

The defendant in the present case neglected or failed to furnish the applicant with the statutory declaration required by the notice under s. 31 MBA within 28 days of service of the said notice or at all. The application for determination of the fair rent was made within the period of three months of the service of the notice upon the defendant. 10

The premises comprise a penthouse and 84 self-contained flats, one of which is used by the defendant as an office as well as stairways and corridors. The defendant carried on the business of letting the self-contained flats other than that used as an office. 20

The Fair Rents Board determined that there was in existence a lease within the meaning of the Landlord and Tenant (Amendment) Act between the respondent company as lessor and the appellant as lessee. He held this to be so despite the fact that the Memorandum of Lease constituted the appellant a life tenant in the premises within the consequent

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

estate of freehold. However, the learned magistrate relied upon the fact that there was constituted an estate of freehold in order to hold that there was as a result no lease for a fixed term within the meaning of s. 17B of the Act. That section provides that where any prescribed premises (not being prescribed premises referred to in s. 32B of this Act and the premises now in question were not within that section) were the subject of a lease for a fixed term the fair rent and the rent of the premises shall notwithstanding any other provision of the Act be as on and from the date of assent to the Landlord and Tenant (Amendment) Act, 1968 and while the lease remains in force the rent fixed by determination of fair rent made before 26th November, 1968 and in force immediately before the date of assent to the Landlord and Tenant (Amendment) Act, 1968. Broadly speaking the purpose of s. 17B was to overcome the effect of the decision in Belmore Property Co. Pty. Limited v. Allen 80 C.L.R. 191 by which it had been determined that the existence of a lease for a term did not prevent the determination of the fair rent of the premises at an amount greater than the reserved rent. As I have said the learned magistrate found that the lease for life was not a lease for a fixed term within s. 17B and that it

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

was therefore open to the Board to determine a rent under Division 4AA. The rent was apparently determined accordingly at \$59,444.44, although this determination does not appear in the stated case which is to that extent defective.

The determination of the Board was, it was contended, erroneous upon a number of different grounds but of those grounds I find it necessary to deal with two only. The first of them is that the Board was in error in determining that a lease for life of land under the provisions of the Real Property Act, 1900 was a lease within the meaning of the Landlord and Tenant (Amendment) Act, 1948. The second ground is that the Board was in error in determining that if such a lease was a lease within the meaning of the said Act it was not a lease "for a fixed term" within the meaning of s. 17B of that Act.

The first question is whether a lease for life comes within the provisions of the Landlord and Tenant (Amendment) Act, 1948. By s. 8 "lease" is expressed to include every contract for the letting of any prescribed premises, whether the contract is express or implied or is made orally, in writing or by deed, and includes a contract for the letting of prescribed premises together with goods. The

definition goes on to say that the word includes any tenancy the existence of which is presumed by operation of s. 22A of the Landlord and Tenant Act of 1899 but does not include any lease arising under an attornment clause in a mortgage or in an agreement for the sale and purchase of land. These exceptions do not concern us in the present case.

10

The Real Property Act, 1900, by s. 53 provides that when any land under the provisions of the Act is intended to be leased or demised for a life or lives or for any term of years exceeding three years, the proprietor shall execute a Memorandum of Lease in the approved form. This language envisages that an interest for life may be described as a lease for life and it has been submitted on behalf of the respondent company that in the case of land under the provisions of the Real Property Act, 1900 a reference to a lease in another Act such as the Landlord and Tenant (Amendment) Act, 1948 should be taken to include a lease for life. Apart from that submission, it is necessary to consider the ordinary signification of the word "lease". "If the owner of land consents by deed that another person shall occupy the land for a certain time, that is a lease." Earl of St. Germain v. Willan (1823) 2 B. & C. 216 per Bayley J. at page 220.

20

"The word lease in law is a well known legal term of well defined import. No lawyer has ever suggested that the title of the lessor makes any difference in the description of the instrument, whether the lease is granted by a freeholder or a copyholder with the licence of the Lord or by a man who himself is a leaseholder. It being well granted for a term of years it is called a lease." Per Jessel M.R. 10

Camberwell & South London Building Society v. Holloway (1879) 13 Ch.D. 754 at 759. However, although it may be said that usually the word lease is to be taken to refer to chattels real it can by no means be said that it is so limited and that the phrase "lease for life" is an inept phrase. "A lease doth properly signify a demise or letting of lands, rent, common, or any hereditament unto another for a lesser time than he that doth let it have in it. For when a lessee for life or years doth grant over all his estate or time unto another, this is more properly called an assignment than a lease." (Touchstone 266.) The word "leasehold" is probably only appropriate to a lease for years, because a lease for life is a freehold but it does not follow that the word "lease" is inappropriate to the freehold estate constituted by the grant of a life tenancy or lease for life. There was strictly 20

never the possibility of creating a life estate by feoffment with livery of seisin. The feoffment was only appropriate to the fee simple. If a life estate was created by livery of seisin the ceremony was called a "lease" (Litt. sec. 57). "And yet sometimes improperly it is called a feoffment when an estate of freehold (that is an estate for life) only doth passe." (Co. Litt. 9a.) 10

There is no distinction in attributes at common law between the tenant for life under a lease at a rent and the tenant for life under a grant by way of settlement. Every tenant for life has by the common law, as incident to his estate, and without express grant, the right to take in reasonable measure three kinds of estovers - housbote (which includes firebote), ploughbote, and haybote, unless he be prevented from taking them by some special covenant. (Coke on Littleton 41b.) In modern times and indeed for centuries past there has been a very great difference between the position of a tenant for life under a lease for life at a rent and a tenant for life under a settlement. The difference in the attributes of the interests, however, was achieved by attaching different obligations in each case by way of covenant or by way of condition in the settlement. For reasons which he 20

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

sets out Professor Megarry (as he then was) in the Third Edition of his Law of Real Property notes that by the middle of the nineteenth century the practice of granting leases for life had declined. "A lease for life, like a lease for years, creates a tenure between the parties, so that rent or other services could be reserved. Such leases were usually commercial transactions which were quite distinct from tenancies for life under family settlements, where a beneficial interest was granted free of any rent or services." At page 621 3rd Edition. An example of a lease for life is found in Jones v. Jones (1868) L.R. 4 C.P. 422. Bovill C.J. said at page 424:

10

"Most persons who hold property on a lease for lives consider it as leasehold, and it is only the strict law which calls it freehold."

20

and Keating J. said at p. 425:

"I think the claimant was entitled under this description (leasehold house and garden) to prove his right to property held either under a lease for lives or for years."

Brett J. said:

"I am of the same opinion. Assuming this property to be freehold it was held under a lease; the description of it therefore was, if not accurate, at any rate sufficient ..."

30

The distinction would appear to be that where the property is let at a rent for life the letting is properly described as a lease for life. Where no

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

commercial rent is stated then it is more usual to refer to the interest for life as a life tenancy.

The question, however, remains whether, despite this and despite the language of the Real Property Act, 1900, a lease for lives is a lease within the meaning of the Landlord and Tenant (Amendment) Act. I have come to the conclusion that it is. I base this conclusion upon the wide language of the definition. "Lease" is defined to include every contract for the letting of any prescribed premises whether the contract is express or implied or is made orally in writing or by deed. The distinction which runs generally between a life estate and a lease for life is that the former does not depend on contract but the latter does. There is nothing in that language to limit the definition to chattels real. The language is just as appropriate to the freehold estate of the lease for life. A rent is just as appropriate to a lease for life as it is to a lease for years or a periodical tenancy. Therefore the fair rent provisions of the Act would appear to be just as applicable to a lease for life as to a lease for a term of years or a periodical tenancy. When it is remembered that all may be regarded as commercial transactions there would appear to be no reason why the Legislature should not have

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

intended to control the rents that could be charged under a lease for life and under other leases. I can see no reason why, if I should intend to grant a lease for life at a rent so that there are rights arising in contract as well as in estate, I should not be bound to comply with those limitations on rental which are imposed by the Act. We were re- 10
referred to Cooper v. Federal Commissioner of Taxation 100 C.L.R. 131 where at 139-140 doubt was expressed whether a lease for life fell within ss. 83 and 88 of the Income Tax Assessment Act but the decision did not doubt that the description "lease" is appropriate to the grant of an estate for life.

"Doubtless the description 'lease' is capable of applying to a grant of an estate for life, but it would be a natural construction of ss. 83 and 88 to confine them to the more 20
ordinary conception of a lease, namely a demise for a term of years or a periodical tenancy and any statutory description of lease which is of indefinite duration."

I am of the opinion that nothing in Cooper v. Federal Commissioner of Taxation (supra) affects the determination of the question whether a lease for life is a "lease" within the meaning of the Landlord and Tenant (Amendment) Act. I agree with the conclusion of Isaacs J. in Withers v. Evans 30
1967 N.S.W.R. 187. Vol. 2.

I turn now to the ground that the Board was in error in determining that the premises were not

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

the subject of a lease for a fixed term within the meaning of s. 17B. Once I have concluded that a lease for life comes within the definition of "lease" in s. 8 I find assistance from that conclusion in determining that the words "lease for a fixed term" in s. 17B cannot be limited to leases for a fixed term of years. The section does not refer to a "fixed term of years". It refers only to a fixed term. What in this context is the meaning of the word "fixed"? I am of the opinion that it means "fixed between the parties to the lease as the term thereof". If the parties fix upon the life of one of them as the term I do not see any reason why that term of the life of the lessee should not be described as a "fixed term". It is to be distinguished from a term which is indefinite in duration between the parties in terms of their contract or agreement, that which is found for instance in the cases of a periodical tenancy and a tenancy at will. This construction of the words not only assists to carry out the obvious intention of the Legislature in enacting s. 17B but is appropriate to the words "fixed term" unless those words are approached with the preconception that all terms of leases are either fixed terms of years or periodic tenancies. It is in that context that the words

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

"fixed term" have been construed and commented upon in such cases as Panucci v. Motor Body Assemblers Pty. Limited 1958 S.R. 390. The subject matter of that decision was s. 86 of the Landlord and Tenant (Amendment) Act which provides that the lessor under a lease or the proposed lessor under a proposed lease of any prescribed premises for a fixed term may, at any time during the currency of the lease while the lessee is in occupation of the premises or prior to the commencement of the term of the proposed lease, make application in writing to the Controller to exclude the premises from the operation of certain parts of the Act. It is not possible to envisage any legislative purpose which in this context would distinguish between a lease for a number of years and a lease for life and the particular decision did not direct attention to the possibility of a lease for life under the Act. In my opinion 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 can well be applied in the present context. It was there held that where partners had agreed in effect to remain partners for life unless they came to some other mutual arrangement there was a fixed term of the partnership. Therefore s. 26(1)

did not apply as it provided that where no fixed term has been agreed upon for the duration of the partnership any partner may determine the partnership at any time on giving notice. The Court declined to give the words "fixed term" in the section the meaning of a period of time fixed by reference to the calendar. Farwell L.J. at page 850 10
said:

"I am of opinion that this case does not come within s. 26, sub-sec. 1, as being a case in which no fixed term has been agreed upon for the duration of the partnership. The effect of the agreement is that the partnership is to endure for the joint lives of the partners."

In the context of the present case it seems to me that this reasoning makes good sense. Indeed, if 20
a contrary conclusion were reached, I think that doubt would be thrown on the correctness of the conclusion upon the other point. If the words "fixed term" are limited to a term of years for no apparent reason it would be some indication that the Legislature was thinking of leases within the definition as being limited to those that could be either expressed in a term of years or expressed in the form of a periodic tenancy or a tenancy at will. 30

I am therefore of the opinion that the appeal succeeds. In my opinion for the reason

Reasons for Judgment
of his Honour
Mr. Justice Jacobs

which I have given the determination by the Fair Rents Board was erroneous in point of law and the case should be remitted to the magistrate with this expression of opinion. The respondent should pay the appellant's costs of this appeal.

I certify that this and the 15 preceding pages are a true copy of the reasons for Judgment herein of the Honourable Mr. Justice Jacobs.

10

20.9.72
Date

S. Wallis
Associate

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

)
)
)
Term No. 162 of 1972

CORAM: JACOBS, J.A.
HOLMES, J.A.
MOFFITT, J.A.

Wednesday, 20th September, 1972.

O'CARROLL v. BORAMBIL PTY. LIMITED

JUDGMENT

HOLMES, J.A.: I agree with the reasons of Jacobs, 10
J.A. and the orders proposed by him.

I certify that this page is a true copy of
the reasons for Judgment herein of his Honour,
Mr. Justice Holmes.

Dated

M. Clancy
Associate

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 162 of 1972

CORAM: JACOBS, J.A.
HOLMES, J.A.
MOFFITT, J.A.

Wednesday, 20th September, 1972.

O'CARROLL v. BORAMBIL PTY. LIMITED

JUDGMENT

MOFFITT, J.A.: I agree with the orders proposed 10
and the reasons of Jacobs, J.A. but wish to add
some observations of my own concerning the second
question raised.

I think that the word "fixed" in the phrase
"lease for a fixed term" in s. 17B refers to a
term defined by the agreement of the parties, so
that it is either defined by reference to the calen-
dar or by reference to some event certain to happen,
the occurrence of which is readily ascertainable by
reference to the agreement. This I think gives 20
"fixed" its ordinary meaning or at least its ordi-
nary meaning when used in relation to some agree-
ment between parties. That which is fixed in dura-
tion is that which has been defined so that it
does not depend upon the will of a party.

This meaning is not only consonant with but
in my view is aided by the context of this Act
which extends tenancies but does not cut them short.
Tenancies extended include periodic tenancies which

Reasons for Judgment
of his Honour
62. Mr. Justice Moffitt

in their nature will continue for an indefinite period unless determined by the act of a party. On the other hand it does not cut short the running of any term as defined by the agreement of the parties. That which is defined by the parties continues during the period defined. At the point where the Act operates the duration becomes indefinite beyond the agreement of the parties. 10

The meaning which I have ascribed to the word "fixed" is in accordance with that ascribed to it in different but not greatly dissimilar contexts (Moss v. Elphick 1910 1 K.B. 846; Melachrino v. Nickoll and Knight 1920 1 K.B. 693; Potato Producers Co-operative Ltd. v. Pavone 1962 V.R. 231 at 234, 241-2).

The conclusion I have come to also gives effect to the apparent purpose of s. 17B. A primary purpose of this legislation was to extend tenancies beyond the time when they would or might come to an end by agreement of the parties. The legislation also provided for fixation and statutory variation of rents. It is understandable that where a tenancy is extended without agreement of the lessor, that some machinery should be provided enabling the rent to be increased in a case considered appropriate. It is more difficult to see why this 20

Reasons for Judgment
of his Honour
Mr. Justice Moffitt

should be so during the currency of the term agreed upon by the parties where a consideration in fixing the amount of the rent may have been the length of the term and possible future events during it.

However in Belmore Property Co. Pty. Ltd. v. Allen (80 C.L.R. 191) it was held that the effect of the provisions of the Act was that rents could be in- 10
creased and that it could be done so during the currency of a term fixed by the agreement of the parties. The apparent purposes of s. 17B is to remedy the kind of situation which arose in that case. There can be no distinction in this purpose between the case where the term agreed upon by the parties is fixed by the calendar as in a lease for a term of years and the case where the term agreed upon by the parties is fixed by reference to a cer-
tain event, such as the life of a person, as in the 20
case of a lease for life.

I certify that this and the two preceding pages are a true copy of reasons for Judgment herein of his Honour Mr. Justice Moffitt.

20.9.72
Dated

S. Knebs
Associate

IN THE SUPREME COURT
OF NEW SOUTH WALES

} Term No. 162 of 1972

IN THE MATTER of a determination made by a Fair Rents Board at Brisbane Street, Sydney in a proceeding between BORAMBIL PTY. LIMITED by its agent JOHN VICTOR ATKINSON (Applicant) and FRANCIS O'CARROLL (Defendant)

The 20th day of September, 1972.

This matter coming on for hearing on 23rd August, 10
1971 and standing for judgment this day WHEREUPON
AND UPON READING the Stated Case herein dated the
29th day of February, 1972, and UPON HEARING Mr. R.G.
Henderson Q.C. with whom was Mr. P.G. Hely of
Counsel for the Appellant and Mr. D.B. Milne Q.C.
with whom was Mr. N.R.M. MacKerass of Counsel for
the Respondent IT IS ORDERED that the appeal is
allowed and that the determination by the Fair Rents
Board was erroneous in point of law.

AND IT IS FURTHER ORDERED that the case be remitted 20
to the Fair Rents Board with that expression of
opinion AND IT IS FURTHER ORDERED that the Respon-
dent pay the Appellant's costs of this appeal AND
IT IS FURTHER ORDERED that, if otherwise entitled,
the Respondent herein be granted an indemnity cer-
tificate as provided by Section 6 of the Suitors
Fund Act, 1951 (as amended).

By the Court,

For the Prothonotary,

(SGD.) J. Gibson (L.S.) 30

DEPUTY PROTHONOTARY

IN THE SUPREME COURT
OF NEW SOUTH WALES

} Term No. 162 of 1972

IN THE MATTER of a determination made by a Fair Rents Board at Brisbane Street, Sydney in a proceeding between BORAMBIL PTY. LIMITED by its agent JOHN VICTOR ATKINSON (Applicant) and FRANCIS O'CARROLL (Defendant).

The eleventh day of December 1972.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the sixth day of December 1972 WHEREUPON AND UPON READING the said Notice of Motion, the Affidavit of Joseph Patrick Sharah sworn on the sixth day of December 1972, and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr. K.J. Carruthers of Counsel for the Appellant and Mr. P.G. Healy of Counsel for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the judgment of this Court given and made herein on the 20th day of September 1972, be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that upon payment by the Appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of fifty dollars (\$50.00) deposited in Court by the Appellant as security for and towards the costs thereof be paid out of Court to the Appellant.

By the Court.

J. Gibson (L.S.)
For the Registrar
Chief Clerk

69. Order Granting Final
Leave to Appeal to
Her Majesty in Council



EXH 8
(Kain Reti)

NEW SOUTH WALES
10 OCT 11 PM 2 41
REGISTRY OF LANDS

R.P. 1.
FEES—
Lodgment — \$.
Endorsements — .
\$.

MEMORANDUM OF LEASE

(REAL PROPERTY ACT, 1900)
IN DUPLICATE

I, BORAMBIL PTY. LIMITED

(hereinafter called or included in the expression Lessor)

being registered as the proprietor of an estate in *fee simple*^b in the land hereinafter described, subject, however, to such encumbrances,^c liens, and interests as are notified by memorandum underwritten or endorsed hereon Do hereby lease unto

^d FRANCIS O'CARROLL of
"Texas" Flats, 3/5 Greenknowe Avenue, Potts Point, Sydney
Company Director

(hereinafter called or included in the expression Lessee)

All that piece of land mentioned in the schedule following:—

County	Parish	Reference to Title			Description of Land (if part only) e
		Whole or part	Vol.	Fol.	
CUMBERLAND	ALEXANDRIA	WHOLE	6420	47	

Typing or handwriting in this instrument should not extend into any margin. Handwriting should be clear and legible and in permanent black non-copying ink.

a Name, full postal address, occupation or other designation of Lessor.

b If a less estate, strike out "in fee simple" and interline required alteration.

c All subsisting encumbrances must be noted on page 3 hereof.

d Name, full postal address, occupation or other designation of Lessee. If more than one, state whether they hold as tenants in common or joint tenants.

e "If part only of the land comprised in a Certificate or Certificate of Title is to be leased add "and being lot sec. D.P. " or "being the land shown in the plan annexed hereto", or "being the residue of the land in certificate (or grant) registered Vol. Fol.

A plan may be endorsed on the instrument. Any annexure must be signed by the parties and their signatures witnessed.

The Registrar General does not require evidence of council's approval of a subdivision by lease unless either the lease is for a period exceeding five years, or, irrespective of the term, contains an option of renewal.

Where it is intended to except, e.g., minerals, timber, etc., or to create easements, an appropriate clause may be noted in this column.

f State both in words and figures.

g Here insert times of payment.

To be held by the said Lessee

as tenant for the term of his lifetime years computed from the eighteenth day of MARCH One thousand ninehundred and fifty-two

at the yearly rent of ^f Ten thousand four hundred dollars (\$10,400.00) payable as follows^g by equal weekly instalments in advance of Two hundred dollars (\$200.00) the first of such weekly payments to be made when vacant possession shall be made available to the Lessee and the succeeding payments thereafter on the corresponding day in each week.

subject to the following covenants, conditions, and restrictions, viz.:—

h These relate on the part of Lessee to payment of rent and to repair; on the part of Lessor to right of entry to inspect and repair and of re-entry and forfeiture of lease subject to the Conveyancing Act, 1919, Sec. 129, after default in payment of rent or fulfilment of covenants.
1. ~~To the covenants and powers implied^b in every Memorandum of Lease by virtue of the Conveyancing Act, 1919, secs. 84 and 85, or such of them, or so far, as not hereby expressly negated or modified.~~
T.J.O.C

This form when filled in should be ruled up so that no alterations are possible. No alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being verified by signature or initials in the margin, or noticed in the attestation.

[Rule up all blanks before signing]
[Do not write or type in margins]

SL 1745 K 308

9.30.5 D

2. To the full effect of the covenants next hereinafter shortly noted as the same are set forth in words at length in the second column of Part 2 of the Fourth Schedule to the Conveyancing Act, 1919¹

T.J.O.C.

ⁱ Here insert any of the following clauses suited to the case. To understand the full effect of each—refer to the Act.
And to pay taxes except for local improvements.
And to insure from fire in the joint names of the lessor and the lessee.
And to paint outside every [] year.
And to paint and paper inside every [] year.
And to fence.
And to keep up fences.
And to cultivate.
That the lessee will not cut timber.
That the lessee will not without consent use premises otherwise than as a private dwelling house.
And will not assign or sublet without leave; no fine to be taken.
That the lessee will not carry on any offensive trade.
That the lessee will carry on the business of a hotelkeeper and conduct the same in an orderly manner.
And will apply for renewal of license.
And will facilitate the transfer of license.
The said (lessor) covenants with the said (lessee) for quiet enjoyment.
And the lessee may remove his fixtures.
The clauses may be varied in the manner mentioned in Section 86 of the Conveyancing Act, 1919, and the Fourth Schedule thereto.

Any other terms of the intended lease may then be added.*

* If the space provided for covenants is insufficient, a form of annexure, with the prescribed margins and of the same size and quality of paper as this instrument, should be used. Such annexure should be signed by the parties and the witnesses.

Exhibit 8 - Memorandum
of Lease

2. To the full effect of the covenants next hereinafter shortly noted as the same are set forth in words at length in the second column of Part 2 of the Fourth Schedule to the Conveyancing Act, 1919.

- (i) AND to paint outside every fourth year and in the last year of the term hereby granted.
- (ii) AND to paint and paper and gild inside every seventh year and in the last year of the term hereby granted. 10
- (iii) AND will not assign or sublet without leave; no fine to be taken PROVIDED that this covenant shall not require the Lessor's consent to the letting of single flats in the ordinary course of the Lessee's business.
- (iv) AND to pay taxes except Income and Land Taxes.
- (v) AND to insure (including all plant and fittings) from fire in the joint names of the Lessor and the Lessee. 20

THE LESSOR Covenants with the Lessee for quiet enjoyment.

3.

- (i) Section 84 (1)(b) of the Conveyancing Act 1919-1939 is hereby negatived.
- (ii) Section 85 (1)(a) of the said Act is modified by substituting the words "at all reasonable times" for the words "twice in every year".
- (iii) Section 85 (1)(b) is hereby negatived. 30

4. The Lessee covenants with the Lessor:-

- (i) That the Lessee will at all times during the continuance of the Lease use exercise and carry on in and upon the demised premises the trade or business of Residential Flat Proprietors and keep open and use the demised premises as and for the trade or business of Residential Flat Proprietors and manage and conduct such business in a quiet and orderly manner. 40
- (ii) The Lessee will at his own expense comply with all requirements including structural

Exhibit 8 - Memorandum
of Lease

alterations additions and repairs under the "Factories and Shops Act" "City of Sydney Corporation Act" "Water Supply and Sewerage Act or Acts" and the "Public Health Act" "Theatres and Public Halls Act" and "Fire Brigades Act" or any Act or Acts amending or consolidating the same respectively or under any other Act or Acts now or at any time during the said term in force in the said State and all ordinances regulations and by-laws made and passed thereunder respectively relating to the said demised premises. In case of default by the Lessee in complying with such requirements or with the terms of any notice in respect thereof the Lessor shall be at liberty to enter and carry out the requirements of any such notice and all moneys expended by the Lessor in so doing shall be repaid to it on demand by the Lessee with interest thereon at the rate of ten dollars per centum per annum from the date of expenditure to date of payment.

(iii) The Lessee will not make or permit to be made any alterations or additions to the said demised premises, or any part thereof without the approval of the plans and specifications by the Lessor and the consent in writing of the Lessee first had and obtained.

(iv) The Lessee shall not do permit or suffer any act matter or thing whereby or by reason whereof the insurance against fire in respect of the said demised premises may be or become void or voidable and should the Lessee with the consent of the Lessor bring or deposit or permit to be brought and deposited on the said demised premises any goods materials or substances which shall in any way increase or contribute to increase beyond the amount at present payable the yearly premium payable on any policy or policies of insurance against fire now or at any time hereafter to be effected on the said demised premises or any part thereof or on any adjoining premises of the Lessor by the Lessor then the Lessee will pay to

Garry F. O'Carroll
T.J. O'Carroll F. O'Carroll
3. 50

Exhibit 8 - Memorandum
of Lease

the Lessor an annual sum equivalent to the difference between the ordinary premium and such increased premium and such sum shall be added to and become part of the rent hereby reserved and be recoverable accordingly.

- (v) The Lessor shall not be liable for any damage to any stock-in-trade goods furniture or effects of the Lessee or any other person which may at any time be in or upon the said demised premises or any building erected thereon arising from the overflow of water in the said buildings or from any adjoining or neighbouring building including the roof or any pipe attached or connected or appurtenant to the same. 10
- (vi) The Lessee shall not hold or permit any auction sale or sales in or about the said demised premises. 20
- (vii) The Lessee will not cause or permit any noisome noxious or offensive odours or smells to be created upon or about the said demised premises and will not permit or allow rats or other vermin to harbour therein and will not do or permit to be done anything whereby the said demised premises or any part thereof may be strained or weakened or walls or floors caused to sag or deflect from their right lines or whereby damage or injury may be caused to the building or buildings erected on the demised premises or any part thereof and will not use or allow to be used any engine or machinery which shall or may cause vibrations in the demised premises. 30
- (viii) The Lessee will indemnify and save harmless the Lessor from all loss and damage to the said demised premises and the building or buildings erected or to be erected thereon and any contents thereof belonging to the Lessor caused by the negligent use or misuse waste or abuse of the water gas or electricity supplied to the Lessee his assigns servants and licencees or by faulty gas water or electric light fittings or fixtures fixed by or by the authority of the Lessee his assigns servants or licencees. 40
- (ix) Should the Lessee become bankrupt or have committed or hereafter commit any act of bankruptcy or make any composition with his 50

Exhibit 8 - Memorandum
of Lease

creditors or threaten or attempt to bring his estate within the operation of the law relating to bankrupts or being a company be ordered to be wound up or go into liquidation or have a receiver appointed or should the Lessee do or permit or suffer any act matter deed or thing whereby or by reason whereof the insurance against fire in respect of the demised premises may be or become void or voidable or should any proceedings for those purposes or any of them be taken by any person or persons firms or corporation or corporations or should any judgment be signed or execution issued against him or his estates lands or goods or should the Lessee be convicted of any offence under the Factories and Shops Act, The Public Health Act, Theatres and Public Halls Act or Fire Brigades Act or of any Act repealing or amending the said Acts or under any other Act or Acts or in the case of the failure of the Lessee after twenty eight days' previous written notice from the Lessor so to do to remedy the breach of non-observance or non-performance of any of the covenants conditions restrictions provisions and agreements herein contained or implied and on the part of the Lessee to be observed and performed then and in any such case it shall be lawful for the Lessor forthwith and without notice at any time or times thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as of its former estate anything herein contained to the contrary notwithstanding and for that purpose to break open fences gates doors windows and fastenings with liberty to plead in bar leave and licence of the Lessee in any action he might bring of which the production of these presents shall be conclusive evidence and that without prejudice to any action or other remedy which the Lessor might or otherwise could have for arrears of rent or antecedent breach or breaches of covenant PROVIDED ALWAYS that nothing herein contained shall limit prejudice or affect the rights remedies powers and authorities of the Lessor in respect of any antecedent breach default non-observance non-performance by the Lessee of any act or thing herein contained or implied AND in the event of any

Garry F. O'Carroll

T.J. O'Carroll

F. O'Carroll

4.

Exhibit 8 - Memorandum
of Lease

75.

Exhibit 8 - Memorandum
of Lease

such breach by the Lessee as aforesaid the tenancy hereby created shall at the option of the Lessor (notice of the exercise of such option to be given to the Lessee in writing) thereupon become a tenancy from week to week and be terminable by a week's notice in writing expiring at any time.

- (x) Should any infectious illness or disease break out in or about the said demised premises during the said term the Lessee will thoroughly fumigate and disinfect at his own expense the said demised premises to the satisfaction of the Lessor and the local Health Authority and give due notice in writing of such illness or disease to the Lessor or its Agents. 10
- (xi) The Lessee will pay to the Lessor all costs charges and expenses in and about the preparation of this Lease and Solicitors' costs of the preparation and service of any notice requiring the Lessee to remedy a breach of any of the covenants herein contained notwithstanding forfeiture for such breach shall be avoided by relief granted by any Court or otherwise. 20
- (xii) That the Lessee will at all times during the term of this Lease and any extension or renewal thereof replace repair amend maintain and keep the said demised premises and all appurtenances thereof and all plant fixtures equipment and other effects including boilers pumps tanks electrical services water service gas service telephonettes refrigerator system and incinerators and lifts and all additions and appurtenances belonging or to belong thereto by and with all needful and necessary reparation amendment and replacements whatsoever when and as often as needed or occasion may require and at the termination of the said Lease or any extension or renewal thereof to yield up the said demised premises and the plant fittings and equipment and other effects including the electric light plant and installations and all additions and appurtenances thereto in good and substantial repair and condition reasonable wear and tear excepted. 30
40
- (xiii) The Lessee shall within the first twelve months of the term hereby created paint the 50

Exhibit 8 - Memorandum
of Lease

whole of the outside brickwork fronting Greenknowe Avenue, Greenknowe Lane and Baroda Lane with three coats of Solpah Clear Oil and shall in every year in which the Lessee has covenanted to paint the outside paint the said brickwork with one coat of Solpah Clear oil.

5. The Lessee shall procure the issue in respect of the demised premises from an approved insurance company of a policy of rent assurance in an approved form in the sum at least of Ten thousand four hundred dollars (\$10,400.00) and shall pay all premiums and do all such things as shall be necessary to procure such issue and shall from time to time make all such payments and do all such things as shall be necessary to maintain such policy and shall deliver the said policy to the Lessor. 10

6. The Lessee shall keep the Lessor indemnified against any claim for damages arising out of any accident or otherwise arising out of any injury personal or otherwise sustained in any manner whatsoever in upon or about the demised premises by any person or persons whatsoever. 20

7. The Lessee shall during the said term well and sufficiently repair maintain and keep in good working order and condition to the satisfaction of the Scaffolding and Lifts Department all gates shutters and screens of the lift and conveyor in the demised premises. 30

8. Upon the completion of any new or further buildings upon the subject land ready for occupation the rental of such new or further building shall be the amount fixed by the authority (if any) then competent to fix rentals for buildings of the type or nature of such new or further buildings or should there be no competent authority the rental of such new or further buildings shall be fixed by mutual agreement PROVIDED HOWEVER that such rental shall not be less than a sum equal to five dollars per centum (\$5%) per annum of the cost of the erection of such new or further buildings (exclusively of the cost of the land upon which they are erected) together with all outgoings in connection with the conduct and management of such new or further buildings but exclusively of land and income tax. 40

9. Upon the completion of any new or further building upon the subject land ready for occupation 50

Exhibit 8 - Memorandum
of Lease

AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED
Incorporating ANZ Bank and ES&A Bank
by its Attorney

and I, the said Attorney, state that I
have not received any notice of the re-
vocation of the Power of Attorney,
registered No. 117183 Miscellaneous
Register and Noted at Land Titles Office,
Sydney, under the authority of which I
have just executed the within instru-
ment. 10

H.R. Graham
Senior Manager Lending for the
time being of Australia and New
Zealand Banking Group Limited

j A very short note of the particulars will suffice.

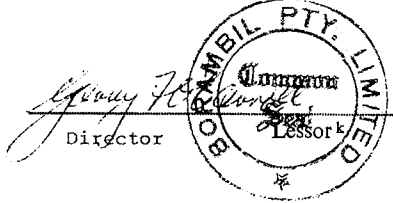
MEMORANDUM OF ENCUMBRANCES, &c., REFERRED TO

Reservations and conditions in Crown Grant Covenant in Deed dated 17.6.1942 vide D161630 Mortgage No.F863977

Dated at Sydney this 13th day of October, 1970.

k Execution in New South Wales may be proved if this instrument is signed or acknowledged before the Registrar General, or Deputy Registrar General, or a Notary Public, a J.P. or Commissioner for Affidavits, to whom the Lessor is known, otherwise the attesting witness should appear before one of the above functionaries who, having received affirmative answers to each of the questions set out in Sec. 108 (1) (b) of the Real Property Act, from the witness, should sign the certificate noted below (Form A).

THE
Signed in my presence, by the said COMMON SEAL OF BORAMBIL PTY.LTD. was hereunto affixed in the presence of and attested by a Member of the Board of Directors and who is personally known to me



*
T.J.D. Carroll
Secretary

I, FRANCIS O'CARROLL the within-named Lessee, do hereby accept this lease as tenant, subject to the conditions, restrictions and covenants above set forth, and certify it to be correct for the purposes of the Real Property Act, 1900.

Signed in my presence, by the said FRANCIS O'CARROLL who is personally known to me

Francis O'Carroll
Lessee^m

As to instruments executed elsewhere, see section 107, Real Property Act, 1900, Section 168, Conveyancing Act, 1919, and section 52A of the Evidence Act, 1898. If a signature be by a mark, the attestation must state that the instrument was read over and fully explained to the party, and that he appeared fully to understand the same.

m Name of Lessee.

n For the signature of the Lessee hereto an ordinary attestation is sufficient.

o Repeat attestation for additional parties, if required.

Witnesses
Sydney

FORM A
CERTIFICATE OF J.P., &c., TAKING DECLARATION OF ATTESTING WITNESS†

Appeared before me o, the day of one thousand nine hundred and p the attesting witness to this instrument, and declared that he personally knew q the person signing the same, and whose signature thereto he has attested; and that the name purporting to be such signature of the said q is his own handwriting, and that he was of sound mind, and freely and voluntarily signed the same.

o To be signed by Registrar General, Deputy Registrar General, a Notary Public, J.P., Commissioner for Affidavits or other functionary before whom the attesting witness appears. Not required if the instrument itself be signed or acknowledged before one of these parties—see note "n".

p Name of witness and residence.

q Name of Lessor.

† N.B.—If by the signing of two or more Lessors before different witnesses it becomes necessary to sign more than one certificate additional certificates can be entered on back hereof. For signature of the Lessee an ordinary attestation is sufficient.

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
IN EQUITY)

No. 1564 of 1969

BETWEEN:

FRANCIS O'CARROLL

Plaintiff

AND:

BCRAMBIL PTY. LIMITED

Defendant

FRIDAY the eighth day of May One thousand 10
nine hundred and seventy.

THIS SUIT coming on to be heard the twenty-fourth day of April last before the Honourable Frederick George Myers a Judge of the Supreme Court sitting in Equity WHEREUPON AND UPON HEARING the oral evidence of J.R. Lehman and B.R. Houston called on behalf of the plaintiff AND UPON HEARING what was alleged by Mr. Bainton of Queen's Counsel with whom was Mr. Hely of Counsel for the plaintiff and by Mr. Needham of Queen's Counsel with whom was Mr. 20
Rolfe of Counsel for the defendant THIS COURT DID ORDER that this suit stand over to the twenty-seventh day of April last AND THIS SUIT coming on to be heard the twenty-seventh day of April last and this day before the said Judge WHEREUPON AND UPON HEARING what was alleged by Mr. Bainton of Queen's Counsel with whom were Mr. Hely and Miss Blackman of Counsel for the plaintiff and by Mr. Riley of

Exhibit 9 - Decree
of Myers, J.

Queen's Counsel with whom was Mr. Rolfe of Counsel
for the defendant THIS COURT DID ORDER that the de-
fendant be at liberty to amend the Statement of
Defence by adding paragraph 2A as set out in the
document initialled by the said Judge and placed
with the papers AND THIS COURT DID FURTHER ORDER
that the costs of and occasioned by the amendment
be paid by the defendant in any event and the said
amendment having been made accordingly WHEREUPON
AND UPON HEARING READ the pleadings as so amended
and filed herein AND UPON HEARING the oral evidence
of the plaintiff and of G.J. Lehman, B.R. Houston,
A.R. Batey and B.J. Hawke called on behalf of the
plaintiff AND UPON READING AND EXAMINING the exhi-
bits put in evidence on behalf of the plaintiff and
marked with the letters "A" "B" "C" "D" "E" "F" "G"
and "H" respectively and the exhibits put in evi-
dence on behalf of the defendant numbered "1" and
"2" respectively AND UPON HEARING what was alleged
by Mr. Bainton of Queen's Counsel with whom were
Mr. Hely and Miss Blackman of Counsel for the
plaintiff and by Mr. Riley of Queen's Counsel with
whom was Mr. Rolfe of Counsel for the defendant
THIS COURT DOTH BY CONSENT DECLARE that the agree-
ment in writing made on the eighteenth day of March
one thousand nine hundred and fifty-two between the
plaintiff and the defendant ought to be specifically

10

20

Exhibit 9 - Decree
of Myers, J.

performed and carried into execution and that the plaintiff is and has since the eighteenth day of March one thousand nine hundred and fifty-two been entitled to a lease for the term of his life of the land comprised in Certificate of Title Volume 6420 Folio 47 upon the terms and conditions contained in the document being Schedule A to the Statement of Claim AND THIS COURT DOTH BY CONSENT ORDER that con- 10
tingently upon the plaintiff then having executed and delivered to the defendant in duplicate the Memorandum of Lease hereinafter mentioned, the defendant to execute and deliver up the same in duplicate to the plaintiff within seven days of the delivery to it thereof, being a Memorandum of Lease of the land now comprised in Certificate of Title Volume 6420 Folio 47 for the term of the life of the plaintiff from the eighteenth day of March one thousand nine hundred and fifty-two upon the terms 20
and conditions and in the form of the document being Schedule A to the Statement of Claim but substituting a reference to decimal currency to the former currency whenever appearing therein AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the defendant do all things and execute all documents which are proper and necessary for it to execute in order that a proper application may be made to the mortgagee of the abovementioned land for its consent

Exhibit 9 - Decree
of Myers, J.

to the said lease and to the registration thereof
AND THIS COURT DOTH BY CONSENT FURTHER ORDER that
the defendant do all things necessary to enable the
registration of such Memorandum of Lease including
producing or arranging for the production of Certi-
ficate of Title Volume 6420 Folio 47 to the Registrar-
General AND THIS COURT DOTH BY CONSENT FURTHER ORDER
that the Notice of Motion dated the twentieth day
of January last for a decree in default of a defence
be and the same is hereby dismissed out of this
Court AND THIS COURT DOTH BY CONSENT FURTHER ORDER
that it be referred to the Deputy Master and
Registrar the Deputy Registrar or the Chief Clerk
in Equity to tax and certify the costs of the plain-
tiff of this suit such costs to include the costs
of the plaintiff incurred on the twenty-fourth day
of April last and also the costs of the plaintiff of
the abovementioned application for a decree in de-
fault of a Statement of Defence AND that such costs
when so taxed and certified as aforesaid be paid by
the defendant to the plaintiff or his Solicitor
within fourteen days after service upon the defen-
dant (or his Solicitor) of an office copy of the
certificate of such taxation AND both parties are
to be at liberty to apply as they may be advised.

10

20

PASSED this Twentieth day of August 1970.
ENTERED same day. A.M.

G. WHALAN (L.S.)
DEPUTY REGISTRAR IN EQUITY

30