Judgment
32 1956

In the Privy Council.

No. 44 of 1955.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

MATTHEW JAMES McKENNA and VINCENT LEO GIFFORD ... ... *(Defendants) Appellants*

AND

PORTER MOTORS LIMITED ... ... *(Plaintiff) Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

* Inclusion objected to by Appellants.

EXHIBITS.

LIST OF DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL.

Description of Document.	Date.
Exhibit " B " in the Supreme Court of New Zealand being undertaking to demolish premises	16th April 1946.
Exhibit " C " in the Supreme Court of New Zealand being agreement extending tenancy	21st December 1945.
Such portions of Exhibit " D " in the Supreme Court of New Zealand being notes of Evidence taken before Hutchison, J. as are not considered relevant to the subject matter of the appeal	27th May 1949.
Exhibit " E " in the Supreme Court of New Zealand being authorisation by Building Controller	15th October 1951.
Exhibit " G " in the Supreme Court of New Zealand being plan of building proposed to be erected by Respondent	——
Exhibit " H " in the Supreme Court of New Zealand being extracts from the Bye-Laws of the Palmerston North City Council ...	——
Exhibit No. 1 in the Supreme Court of New Zealand being notice from Palmerston North City Council Town Clerk to Defendants' Counsel	31st May 1949.
Exhibit No. 2 in the Supreme Court of New Zealand being Defendants' plan showing 1945 fire damage	——
Exhibit No. 3 in the Supreme Court of New Zealand being Defendants' Boarding House licence	1st April 1953.
Exhibit No. 4 in the Supreme Court of New Zealand being Defendants' Boarding House licence	1st September 1952.
Exhibit No. 5 in the Supreme Court of New Zealand being list of items of repair claimed by Plaintiff Company against Defendants in action before Hutchison, J.	——
The affidavit of Vincent Leo Gifford in Mandamus proceedings against Palmerston North City Council and all exhibits thereto except Exhibits "C," " E " and " I "	16th June 1952.

In the Privy Council.

No. 44 of 1955.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

MATTHEW JAMES McKENNA and VINCENT LEO GIFFORD ... ... (*Defendants*) *Appellants*

AND

PORTER MOTORS LIMITED ... ... (*Plaintiff*) *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Statement of Claim.

In the Supreme Court of New Zealand.

No. 1. Statement of Claim 15th April, 1953

The Plaintiff by its Solicitor, George Innes McGregor, says :—

1.—THE Plaintiff is the owner of certain premises situated at 108 Rangitikei Street in the City of Palmerston North let at a present rental of £5 per week.

2.—BY an Agreement dated the 29th day of August 1944 the Plaintiff agreed to let and the Defendants to take as tenants the said premises for a term of one year from the 1st day of August 1944 upon the terms and conditions of the said Agreement.

3.—THE said Agreement further provided (*inter alia*) :—

(*a*) " That the tenants will comply with all by-laws and regulations " in respect of the said premises and in particular will comply " with the requirements of any health or other inspector in " respect thereof."

(*b*) " That in the event of the tenants with the consent of the " landlord remaining in occupation of the premises after the " expiry of the period of one year then the tenancy of the " premises shall be deemed to be terminable at the will of " either party hereto by giving to the other of them three " calendar months' notice in writing of such termination."

In the Supreme Court of New Zealand.

No. 1. Statement of Claim 15th April, 1953—*continued.*

4.—By a subsequent Agreement it was agreed the said tenancy should continue until the 1st day of August 1946 and that after such date any notice of termination from the landlord should be a three months' notice.

5.—That by an Agreement dated the 16th day of April 1946 the Plaintiff and the Defendants for the consideration therein expressed entered into an Agreement with the Corporation of the City of Palmerston North and each other agreeing to demolish or permit to be demolished the buildings on the said lands immediately on the expiration of three months' notice given by the Council of the said Corporation.

6.—That on the 2nd day of February 1948 and on the 20th day of December 1951 the Plaintiff gave to the Defendants notices in writing to quit and deliver up possession of the said premises at the expiration of three calendar months' notice from the receipt of the Defendants of such notice.

7.—That the said notices have expired and the Defendants have failed to give up possession of the said premises to the Plaintiff

8.—That on the 28th day of September 1951 the Plaintiff caused to be served on the Defendants a notice of not less than one year of its intention to make application for possession of the said premises and that the landlord had been the landlord of the said premises for more than two years immediately preceding the date of service of the said notice.

9.—That on the 7th day of April 1952 the Palmerston North City Council gave notice to the Plaintiff and the Defendants requiring them to demolish or permit to be demolished the said premises.

10.—That the Defendants have failed to comply with the requirements of the said notice or to perform the said Agreement.

11.—That the Defendants have failed to perform or comply with the conditions of the said tenancy.

12.—That the premises are reasonably required by the Plaintiff for its own occupation or in the alternative that possession is required of a part of the premises in excess of the reasonable requirements of the Defendants.

13.—That notice of intention to commence these proceedings was given to the Defendants by registered post on the 30th day of March 1953.

Wherefore the Plaintiff claims :—

(*a*) An order that the Defendants do give to the Plaintiff possession of the said premises,

(*b*) Such further or other relief as to this Court seems just,

(*c*) The costs of and incidental to this application.

No. 2.

Statement of Defence.

THE DEFENDANTS by their Solicitor, Reginald Hardie Boys, say :

1.—THAT the Defendants admit each and every the allegations contained in Paragraphs 1 and 2 of the Plaintiff's Statement of Claim.

2.—THAT the Defendants admit each and every the allegations contained in Paragraph 3 of the Plaintiff's Statement of Claim AND SAY that the extracts from the said Agreement set out in such Paragraph are a reproduction of portions of clauses 6 and 8 of the said Agreement.

3.—THAT the Defendants deny each and every the allegations contained in Paragraph 4 of the Plaintiff's Statement of Claim AND SAY that Clause 8 of the Agreement referred to in the previous paragraph hereof contained the following proviso :

> " PROVIDED ALWAYS and it is hereby specially agreed and " declared that unless the Landlord shall require the said premises " for the purposes of rebuilding the Landlord will not give notice " terminating the tenancy earlier than the 1st day of August 1946 " this provision however not to prevent any purchaser from the " Landlord from terminating the tenancy hereby witnessed at an " earlier date as provided by this clause."

4.—WITH reference to Paragraph 5 of the Plaintiff's Statement of Claim the Defendants say that following upon a fire in the premises in July 1945 which partly destroyed the same and in particular the Kitchen thereof the Plaintiff received a sum of approximately £1070 by way of fire insurance and refused to expend any part of the same on reinstatement and gave to the Defendants on the 2nd day of August 1945 three months' notice to quit the said premises : THAT the Defendants gave notice claiming under the provisions of the Fires Prevention (Metropolis) Act 1774 that the insurance moneys should be spent on re-instatement : THAT after negotiations the Plaintiff and the Defendants entered into the following agreement dated the 21st day of December, 1945 :—

> " It is agreed that your tenancy is to continue till 1st August, " 1946 : that no notice will be given by the landlord prior to " 1st August 1946 terminating the tenancy : that after 1st August " 1946 any notice of termination from the landlord is to be " a three months' notice.
>
> " You are entitled to remove any improvements that you " make to the dining room and kitchen, and also the hutments, " on termination of the tenancy.
>
> " This arrangement is on the condition that you release your " claim requiring the insurance money to be spent in " reinstatement."

In the Supreme Court of New Zealand.

No. 2. Statement of Defence 20th April, 1953— *continued.*

THAT thereafter the Defendants sought to carry out, at their own expense, the repairs and improvements to the Kitchen and Dining room of the said premises contemplated by the said agreement and were refused by the Palmerston North City Council a permit to do so unless and until the Plaintiff and the Defendants executed the following undertaking which they did on the 16th day of April, 1946.

" His Worship,
" The Mayor, Councillors, Burgesses,
" City of Palmerston North.

" Dear Sirs,

" We the undersigned do hereby undertake and agree that in " consideration of your permitting temporary repairs to be done " to the Rangitikei Private Hotel, to make good the damage done " by fire.

" We will demolish or permit to be demolished the said " Private Hotel immediately on the expiration of any notice from " your Council, requiring such Private Hotel to be demolished, " such notice however, to be a three months' notice to be given " by your Council.

" For Porter Motors Ltd.

" K. A. HENDERSON
" R. PORTER
" M. McKENNA
" L. GIFFORD
} *Directors.*"

THAT thereafter the Defendants at their own expense reinstated the said fire damage at a cost of approximately £250 of which the salvage value would not be more than £50; save as expressly hereby admitted the Defendants deny each and every the allegations contained in Paragraph 5 of the Plaintiff's Statement of Claim.

5.—THAT the Defendants admit the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Statement of Claim AND SAY that pursuant to the said notice of the 2nd day of February 1948 the Plaintiff brought proceedings in this Honourable Court in Action No. A27/1948 for recovery of possession of the said premises pursuant to such notice and was not granted such order of possession on the grounds that appear in the official law reports under the title of *Porter Motors Limited* v. *McKenna & Gifford* 1950 N.Z.L.R. 8 AND that the said notice of 20th December, 1951, was preceded and rendered ineffective by the issue by the Plaintiff of a year's notice to quit bearing date the 14th day of November, 1950, and served on the Defendants on the 28th day of September, 1951, whereby the Defendants right to continue in occupation of the said premises was continued until the 28th day of September, 1952.

6.—THAT the Defendants deny each and every the allegations contained in Paragraph 8 of the Plaintiff's Statement of Claim AND SAY that the said notice served on the Defendants on the 28th day of September, 1951, is the notice to quit referred to in the preceding paragraph hereof and is in the words and figures following :

" To : Messrs. McKenna & Gifford,
" Proprietors,
" Rangitikei Boardinghouse,
" Palmerston North.

" Notice is hereby given pursuant to the provisions of the " Tenancy Act that the premises occupied by you in Rangitikei " Street Palmerston North as tenants of Porter Motors Limited " are required by your landlord for its own occupation, and that " you are required to quit and deliver up possession of the same " on or before the expiration of one (1) year from the receipt by " you of this notice, and at the expiration of that time it is the " landlord's intention to make application for possession of the " premises on the above grounds.

" The address for service of Porter Motors Limited is at the " offices of Messieurs McGregor & McBride, Solicitors, 97 Rangitikei " Street, Palmerston North.

" DATED this 14th day of November, 1950.

PORTER MOTORS LIMITED
By its Solicitors and Authorised Agents,
McGREGOR & McBRIDE.
per : G. McGregor."

7.—THAT the Defendants admit each and every allegation contained in Paragraph 9 of the Plaintiff's Statement of Claim save that the notice to the Defendants required them only to permit the said premises to be demolished.

8.—THAT the Defendants deny each and every the allegations contained in Paragraph 10 of the Plaintiff's Statement of Claim AND SAY

(*a*) That it was *ultra vires* the Palmerston North City Council to require the Defendants to execute the said undertaking of the 16th day of April 1946.

(*b*) That the said undertaking was extracted *in terrorem* and is unenforceable as being *ultra vires* and without consideration.

(*c*) That as between the Plaintiff and the Defendants the said undertaking is unenforceable by virtue of Section 47 of the Tenancy Act, 1948, or alternatively is an undertaking to give up possession of the said premises to the Plaintiff for the purposes of demolition entered into prior to the protection afforded to the Defendants by the Tenancy Act. 1948, and the Regulations in force prior thereto.

In the Supreme Court of New Zealand.

No. 2. Statement of Defence 20th April, 1953—*continued.*

9.—THAT the Defendants deny each and every the allegations contained in Paragraphs 11 and 12 of the Plaintiff's Statement of Claim.

10.—THAT the Defendants admit each and every the allegations contained in Paragraph 13 of the Plaintiff's Statement of Claim,

AND FOR A FURTHER OR OTHER DEFENCE the Defendants by their said solicitor say :—

11.—THAT the Plaintiff requires possession of the Defendants' premises only to demolish and not to occupy the same and has not offered to the Defendants any alternative accommodation nor is any suitable alternative accommodation available to the Defendants now or at any time when any order now made is likely to take effect.

12. THAT the Defendants occupy less than one quarter of an area of land which is otherwise vacant, is owned by the Plaintiff, and is available to the Plaintiff for the purposes of erecting thereon buildings to the full extent of any building permits held by the Plaintiff and including a frontage of approximately one chain to Rangitikei Street, Palmerston North.

Notes of Evidence before Cooke, J.

Notes of Evidence before Cooke, J.

PLAINTIFF'S EVIDENCE.

Plaintiff's Evidence.

No. 3.

Evidence of Kenneth Allen Henderson.

No. 3. Kenneth Allen Henderson, 26th May, 1953. Examination.

Mr. G. I. MCGREGOR appeared for the Plaintiff and Mr. R. HARDIE BOYS appeared for the Defendants.

I reside at Palmerston North and am a director of the Plaintiff Company. I have been a director since before 1941. In 1941 the Plaintiff Company bought a property in Rangitikei Street. It was purchased—our principals, General Motors, asked us to acquire a property to build a new garage when we vacated the garage in Rangitikei—we had a new garage there of which we were tenants. General Motors asked us to acquire a new garage as soon as possible. The lease of that property had expired and we had to vacate. It was then our intention to build as soon as circumstances permitted on the new property. I have mentioned that we were occupying the garage at corner of Rangitikei and Maire Street—while we were occupying that property the Plaintiff also had the property it still owns in Queen Street. We acquired it when occupying the property at corner of Maire and Rangitikei St. At that stage we were using the two properties—one for

new cars and one for secondhand cars. The property with which we are concerned has a frontage of two chains to Rangitikei St. by a depth of 5 chains. At the time we purchased, the Defendants were in occupation of the Rangitikei Private Hotel, and that had a frontage of 63 ft. by a depth of 147 feet. The matter of the tenants' occupancy was discussed with the tenant about the time we purchased the property. We told them our intentions—that we wished to build as soon as we could. At that time it was impossible to build immediately because of general conditions.

That lease existing at the time we purchased expired on 1st August 1944. The tenants then negotiated for a further lease. As a result of those negotiations on the 29th August 1944 a new lease was given for a period of one year. (Copy put in.) That is a copy of the lease then granted. (Exhibit " A.") When that lease expired in 1945 there were further negotiations. Prior to the expiry of that lease there was a fire in the premises just before the lease expired in July 1945. When the fire took place, Porter Motors immediately started to make enquiries to sell what was left there, and applied for a permit—renewed our application for a permit for the new building. The boarding house was then empty. I inspected it after the fire, and it was not capable of being occupied. The tenants obtained a permit from the City Council for reinstatement. That was done with the co-operation of the Hon. Mr. Semple I understand. Porter Motors had nothing to do with it. My Company was then asked to enter into the undertaking with the City Council—In consideration of a waiver of the by-laws that we would demolish on 3 months notice. That agreement was entered into on 16th April 1946 (as the same appears at page 4 Record document No. 2). That is the agreement. (Exhibit " B.") Just prior to that undertaking being given to the City Council on 21st December 1945, Porter Motors agreed to extend the tenancy to 1st August 1946; and after the 1st August 1946 termination would be on a three months notice (Exhibit " C.") (As the same appears at page 3 Record document No. 2.) Proceedings were taken for possession of these premises and were heard in this court on 27th May 1949. I gave evidence in those proceedings. I was present during the whole of the hearing. Those proceedings were continued on the 31st May. I produce the copy of the notes of evidence taken at that hearing. I have heard the extracts referred to in opening. Those extracts are a correct record of the evidence that was given on that occasion. (Notes of Evidence put in—Exhibit " D.") That is also a correct record of your evidence given at that hearing? Yes. Subsequent to that hearing, on 15th October 1951 my company obtained authority from the building controller for the erection of new premises on the Rangitikei St. property. An area of 17000 sq. ft. main building, plus a 2000 sq. ft. bowser at an estimated cost of £30,000. That is the authority I received from the Building Controller. (Exhibit " E.") Subsequent to that, two notices to quit were given—the first one, a year's notice served on 28th September 1951, and a subsequent three months' notice on the 20th December 1951. Those notices are referred to in my Statement of Claim and the Defendants' Statement of Defence. Then, on the 7th April 1952, a notice was given to

my company by the City Council to demolish the buildings, pursuant to the undertaking of April 1946. We then desired to comply with our undertaking and advised the defendants that we so desired. Prior to the giving of those notices my company through our solicitors had made a request to the City Council that it should act under its agreement. That is a copy of the letter from my solicitors to the City Council making the request (Exhibit " F "). As far as our building operations are concerned it is necessary that my company should obtain possession of the portion at present occupied by the Defendants. I have had preliminary plans prepared as far as our building is concerned. That is the latest sketch showing the occupancy of the whole of the frontage practically. That occupies approximately 128 ft. of the frontage. (Plan put in—Exhibit " G "). The company has arranged the necessary finance for its building. It is fundamental that the whole frontage should be occupied by the new building to enable proper access to the garage as well as the bowser station. Any shorter frontage would not enable a satisfactory entrance for cars coming in. The approximate sq. ft. area of the new building will be 17000 or 18000—the bowser station will cover about 2000 to 3000. In accordance with the permit. The company desired to proceed with that as quickly as possible. I agree that it will be some months before plans and specifications can be completed—6 to 9 months before we can start. We are prepared to delay possession for a reasonable period.

What premises does the Plaintiff occupy now ? The Queen Street garage—a freehold, and two properties, one from Government Life and one belonging to Smith & Smith. As far as the Queen Street property is concerned, its area approximately is not much more than 8000 sq. ft. The whole of that property is built on. No room for expansion at all. That is not adequate for the present business of the company. It is totally inadequate. Opposite is a property owned by Smith & Smith's. There are no buildings on that property. We have not an exclusive occupation of that. We rent it at £6 a week from Smith & Smith and sublet the use of it to Newman Motors for half the rental. Newman pay us the rent and we pay Smith & Smith £6 a week. It is only a licence from day to day. That property is used for parking of cars that can't be accommodated in the garage, certain small repairs and general use of a garage. We also have a tenancy of the bowser station at corner of Queen Street and Rangitikei Street. The Government Life own that. The premises are a covered-in bowser station with a small office—no walls except for the office. It is a monthly tenancy at £6 a week. The Government Life have terminated that tenancy. We received a notice to quit about a month ago. It was a bolt from the blue. We had no knowledge that it was coming at all.

Regarding the Rangitikei and Maire Street property we vacated prior to buying the present property that was used at the same time as the Queen Street property. The sq. ft. area was about 12,000 or 15000. My company has a General Motors franchise for Buicks and Chevrolets. That franchise is a day to day one that can be revoked at any time. We get

supplies of Chevrolet cars in the year. No Buicks for some time. General Motors require the franchise operated in a properly equipped garage—an up-to-date garage—and from the moment we acquired this property they have been insisting on our building as soon as we can. Even when the war was on, they asked us when we were going to build. They want people to say " This is the garage for a Chevrolet car," it being an advertisement for themselves. If we don't build, the position will be very serious—they may look for another agent who has more up-to-date premises. It may be a question of " will." I consider that our franchise will be in jeopardy. In regard to the boarding house, my company would be prepared to shift it to another part of the same section at our own expense. If it were shifted, we would be prepared to allow the tenants to continue in occupation. It would be convenient to shift it to the back of the section to adjoin a new road that will come through. The City Council have agreed to make a road, we understand. It would be behind the present site—whatever part of the back part of the section was suitable. It would have access by a new road subsequently. That new road—we would lose half a chain of part of our section at the back. The road will run from Grey Street along our back boundary parallel to Rangitikei Street. There have been negotiations for about 5 years. Until that road is completed we could arrange some access through our bowser station. The original agreement was a frontage of 63 ft. by a depth of 147 ft. There have been some encroachments on the remainder ; we extended the lease to include the use of certain sheds right at the back of the section. To get access to these they have encroached on the land on the western side. That is on the western side of the private hotel building. My Company have repeatedly advised the tenants of the position. We advised them immediately we got our permit and have pressed them all the way through to do something. At times we have suggested to them other premises that might be available for their boarding house business. We have suggested to them the property belonging to Mr. Adam Burgess in Featherston St. Immediately behind the Family Hotel. That has since been turned into a boarding house. Nathan's property at corner of Linton St. and College St. was available at one time. The Defendants have had a total occupancy of 20 years or more of this property of ours as tenants.

Cross-examination.

Xxd. Your desire is to rebuild—to build a new garage on the site of the private hotel ? Yes. You do not want to occupy the structure that is now known as the Rangitikei Hotel ? Yes we could occupy that—if the tenants don't want to occupy it we could remove it and turn it into flats for our own employees. Would you require the structure of the boarding house if it were vacant only to move it off the site ? Yes. But not to occupy it for the purpose of your business ? If it was moved to back of the section it would be occupied because we have great difficulty in obtaining staff and accommodation for your staff makes more staff available. And that has been proved in other business as well. Are you wanting to occupy for residential accommodation the premises of the private hotel ? That

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Plaintiff's Evidence.

No. 3. Kenneth Allen Henderson. 26th May, 1953. Cross-examination—*continued.*

point has not been fully discussed but if the Council would give us a permit the subject would be fully considered. We at present have two flats in Feilding for our staff but that is too far away to attract—one member of the staff is in—He has been dismissed. But we find Feilding too far away to attract staff for P.N. Do you seriously urge to the Court that you want the structure of that private hotel for accommodation purposes or do you want it only to pull it down ? I think we might use it for accommodation. We certainly don't want it where it is at present but if we could get a permit we would use it for accommodation for our own staff. Then why in March last did you urge the C.C. to make you pull it down ? We wanted it removed from the present site. To pull it down we would have sold it or erected it somewhere. Didn't you use the word demolish ? Yes. And isn't the truth that you wanted it demolished out of the road in order to build a new garage ? Yes. But if it could be used for our staff it would be an adjunct for our business. Provided it was not in front of the section. Have you told the City Council so ? No. Have you in any way mentioned that Mr. McGregor's letter of the 4th March 1952 which I would like you to look at is now to be interpreted as meaning something other than demolition ? If it can be used. Have you ever mentioned that that letter to the City Council is to be now read as something other than demolition ? No. Have you canvassed the likelihood of a permit being given for the removal of the hotel building ? No. Perhaps—do you think you would ever get a permit to remove that building, agreed to be demolished in 1946, a few yards back into the same brick area where it is not supposed to be ? I would doubt it for ourselves. But to be used as a boarding house they may be given a permit. They (the Defendants) have many friends on the City Council and they might be given a permit. I doubt if the Council would give us permission. We have not approached them. It is common ground that the City Council objection is that it is a wooden building in a brick area ? Yes. There are quite a number of others. But whose existence they can only attack when it comes to altering or removing ? Yes. Have you had any expert advice as to the physical possibility of moving *in toto* that two storied building from its present site ? No. May I suggest the surest way of ensuring it would be demolished would be to attempt to shift it ? It has stood up pretty well for a long time. It is on various floor levels ? It is two storied. But even the ground floor ? I haven't noticed that. I have been in it. We shall call evidence—do you think that building would stand up to the physical strain of being jacked up and removed ? I wouldn't like to say till I examined it. It has been estimated to be 60, 70 or 80 years old ? Yes. The road to which you propose to give it a frontage has any notice or proclamation been put over your land for the taking of a road ? No. Or over the land on the adjoining boundary which would furnish the other half chain ? No. It is one of these future schemes of the C.Cl. ? We have been definitely told it will be carried out. I should say within 2 to 3 years. It has been under negotiation from about 5 to 3 years. What is the present state of negotiations ? We have said what we are prepared to give and what compensation we require. Has that been accepted by the

Council ? Not as far as we know. Will you show us on the plan that you produced as Exhibit " G " where you say you would provide access to this private hotel through your bowser ? I think this plan would require certain amendments to enable a satisfactory access to be given. It wouldn't be available on that plan would it ? Except the re-drawing of that plan could be arranged. Through your bowser the only access to the rear part of the section is through the main garage on this plan ? I think that is an open space—spaces marked In and Out on the left of the plan and to right of the lubratorium. The plan would require alteration if we are to give access and we are prepared to do that. It would involve people going through your garage property ? Yes it would be open—not all will be covered over. The front elevation on top right of the plan—doesn't that appear to be the intention ? On this plan yes. The section BB at the rear is entirely covered over ? Yes. Do I read this plan as being that the south eastern portion marked Parking is all open space ? Yes. That is the access to the bowser station. To the rear of it being the general offices ? Yes. And to the west of it the bowsers store and lubratorium ? Yes. Substantially isn't that vacant space on the plan where the 2 storeys of the hotel to-day stand ? Yes. You have told us you have the ownership of the area of 132 ft. by 330 ft. ? Yes. The premises occupied by the defendants are 63 by 147 ft. ? Yes. But the 147 ft. includes an area occupied by huts and fowl houses and the like ? Yes. The two storied hotel is only I suggest about between 1/5th and a 1/4th of the enclosed area of the hotel ? Yes I should think so. The hotel building stands on only 1/4th or 1/5th of the area of 63 by 147 ? Yes it stands about 20 feet off the road. Have you calculated what your total ground space is ? An eighth. But in square feet ? Will you accept it is 43560 sq. ft. ? Yes. That is right. I accept that. And similarly multiplying 63 by 147—taking the whole area of the hotel that is 9261 ft. ? Yes. Even if you took none of the area of the fowl house, or the huts, on those figures leaving out the odd 1 ft. you would still have an area of 34300 sq. ft. ? Yes. And your building permit only extends to half of that ? Yes. Half of the 34000 ft. ? Yes. Now using one chain of the Rangitikei St. frontage do you ask us to accept that you cannot put an adequate building of 17000 sq. ft. on the 34000 sq. ft. you have available ? Yes. It has all been worked out by our Engineer. Our architect has submitted diagrams showing that it is impossible to construct 17000 sq. ft. of a satisfactory garage without utilisation of the whole street frontage. Looking at the blue plan again (Exhibit " G ")—that is on a scale of 16 ft. to an inch ? 1/16th of an inch to 1 foot. That is 16 feet to 1 inch. And 64 feet would be 4 inches on the plan ? Yes. Any 4 inches on the plan I suggest could include your lubratorium and your bowser ? Not quite. But could include your entrance and your bowser if you set your lubratorium back ? Yes but no access to the bowser at all. Whilst the bowser and lubratorum do not occupy the whole of the frontage the balance of frontage is required to give access for cars.

The City Council got you and the Defendants to sign the agreement of

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Plaintiff's Evidence.

No. 3. Kenneth Allen Henderson, 26th May, 1953. Cross-examination—*continued.*

April 1946 ? Yes. Do you know that after that date and until you asked them to do so in March 1952 the Palmerston C. Cl. took no step to require either of you to demolish the premises ? Correct. Do you know that in 1947 some new regulations were introduced—the Housing Improvement Regulations ? No. Do you know that in and after 1947 the City Council far from requiring the premises to be demolished required the Defendants at their own expense to bring them up to new standards ? Not to my knowledge. I thought they always had the power. But you did know the defendants had to spend money on bringing the place up to scratch ? Yes. Indeed do you recall that on the 2nd day of the hearing of the case before Hutchison J. the City Council delivered to your Counsel and to the Defendants' counsel a letter dated 31st May 1949 saying while the case was in progress they were proposing to enforce their regulations to the full ?

(Court adjourned 1 p.m.)
(Court resumed 2.15 p.m.)

Letter put in, dated 31st May 1949—put in by consent (Exhibit No. 1). You will recall that before the proceedings were heard by Hutchison J. in 1949 your company had been prosecuted by the City Council for failure to carry out repairs ultimately recovered from the Defendants ? Yes. In that prosecution your Counsel Mr. McGregor informed the court that it would take £500 or £600 to comply with what the council required ? Yes. I think so. Do you agree that in the end those things and more had to be carried out by the Defendants ? Yes. Do you recall in the proceedings before Hutchison J. Mr. Wattie Rutherford of the local R.S.A. Adjutant Simpson of the Salvation Army gave evidence for the Defendants ? Yes. And they spoke of the great shortage of accommodation in P.N. and the need that this hotel filled in this respect ? Yes. And from your own knowledge do you agree that the same situation prevails to-day ? It does not. Their evidence is as good on that point to-day as 4 years ago—do you agree ? No. Dealing with a few unrelated matters—Mr. McGregor has said that the two notices the Council sent out were to you to demolish and to the Defendants to permit it ? If he says so that is correct. I only saw our notice not the other. I want to ask you if you complain that these people have not pulled the place down ? Yes, we do. Or allowed us to. Whose obligation do you recognise it to be ? I think under the undertaking it is a joint responsibility. At whose expense ? We will pay the expense. You said in your evidence that you thought the fire of 1945 rendered it impossible to carry the place on without repairs ? Yes. I want to refer you to the evidence of Mr. Gifford at page 67 before Hutchison J. (reads). Having been referred to what he said do you now recall that the Defendants carried on their private hotel despite the fire ? If Gifford said so I would never doubt it. I was in the hotel the morning of the fire and it certainly didn't look then as if it could be done. (Passage of the evidence referred to, page 67 lines 13 to 17). Mr. Gifford said that there is no doubt it was so. And must have been under great difficulties ? Yes. And on this question of hardship it is correct that your Co. collected £1070 insurance ? Yes.

You referred to having not offered—I think you said mentioned other accommodation to Defendants—Nathans place and Burgess's ? Yes. Those were mentioned to the Defendants prior to the case that came before Hutchison J. ? Yes. And are they not the places referred to in the evidence in the previous case at page 69 beginning at line 21 and going to about 10 lines (shows witness the evidence) ? That is correct. But you don't suggest that you have made available for them to occupy some alternative accommodation ? No. Now dealing with your own premises have you recently taken possession of the frontage on the west side of the hotel ? Yes. It formerly had an old paint shop on it ? Yes. Which we had used at different times. We have dismantled that. And have constructed a used car depot ? Yes. At quite some considerable cost ? I think about £500. When did you do that ? Within the last 12 months. Since you got your building permit ? Yes. And at that used car depot you have some sort of office erected also ? Just sufficient for what we want. Then at the bowser site at corner of Queen St. and Rangitikei Street have you recently been installing new pumps ? Not us. The Shell Co. Shell Co. has installed new pumps on the bowser operated by your company? That is correct. That is because of an arrangement we have with them that we only stock their petrol. That is the site owned by the Government Life ? Yes. I invite you to explain the recent construction of new pumps there when you say your tenancy is in peril ? The notice was given us after the pumps were erected and we can't get any definite information from the Crown why we were served with the notice. It was served after the Shell Co. had completed their pumps. Do you as a citizen know of any present intention of the Govt. Life to build on that site ? They have owned it for many years and that may be the only reason they want premises. I know of no intention outside this notice. These expenditures you have incurred coupled with your counsel's statement that you won't want the place for 9 months make me ask whether you really do intend to build in 9 months time ? We would commence to build to-morrow if we could get our plans completed and get possession. We want to be reasonable to the tenant and we know that to formulate our plans we can't do it within 9 months. And if you could not in these proceedings get physical possession of the hotel would you go ahead with revised plans ? No. We have already studied that and it is impracticable. Must that not mean that your franchise is in peril ? It is in peril. You suggest that General Motors wouldn't be satisfied with a Porter Motors who had a chain frontage to Rangitikei St. and adequate premises behind ? Adequate new premises behind yes. How much of your business is tied up with General Motors franchise ? Over 50 per cent. Can't sell Buicks ? No. We sell Chevrolets—40 or 50 per annum and we have numerous agencies as well. Not related to General Motors franchise ? No but we are sub-agents for Vauxhall which is General Motors. One word about encroachment—You know that in the 1944 lease that your company gave the Defendants the premises were not described by frontage and depth but simply as the premises at 108 Rangitikei St. ? Yes. Those are the same to-day as they were in 1944 ? Yes.

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Plaintiff's Evidence.

No. 3. Kenneth Allen Henderson. 26th May, 1953. Re-examination.

Re-xd. What do you estimate the value of the land in Rangitikei St. per foot frontage ? From £200 to £250 per foot.

This used car depot in Rangitikei St. is that a temporary expedient ? It is quite temporary to enable us to go on with our business pending erection of new premises.

To BENCH : That last topic—this depot for used cars—would any of the new construction or work you have put into that in last 12 months be incorporated in for the major proposals you have in view ? Only the levelling of the section. Only metal on the ground but the improvements would be saleable. You discussed with Hardie Boys the question of removing this building to the back for the benefit of the tenant—putting on one side all questions of permits etc.—How long would the tenant be disabled from carrying on his business by that operation ? One month approx. As short as that ? I should think so.

(Case for the Plaintiff.)

Defendants' Evidence.

DEFENDANTS' EVIDENCE.

No. 4. Alan Desmond Long. 26th May, 1953. Examination.

No. 4.

Evidence of Alan Desmond Long.

I am an estate agent and valuer practising in Palmerston. I was a witness in the proceedings before Hutchison J. and my evidence appears on page 77 of that record. Just on that point—are premises to-day still in the good condition of which you spoke ? Yes I would say quite as good. Probably better. Since 1949 do you know of considerable requisitions that have been satisfied ? Yes. Have you learned that it is suggested that this 2 storey building could be shifted to the rear of the section ? I have heard it suggested. Have you formed an opinion as to whether that would be physically possible ? I would say it is not possible. Firstly, the building is approx. 80 years old. The type of construction is such that the building would not stand moving. It would practically collapse. Secondly, I don't think that a permit would be granted to remove the building. I am almost certain of that. Is the ground floor all on one level ? Not the entire ground floor. From memory the back portion is lower than the front portion. Would it in your view withstand the jacking up ? I don't think it would even assuming it is all on one level. It would collapse if it survived the jacking up.

Cross-examination.

Xxd. You think the building is in better condition now than it was 4 years ago ? Yes. Its general condition is slightly better. It improves with age ? Well no. It has been—it has had things done to it. I expect

you have had experience of removal of buildings only on odd occasions ? Very odd occasions. And the building of this nature it might be a factor more of extra expense in taking precautions and adding strength rather than impossibility ? No. I would go so far as to say I think it is impossible. With the machinery available to-day it is much easier to shift bigger buildings than it was 20 years ago ? Yes I agree. And although extra cost might be incurred it is not necessarily an impossibility ? I would say that it is not possible. You would agree that if it could be done on new foundations and on new site it would be a much stronger building than it is now ? Yes. Would you also agree that the site considering its present value is being put to an uneconomic use ? No I wouldn't agree. The site is in a very valuable part of the city ? Yes. Would you agree with Mr. Henderson's estimate that it is worth £200 to £250 a foot ? I would say nearer £200. I suggest that it is far too valuable a site to be occupied by a 60 to 80 year old building ? Well I repeat that it is a valuable site and there are other buildings on equally or more valuable sites of the same age. It is a site that should be rebuilt on as soon as conditions allow ? We would like to see it.

No. 5.

Evidence of Vincent Leo Gifford.

I am a private hotel proprietor of Palmerston North and am one of the Defendants. I remember the fire in 1945. Was that fire—did that fire damage any of the external walls of the building requiring them to be replaced ? No. Do you produce the plan which was put in at the time to the City Corporation of the area where the fire damage required replacement. It is marked in red on that plan. Some of the studs of the kitchen wall were charred. Did they have to be removed ? No we put some alongside the charred ones. Was the only physical interference with the exterior that in the course of what you did you enlarged a window ? Yes. And made a bigger hole where a smaller one was before ? Yes. Was that rendered necessary by the fire or did you take the opportunity to do it ? No that was not necessary. It was a benefit. You recall that in the proceedings before Hutchison J. in 1949 from the witness box you said that when the plaintiffs got their permit you would be willing to help them ? Yes. Do you recall that on the 2nd day of the trial the letter from the City Council produced as Exhibit 1 was handed to your counsel at the Court ? Yes. And the first para. of that letter speaks of the council's intention of enforcing all outstanding requisitions ? Yes. And also of the requirement of things to be done to the balconies ? Yes. Did the council enforce those requirements ? Yes. Did you let the work out on contract or do the work yourselves ? Mostly did it ourselves and bought

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 5. Vincent Leo Gifford. 26th May, 1953. Examination—*continued.*

the materials. In calculating cost have you endeavoured to charge up your own labour at a fair and reasonable ? No. Not at contract price. At what figure for your own labour ? What do you estimate the cost of carrying out these requisitions since 1949 ? About £1200 odd. And in the labour portion of that what do you charge to your own labour ? I don't remember estimating for that. How much was out of pocket expenditure ? No recollection. What was the work that had to be done since 1949—dealing with lavatories first ? We had to put in two new lavatories. One bathroom, and handbasin, several rooms were not up to the standard size of the Housing Regulations. We had to increase the floor space to bring it up to the minimum by moving partitions and taking in part of another passage in different parts of the building. The balcony floors had to be fixed up and the fire escapes. Complete new construction of fire escapes. Anything else inside of that sort ? Painting and paperhanging. As these partitions were shifted the electrical installation had to be moved and altered to meet the new requirements. Outside what did you have to do ? Instal storm water drainage, sumps, attend to all the spouting, put spouting round all the huts and fix up the outside weatherboarding. At the request of the council we put in 2 or 3 new windows to give more light. We also had to shift the fowlhouse to a different site. Throughout that work was there any suggestion from the council that they required you to pull the place down rather than spend this money ? Definitely not. Has that fact influenced you when Porter Motors now tell you that they have a building permit ? Yes. In the light of the expenditure you have incurred are you and Mr. McKenna in a position to say that you will go out ? No. You have been acting under legal advice throughout ? Yes. Do you know that a contract to go out is not enforceable against you ? We have been advised so. Has your house been continuously licensed as a private hotel or boarding house except for the period when you had to go to court ? Yes. And what does your current license entitle you to—how many people ? A total of 44 persons. That is divided up—first adult guests ? Yes. I produce the current license dated 1st April 1953 which is for 38½ persons. On the back it specifies how that is made up. In addition to that 38½ lodgers how many owners and staff are there ? Six. That makes it up to 44. License put in. I produce the license issued on 1st September 1952 after the mandamus proceedings, which licenses us to keep 31 adults and 7 children. Your accommodation is usually full ? Pretty well. What sort of people do you cater for in the main ? We get quite a number of enquiries from the Salvation Army, the St. Vincent de Paul Society, Returned Services Association, All Saints Parish. Any Government people ? From the Department of Labour and the Post Office. Are you always able to meet the requirements of these organisations in seeking accommodation ? Yes, nearly always. At the present time for instance in connection with the Dept. of Labour Immigration section we have housed a number of people at their request. They are new settlers coming in under the immigration scheme. And can you tell us from experience whether these people would find it easy to get other accom-

modation in P.N. ? I don't think they would find it easy. Apart from any hardship to you and Mr. McKenna would the closing of this place cause hardship to others ? Definitely. Who ? Permanents we have staying there who have been there a number of years. Just to go back—did you have to close the premises at all after the fire in 1945 ? No. Maintained the running of the place right through ? Yes right through. You have heard of the proposal to move the hotel to another site ? Yes. You have had some practical experience in the repair of this place over many years ? Yes. I don't think there would be a hope of moving it bodily. Any reason ? It wouldn't stand up to it. Is the floor continuous through ? More than one level. And how far off the ground is part of the floor ? 18 inches some parts and down to a foot or eight inches in other parts. How many different levels of floors ? Three I think. Have you since Porter Motors bought this place sought other premises where you could transplant your business ? Yes. With any success ? No success. In the last case you gave your comment on Mrs. Nathan's house and the Burgess home ? Yes. Have any other similar places been available in the last 4 years ? No. I don't think so. Have you the means to build a new private hotel ? No. How long have you carried on the occuption of a private hotel proprietor ? About 26 or 27 years. And always in these premises ? Yes.

Cross-examination.

Xxd. I take it you have known since 1941 the purpose of Porter Motors in buying these premises ? Not exactly 1941. From the time they bought them or about then you have known they intended to build on the land as soon as possible ? Yes. And right up till 1951 you have led them to believe that when they obtained a permit you would be willing to give up ? Yes. But the City Council had not been at us. So is it your sole reason for declining to observe your previous undertakings on account of the money you have spent on the premises during the last few years ? And legal advice. Would you be prepared to accept compensation for the money you have spent on the premises since the last hearing ? It all depends on the amount. What amount would you suggest would be fair compensation ? I haven't thought that over. But suggestions have been made to you before this by Mr. Porter ? Not any amount. To reimburse you fairly for expenses ? Not that I recall. Mr. Porter has suggested that he would be willing to meet something towards your expenses if you went out ? I can't remember him ever saying anything of that sort. Some of the expenditure has been on the huts ? Very small proportion. Those are your own property and are removeable ? Yes. And even when you undertook this expenditure did you not know that your occupation could not be long ? Nothing definite. But you had known that you were there only on sufference and the protection of the law ? If you put it that way, yes. And since the last hearing before Hutchison J. is it not correct that you have had only one requisition from the City Council ? Those requisitions were out at the same time as the hearing was on. Is it not correct that since the hearing in May 1949 you have had only one requisition from the City Council ? I don't remember. You remember making an

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 5.
Vincent Leo Gifford
26th May, 1956.
Cross-examination.—*continued.*

affidavit in the mandamus proceedings ? Yes. That is your signature ? Yes. And in that affidavit you made a copy of the requisition of 8th July 1949 from the City Council regarding baths and lavatory basins ? Yes. And did you not agree in your evidence in those proceedings that that was the only requisition you had had since the proceedings before Hutchison J. ? Yes. And that would be correct ? Yes. The work in this requisition of 8th July 1949 was not expensive was it ? Yes. It comprised quite an increase in the floor space of these rooms. It first of all required additional bath and basin and 2 w.c.'s ? Yes. You say you have put those in ? Yes. What would be the cost of those ? £100 I should say. The plumbing alone without any fixing up of walls—We fixed up the walls with hardboard ourselves. The second requisition—the second clause in the requisition—simply prohibits occupation of two rooms—Room 5 and also Hut No. 4 ? Yes, because of insufficient floor space. Third huts Nos. 1 and 6 are to have their windows increased ? Yes. Those huts are your own property ? Yes. And are removeable by you ? Yes. Fourth clause requires the dismantling of the fowl-house ? Yes. That was your own personal property ? Yes. And has been dismantled ? It is still there. It has been shifted some distance. Doesn't this requisition require you not to keep fowls ? It was agreed on if it were shifted 6 feet from the boundary we could keep them. Removal of a fowlhouse wouldn't cost much would it ? Quite a bit of labour. Not so much materials. You did it yourself ? Yes. The copper fire place and chimney dismantled ? We did that. With your own labour ? No we had help. And the washhouse floor repaired ? Yes. A new floor. A concrete floor was put in. What did that cost ? I don't remember. Did you provide storm water drainage as in clause 6 ? Yes. How much did that cost ? I don't remember. Did you repaper rooms 2 and 16 ? We repapered all the rooms. This requisition only requires repapering Rooms 2 and 16 ? Yes. We did those. I suggest to you that the cost of complying with that requisition would not amount to more than £200. I disagree. Have you any accounts or invoices or anything at all to show what that work did cost ? Not at the moment. I have had. Can you produce them later if required ? I am not quite sure. I think so. For work done about July 1949 ? I have my doubts. And is it not correct that any work done since July 1949 has been done without any pressure by the City Council at all ? No. They have left us alone. And subsequent work that has been done was done voluntarily by you ? Only as necessity arose. And for the purpose of your own business ? Yes, and also we know what the Council requires. What do you consider would be reasonable compensation for the work that you have done ? I am not prepared to state any amount just now. If satisfactory compensation were arranged would you be prepared to give the same assurance that you would go out as you gave to Hutchison J. ? No. Prior to the hearing before Hutchison J. in May 1949 certain requisitions had been given to the landlords and yourselves ? Yes. And the landlords had complied with requisitions to some extent and claimed reimbursement from you in that action ? Yes. And the landlords had also complied with

some requisitions regarding fire escapes ? Yes. Which work they did at their own expense ? The judgment was issued for those fire escapes against us. Is it correct that the only outstanding requisitions at the time of the hearing were repeated in this requisition made about a month later on the 8th July ? Yes. That would be correct ? The only requisitions from the City Council that had not been complied with at the time of the hearing were repeated in the new requisition 6 weeks later ? Yes.—In the month of June, i.e. the first month after the hearing before Hutchison J. you did no work on the hotel ? I don't remember that. Mr. Justice Hutchison's judgment was not delivered until the 12th August—a matter of 2½ months after the hearing. Yes I remember that. And during that period of waiting for the judgment of Hutchison J. everything remained in abeyance and you did not do any work ? Quite possibly. Not knowing whether you had to go out immediately you wouldn't be likely to do any work ? Hardly. And you know that as tenants you were under no obligation to spend any substantial sum in repairs under the terms of your lease ? There is a clause in the lease to comply with the City Inspector's requisition. There is also a proviso that if the cost exceeds £25 you can vacate the premises and are not required to do the work ? Yes. And I put it to you that the work done has really been for your own benefit in carrying on the boarding house ? Yes. And we were legally advised to do it. In regard to the fire damage in 1945——

(Short adjournment.)

Passing to the fire in 1945—you and your partner then applied for the permit to carry out the necessary repairs ? Yes. Did you not then advise the City Council that those were temporary repairs ? Yes. And is it not correct that the permit was declined in the first instance ? Yes. And it was only on your agreement to sign the undertaking to demolish that the permit was granted ? Yes. And is it not correct that new studding was put in the walls then ? The walls were strengthened with new studding inside. Was that not for the reason that the old studding was charred and would not do its job ? We considered it a bit too weak. It was charred, and we considered that the charring made it too weak. A portion of the kitchen wall was extended ? No. Was there weather boarding removed from the kitchen wall ? It was removed and put back again. Was the lighting altered in the kitchen ? The windows were enlarged. Of the kitchen ? Yes. And was that work done on the external wall ? Yes. You can't put in a window without altering the outside. Do you own any properties in the Town ? No. Have you over recent years owned any properties in the town ? Yes. Have they been sold ? Yes. How many ? Two houses. It is correct that your partner owns 8 properties in the town ? Yes. 6 in Boundary Road and 2 in Rangitikei Street ? I don't think that is quite correct. 4 in Boundary Road and the remainder in Rangitikei Street. And it is correct that the Govt. valuation of these properties is something over £12000 ? I don't know. Would you accept that figure as approx. correct ? Yes. And do you know that the present

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 5. Vincent Leo Gifford 26th May, 1953. Cross-examination—*continued.*

City valuation—the 1949—based on 1942 values ? No I don't know. The City has not been valued since 1949 ? No I don't know whether it has or not. Do you know of any large properties in the town for sale to-day ? No. Have you seen advertised the property of the late Mr. Innes in Featherstone St. ? No. Do you know that property ? I don't know it. I have an idea where it is situated. And would you accept a large 12 or 14 roomed house with substantial land as being satisfactory for your requirements ? No. The position is too far out. Would you accept a 12 or 14 roomed substantial house as sufficient in size for your requirements, with substantial land ? No. 12 or 14 rooms wouldn't be near enough to house the people we have there now. Is it not correct that although your present premises may have more than 12 or 14 rooms the greater part of those rooms are very small ? They are all up to requirements now. Are not the greater number very small ? Yes they are small. And has not the number of rooms in your present premises been obtained by subdividing rooms ? No. Is it not correct that since the original erection of that building a number of interior partitions have been put in ? None since we have been there. How many rooms have you in the house itself ? 20 bedrooms. When the agreement of April 1946 with the City Council was signed you knew that you could not—the Council would not allow you to do the renovations unless that agreement was signed ? I don't know whether they wouldn't allow us. They asked us to sign. And they had previously refused you a permit ? Yes. And you were prepared to take the benefit of that agreement by obtaining a permit ? We had no other alternative. But you did take the benefit of that agreement ? Yes. You keep a regular advertisement in the local papers advertising vacancies ? Yes.

Re-examination.

Re-xd. Mr. Justice Hutchison gave judgment for the repairs that Porter Motors had done—the sum of £82.16.4 ? Yes. This document produced is the list of how that was made up ? Yes. Its substantial item is £55.17.10 to a man called Townsend ? Yes. But it includes no electric light work ? No. (Document put in.) Was Townsend's work on the fire escapes the only work that was done to fire escapes under the City Council requisition ? No. Do you point in part to the evidence of Mr. Henderson himself in the last two lines of Page 3 in the previous case where he says " Some fire escape work is included in those accounts ? " (See Line 12 Page 50.) Yes.

Mr. McGregor put to you your affidavit in the Mandamus proceedings—I draw your attention to a requisition which is Exhibit " C " to our affidavit in the Mandamus proceedings—a requisition on electrical installation dated 25th Sept. 1947—was that outstanding when Hutchison J. heard the case ? That was outstanding. The requisition that appears as Exhibit " E " in that affidavit, dated 5th February 1948—look at it and tell me whether that requisition was issued before or after Mr. Townsend actually did his work ? Just look at the proceedings in the Supreme Court—they were issued on 30th Sept. 1948—Can you answer my question ? Those were done after that requisition of 25th Feb. 1948. But did it cover the whole of what was requisitioned for ? No.

In the Supreme Court of New Zealand.

No. 6.

Evidence of George Guthrie Wilson.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 6. George Guthrie Wilson 26th May, 1953. Examination.

I am a registered valuer in Palmerston North. I am well acquainted with the Rangitikei Hotel and gave evidence before Hutchison J. I have inspected it since then on quite a number of occasions. Speaking generally what is the comparison between its condition 1949 and its condition now ? It is still kept in the same tidy clean manner. It is a very old place and is kept remarkably clean. Does it reflect the expenditure of money on it in the last few years ? You must expect to spend some money to keep it up in condition. It is suggested that this whole building could be jacked up and removed to the rear of the acre upon which it stands—you have some knowledge of that problem ? Yes. I practiced as an architect for some years here. I would say it would be an extremely risky business. It has 3 different floor levels. The front floor is low to the ground and there may be quite a lot of dry rot or decay there. Certainly lots of the piles have gone. I have been under there inspecting. If they shifted it too far back they would go into a depression running across the section. Approx. 6 or 7 feet below the present level. You know of the requirement of the City Council that this place should be demolished ? Yes. Do you think this place would survive an attempted removal ? My personal opinion is that it would not. It would more likely collapse but if it were well tied together it is possible that it would have to be shifted in sections. Having regard to the Council requirement for demolition can you as knowing the way in which these things are granted tell us if any permit would be got for its removal within the brick area ? I doubt it very much.

Cross-examination.

Xxd. Would you not agree that the City Council in P.N. are to a very great extent unpredictable ? I find that anywhere. It is amazing what can be done with sufficient pressure sometimes ? It is. What would you say the value per foot of this proprety is ? We have missed the highest season but even now it would be well worth £200 per foot. And I understand that the shifting of the building is not impossible ? I wouldn't say it is impossible. I would say it is extremely risky. I mean *en bloc*. I am not speaking of shifting in sections. And your objection to shifting in sections would be on account of the extra expense involved ? No. They would have to take it in sections to keep the floor levels. The front part which is the 2 storey part is fairly low to the ground there is plenty of movement in the under structure, which denotes either rotten house blocks or decayed floor joists. And in any case it would have to be put on new piles ? Oh yes, the piles would be useless.

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 7.

Evidence of Leonard Olsen Millar.

No. 7. Leonard Olsen Millar. 26th May, 1953. Examination.

I am in charge of the Salvation Army here in Palmerston North. In the course of my work it is necessary to endeavour to house people from time to time. That is for people of limited means. Have you found the Rangitikei Private Hotel helpful in meeting the needs you encounter ? Yes. Can you tell the Court this—leaving out of account any hardship that might be caused to Mr. McKenna and Mr. Gifford do you know of any hardship that would be caused to other people by the closing down of that hotel ? I know I would find it difficult to find accommodation for casual people who come to me from time to time seeking accommodation for a night. I know something of the housing problem in Palmerston—a little. Do you consider it would be easy to house the 30 or 40 odd people who are in that place now ? I shouldn't think so.

Cross-examination.

Xxd. I expect that in any town the Salvation Army have difficulty in obtaining odd accommodation ? It isn't easy. You will recognise that your job is to surmount these difficulties ? Yes. And if you can't do it one way you will find another way—isn't that the Salvation Army's policy regarding waifs and strays ? You can't work miracles. But you will get over it somehow ? Well we always do our best. And the housing problem in P.N. is not as acute as it was ? I couldn't answer that. I have not been in Palmerston more than 4 or 5 months at the outside. I have not much experience in this town of the actual housing difficulties. Do you know that in the last 3 months the Council have been able to close the transit camp for temporary accommodation ? I wasn't aware of that. They are allowing some to remain there but as vacancies occurred they were not filling them ? No.

Re-examination.

Re-xd. Do you know the transit camp is a house provided for people ? Yes. It is very different regarding getting people a lodging house.

No. 8.

Evidence of Hector Sefton Innes Kenney.

No. 8. Hector Sefton Innes Kenney. 26th May 1953. Examination.

I am the Vicar of All Saints in Palmerston North. In the course of your work have you been concerned in endeavouring to get accommodation for people in P.N. ? Yes quite frequently. Has the Rangitikei Private Hotel been of any assistance to you ? Yes I have found it very useful indeed. You know that in this case possession of the hotel is sought for the purposes of its demolition ? Yes. Apart altogether from the concern of the immediate tenants, can you tell us whether any hardship is likely to

be occasioned to other people ? I feel there is a definite shortage of accommodation of that type and at that price. It is very hard to get decent accommodation at the sort of price that class of people can pay. I think it would be difficult for them all to find other accommodation in Palmerston. There is a shortage of that class of accommodation here. I refer to the people already in the place. It would apply also to others seeking accommodation.

Xxd. You use a number of other establishments in the town for your odd requests for board ? I did try on 1 or 2 occasions when I first came here to get people in by ringing late at night and I found places full and came to R. House and ever since then I have found they are always able to take me. For the last 18 months or so you haven't tried the other places ? Not entirely correct. A week or so ago I was stuck one night and I rang several other places and was not able to get them in. That is just recently. You wouldn't know if they happened to coincide with race weekend ? No. And will you agree that as far as permanents are concerned in a matter of months they could mostly be accommodated in private places ? I am not certain. I find private places are difficult to find. But if a period of months were given most permanents could obtain private board ? I think sooner or later they would but it might take a very long time.

Re-xd. Would your answer require qualification if a number of the people concerned were new settlers of foreign birth—would they easily get accommodation in boarding houses ? I should say it would be more difficult for them.

Re-examination.

No. 9.

No. 9.
Arnold William Bearsley.
26th May.
1953.
Examination.

Evidence of Arnold William Bearsley.

I am the president of the St. Vincent de Paul Society in P.N. In connection with the charitable purposes of the Catholic Church and my Society I try to attend to the needs of people seeking accommodation. We have them come to us. I have only been in this position about 3 months but quite a few came to us during that period. I was on the committee since 1931. Apart from my work as President I know the state of affairs. The previous President did this work himself. It was confidential and not much was mentioned to us but my brother President always recommended this Rangitikei House and I followed on this practice. The people we look out for are for rehabilitation of their characters. As far as accommodation is concerned it is mostly men a bit under the influence. They come in late at night and—we think if we can see them over the night we may be able

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 9. Arnold William Bearsley. 26th May, 1953— Examination— *continued.*

to do something with them and give them a chance to sober up and get on the right path. After that we just refer them to the police. Are there many people who will help you out ? Very few. These people are a class. Under the influence slightly. More or less respectable people. It is hard to get boarding house people to take them. 3 or 4 persons in a room. They don't like to take people in there, into a good room. We can't expect to get them first class accommodation. Then again funds come into it. We want cheap accommodation and by doing that we gradually raise the standard of their character. Into that picture of your problem and work where does the Rangitikei Hotel help you ? The thing is you must not hand cash out—that is very obvious. I can ring up there and ask them and they will help to accommodate me. We like to do it better this way. Get them to pay the next day themselves. Do it on a loan principle as far as possible. From the point of view of your Society do you know of any hardship that would arise from the closing down of the Rangitikei Hotel ? It would be hard. I don't know what we would do. I suppose we could get over the difficulty. There is a way around these things. The only way I could see round it at present is to go round to some professional men and get the money from them and go to some bigger hotel. Have you many other places you could use the same way as you use the Rangitikei ? Very few—only Birbank House and they are rather more particular. They won't take anyone under the influence of drink. This house will take them as long as they are reasonable.

Cross-examination.

Xxd. You might have the same difficulty if the proprietors of the Rangitikei Hotel changed ? I imagine for anyone to get another license in their place there would be some regulation where they could not change. It would depend on the proprietor as to whether he would take your class of occupier ? Yes that is our worry. It is more a convenience to you from the personnel of the proprietor ? That is a building that otherwise would be condemned and is really only up to this particular standard. Only up to the standard of those you get more or less stuck with ? Yes. They are filling the purpose of a charitable institution—what a charitable institution will take in other towns ? Yes, we haven't got them here. That is the purpose they are fulfilling as far as they are concerned.

No. 10.

Evidence of Thomas Little.

No. 10. Thomas Little. 26th May, 1953. Examination.

I am a retired man. I live at the Rangitikei Hotel. I have been there 8 years on 1st August. I regard myself as representative of the people who stay there. It is a home. You know some slightly and some more than slightly the other people who stay there ? Yes. Would you

find it easy to get other accommodation if this place were changed ? It is hard. I find it hard to get. When they do get private accommodation they only stop a week or two. They can't stand the people. How many new settlers are there now ? We had 10 or 12 there once. I think two are there now. They come and go all the time. Does that place provide reasonable accommodation ? Just as good as you get in town.

In the Supreme Court of New Zealand.

Notes of Evidence before Cooke, J.

Defendants' Evidence.

No. 10. Thomas Little. 26th May, 1953.

Cross-examination—

Xxd. Are you in the main building or a hut ? The main building. I expect most of the boarders come and go ? Oh yes all the time. There are some there for a while. Only a few stay any length of time ? Yes. They are working people and are on the move. I have been there 8 years on 1st August. In that period you have never had occasion to look for other accommodation ? No because I hear so much from other people who look for it. I have had no reason to look for myself. I am quite satisfied where I am.

(Case for the Defendant.)

No. 11.

Reasons for Judgment of Cooke, J.

No. 11. Reasons for Judgment of Cooke, J. 4th December, 1953.

This action for possession of certain premises in Rangitikei Street, Palmerston North, first came before me at Palmerston North on 26th May, 1953. On that day the evidence was concluded, but for the convenience of counsel the further hearing of the action was adjourned to Wellington to a date to be fixed in July. Counsel did not find it practicable to proceed with the matter in July. I was thereafter away on circuit and it was not found possible to finish the hearing until 27th October. The claim made in the action relates to premises of which the Plaintiff is the owner and the Defendants are the tenants, and that are described in an agreement to lease of 29th August, 1944 as " premises known as the Rangitikei Private Hotel." Of the grounds mentioned in sub-section (1) of Section 24 of the Tenancy Act, 1948, those that are relied on for the Plaintiff are first, that the Defendants have failed to comply with the conditions of the tenancy, and, secondly that the premises are reasonably required by the Plaintiff for its own occupation.

I do not think it is necessary to state the facts of the case but, for the sake of clearness, it is desirable to mention one or two matters. The undertaking or agreement of 16th April, 1946, that is referred to in the judgment of Mr. Justice Hutchison in the previous action between the parties, which is reported at (1950) N.Z.L.R. 8, was in the following form :

In the Supreme Court of New Zealand.

No. 11. Reasons for Judgment of Cooke, J. 4th December, 1953— *continued.*

" Palmerston North

" His Worship,
" The Mayor, Councillors, Burgesses,
" City of Palmerston North.
" Dear Sirs,

" We the undersigned do hereby undertake and agree that in " consideration of your permitting temporary repairs to be done " to the Rangitikei Private Hotel, to make good the damage done " by fire.

" We will demolish or permit to be demolished the said " Private Hotel immediately on the expiration of any notice from " your Council, requiring such Private Hotel to be demolished, " such notice however to be a three months notice to be given by " your Council.

For Porter Motors Ltd.
" K. A. HENDERSON
" R. PORTER *Directors.*
" M. McKENNA
" R. GIFFORD

" 1/3d. Stamp
" 16.4.46
" R. Gifford."

Mr. Justice Hutchison's judgment was delivered on 12th August, 1949. On 15th October, 1951, the Plaintiff received from the Building Controller an approval. That approval has, in and for the purposes of this action, been referred to and treated by both counsel as a permit to build and, without assenting to the correctness of that view, I think that for the purposes of my judgment I should treat it in the same way. On 7th April, 1952, the City Council gave the parties notice pursuant to the agreement of 16th April, 1946 requiring the Plaintiff to demolish the premises and the Defendants to permit them to be demolished. The Plaintiff then desired to comply with the undertaking to demolish and informed the Defendants of its wishes.

The case for the Plaintiff, in so far as it depends upon the allegation that there have been breaches of the conditions of the tenancy, is based on the alleged breach or breaches by the Defendants of certain of the City by-laws. In the earlier action between the same parties Mr. Justice Hutchison held that the terms of the extended tenancy that was created by an agreement between the parties of 21st December, 1945, included the terms and conditions of the earlier agreement of 29th August, 1944, that I have already mentioned. Upon that point there was no dispute before me. In any case, however, I respectfully agree with his view. By Clause 6 of that agreement the Defendants agreed to comply with all by-laws and regulations in respect of the premises ; and the tenancy that was created or extended by the agreement of 21st December, 1945, has been in force ever

since that date. At the time of the alleged breaches of the by-laws by the Defendants it was, therefore, a condition of the tenancy that the Defendants should comply with them.

The breach or breaches of the by-laws relied on consisted in the acts of the Defendants in repairing and reconstructing interior walls with non-combustible materials contrary to by-laws 161–164 of the by-laws of the City of Palmerston North; and the case for the Plaintiff is put in two ways. It is said first that neither by-law 171, which contains a dispensing power, nor the dispensation or concession granted under it by the agreement with the Council of 16th April, 1946, was *ultra vires*, but that such concession expired upon the giving by the Council of the notice of 7th April, 1952, requiring the demolition of the premises and that thereafter there were breaches of by-laws 161–164. Alternatively it is said that, if that concession was not a valid concession, the Defendants, having accepted the benefit of it, cannot now set up its invalidity but that, after the notice of 7th April, 1952, there still were breaches of by-laws 161–164. It is further said that, if the concession was *ultra vires* and the Defendants are free to set up its invalidity, the position is worse for them because there were, in those events, breaches of those by-laws as from the doing of the work. Counsel for the Defendants on the other hand maintains that the only reasonable meaning of the agreement of 16th April, 1946, is that the tenants would give up possession and let the tenancy end and that an agreement to do that is not a condition of the tenancy within the meaning of para. (*a*) of Section 24 (1). He further contends that, even if such agreement to give up possession is a condition of the tenancy, the whole agreement of 16th April 1946, is invalidated by Section 47 of the Tenancy Act, 1948, or alternatively is unenforcible because it is *ultra vires* of the Council in that the Council, having itself no power to order demolition had, as he puts it, no power to " extract " a promise to do so. In the view I take on this part of the case it is unnecessary to express any opinion on the questions that are raised by the foregoing contentions because, as I have already said, the only breaches relied on for the Plaintiff are the breaches of by-laws 161–164 and because I have come to the conclusion that, assuming those breaches were committed and that they were breaches of the conditions of the tenancy, I would not be prepared to exercise my discretion in favour of the Plaintiff. The Defendants in fact got a permit to carry out repairs. There is no suggestion that the work did not accord with the permit. It must therefore be treated as having been done with the approval of the Council, and if, as is contended for the Plaintiff, the concession contained in the agreement of 16th April, 1946, was valid, the position on the Plaintiff's own case is that breaches occurred only as from the withdrawal or termination of the concession by the notice of 7th April, 1952, and consisted in the acts or omissions of the Defendants in allowing work already done by them under permit and during the concession to remain *in situ*. In those circumstances I would, as a matter of discretion, refuse to make an order for possession without, at the least, giving the Defendants an opportunity to put matters right.

In the Supreme Court of New Zealand.

No. 11. Reasons for Judgment of Cooke, J. 4th December, 1953— *continued.*

It is necessary to consider next the allegation that the Plaintiff requires the premises for its own occupation. The contention for the Defendants is that the Plaintiff does not require the premises for that purpose but for the purpose of demolition—a matter that falls within para. (*m*) of sub-section (1) of Section 24. Upon this point reliance is placed on the passage in Hutchison J.'s judgment in the previous action where the learned judge held that paras. (*h*) and (*m*) of sub-section (1) were grounds which, in the case before him at any rate, could not be treated as cumulative and that, as the landlord wished to demolish the " premises," it could not claim that it required to occupy the " premises " itself. The situation has altered since that decision was given in that on 7th April, 1952, the Council gave notice to both parties with regard to the demolition of the premises and in that the Plaintiff then desired to comply with its undertaking and advised the Defendants accordingly. In substance, however, the position still is that the landlord desires both demolition and occupation. Counsel for the Defendants made it quite clear that he does not rely on the decision of Hutchison J. on the present point as an estoppel nor indeed was estoppel pleaded. He does contend, however, that for the sake, as he put it, of certainty in men's dealings with one another, the Plaintiff should not as a matter of expediency be allowed to advance a different view. I do not think I should accept that contention. I think that, it being common ground that the question of estoppel is on one side, my duty is to consider the matter *de novo.*

It is contended for the Plaintiff that the view taken by Mr. Justice Hutchison is wrong, and that the Plaintiff is entitled to rest its case on para. (*h*). In particular it is said that in Section 24 the word " premises " is not confined to buildings only but means, although not always, the whole of the property let, that in paragraph (*h*) the word includes land, but that its meaning in paragraph (*m*) is a matter of doubt. On behalf of the Defendants it is submitted that the evidence shows that the Plaintiff requires to demolish the existing premises and that is it only paragraph (*m*) and not paragraph (*h*) that has any application to the present case. The importance of these contentions in the present case of course is that, if the Plaintiff is confined to paragraph (*m*) to the exclusion of paragraph (*h*), its case necessarily fails because no order can be made on the ground contained in paragraph (*m*) unless the Court is satisfied that there is or will be suitable alternative accommodation and it is not suggested that any such alternative accommodation is or will be available here. I hold that on the evidence the Plaintiff has established that it reasonably requires the land for its own occupation and that it reasonably requires the buildings for demolition. I think that the word " premises " in paragraph (*h*) includes both land and buildings, but that, as used in paragraph (*m*), the word refers only to buildings, a view that is supported by the words " or for removal to another site " that have been inserted in the paragraph by the amending Act of 1953. Moreover, I think there is sufficient reason for construing the word in the former sense in paragraph (*h*) and in the latter sense in paragraph (*m*) c.f. *Whitley* v. *Stumbles* (1930) A.C. 544 at 547.

It seems to me too that circumstances may exist in which a landlord would not speak inconsistently if he made assertions that brought his case within each of the two paragraphs. Thus, in the present case, the landlord has in one breath said in effect that " the premises " are required for its own occupation and that " the premises " are required for demolition ; and I think that in the circumstances the first of these assertions means that " the premises " that are required for occupation are the land and that the second of those assertions " the premises " means the buildings that are themselves to be demolished. The Plaintiff having, as I think, established both the ground contained in paragraph (*h*) and the ground contained in paragraph (*m*) is entitled to have its case dealt with as it asks that it should be dealt with, on the footing that it rests on the former ground alone.

I regret that the view I have expressed is not the same as that taken by my brother Hutchison. I need not say that I differ from him only after giving the matter anxious consideration. Having formed my own conclusion however, I have felt bound to express it.

Treating the Plaintiff's case then as based on paragraph (*h*) I turn to the other aspects of the matter that require consideration. It is common ground that on 28th September, 1951, there was given a notice under the second proviso to sub-section (1) of Section 25 that had the effect of excluding the provisions of that sub-section : and it is accordingly also common ground that the jurisdiction that now has to be exercised is that entrusted to the Court by sub-secton (2) of Section 24 of the Act.

There is no doubt that the refusal of an order would cause hardship to the Plaintiff. It claims that for reasons that were advanced in some detail, possession is essential to its business. I am not satisfied that in that respect the use of the word " essential " is justified ; but I am satisfied that without possession it will suffer considerable loss and inconvenience and therefore considerable hardship. I am satisfied too that the making of an order would cause considerable loss and therefore considerable hardship to the Defendants. It was contended by Mr. Hardie Boys that the two main matters of hardship to the Defendants that would flow from an order for possession are the extinction of their business and their loss of expenditure they have incurred since 1946. I shall refer to the latter in a moment ; but, with regard to the former, the extinction of their business, I think it is safe to say that, speaking generally, the Court shrinks from exercising its jurisdiction under the Act in a way that will involve the extinction of a business ; and, if the matter rested solely upon the consideration to which I have already referred, I would, to say the least, hesitate to make an order for possession.

But the matter does not rest there. The property was bought by the Plaintiff in 1941. At about that time it was made known to the Defendants that the Plaintiff desired to build ; but conditions made building impossible and the Defendants thereafter remained in possession under one agreement or another until 2nd February, 1948, the Plaintiff gave the Defendants a three months notice to quit and later began the proceedings for possession that were heard in 1949 by my brother Hutchison. Up till then the Plaintiff

In the Supreme Court of New Zealand.

No. 11. Reasons for Judgment of Cooke, J. 4th December, 1953— *continued.*

had failed to obtain a building permit. It was, however, proved in the present action that in those previous proceedings the Defendant Gifford said that, at the time of the agreement to lease of 29th August, 1944, the Defendants said they would go as soon as the Plaintiff got a permit and that, in reply to the learned judge, Mr. Gifford said :

> " We have always said that once the landlords got their " permit we will be quite agreeable to help them. I understood " when they got their permit we would go. At present they don't " seem to have much chance of getting a permit."

It was also proved in the present action that Mr. McKenna, who had heard Mr. Gifford's evidence in the previous proceedings, said in those proceedings that he was able to corroborate it as true. I think this corroboration extended to the parts of Mr. Gifford's evidence to which I have just referred. In the course of his evidence in the present case Mr. Gifford said this :

> " And right up till 1951 you have led them to believe that " when they obtained a permit you would be willing to give up ? " Yes. But the City Council had not been at us. So is it your " sole reason for declining to observe your previous undertakings " on account of the money you have spent on the premises during " the last few years ? And legal advice."

Later in his evidence, after giving somewhat vague answers to questions directed to the cost of work done since the judgment of Hutchison J., he said :

> " What do you consider would be reasonable compensation " for the work that you have done ? I am not prepared to state " an amount just now. If satisfactory compensation were " arranged would you be prepared to give the same assurance that " you would go out as you gave to Hutchison J. ? No."

I cannot but feel that the giving by the Defendants of the assurance before Hutchison J. and the refusal to renew it before me if satisfactory compensation were arranged for the intervening expenditure is a matter that must go pretty heavily into the scale in favour of the Plaintiff in this case.

The other main ground of hardship relied on by Mr. Hardie Boys is the expenditure by them since 1946 of considerable sums of money on the premises. The weight of this as a ground of hardship is not only materially lessened by the absence of any details of expenditure and by the fact that the agreement with the Council of 16th April, 1946, provides for demolition on three months' notice, but is very largely removed by Mr. Gifford's refusal in the present proceedings to vacate if satisfactory compensation were arranged for the work that the Defendants have done since the hearing before Mr. Justice Hutchison.

There is also evidence that over recent years Mr. Gifford has owned two houses in the town and that Mr. McKenna owns properties the value of which runs into many thousands : but there is no evidence at all before the Court as to the income derived by the Defendants from the boardinghouse business. Indeed their Counsel said that they elected not to put their

financial affairs before the Court except for the evidence of Mr. Gifford that he has not the means to build a new private hotel. It was also said by Mr. Hardie Boys that, if the Defendants wished to rely on having no other business than the boardinghouse business or on their income from the latter business being of any particular amount, it was for them to prove it. Nevertheless, they have carried on the boardinghouse business for 26 years and from that fact alone it is, in my view, reasonable to infer that they have made worthwhile profits from it.

I think that in the absence of any suggestion that there is suitable alternative accommodation, I must assume that an order for possession would mean the extinction of the Defendants' business. I think, however, that on the material before me, I cannot hold that such an order would deprive them of their whole livelihood or of any particular amount of income. On the other hand there is the Plaintiff's need of these premises for its business, coupled with the history of the matter since 1941 and the circumstances to which I have already referred in which the offer to vacate was made, but was, because of the subsequent expenditure, no longer kept alive.

Having regard to the considerations I have mentioned and to the circumstances of the case I have come to the conclusion that, looking at the matter only as between the Plaintiff and the Defendants, the just and proper course would be to exercise the discretion under sub-section (2) of Section 24 in favour of the Plaintiff and to make an order for possession.

Before turning to the question of hardship " to any other person " it is necessary to say a word or two about a question that arose towards the end of the hearing. By its statement of claim the Plaintiff, having alleged that the premises are reasonably required by it for its own occupation, asserts alternatively that possession is required of a part of the premises in excess of the reasonable requirements of the Defendants. I understand it to be clear, however, that, if construction were proceeded with in accordance with the plan or sketch put in as part of the Plaintiff's case, land at present covered by the hotel building would be covered by a new building or by covered space. Neither counsel in opening his case said anything about the Plaintiff's alternative assertion ; but after the conclusion of the evidence Mr. Hardie Boys submitted that with very little alteration of the plan the Plaintiff's needs could be accommodated by using the vacant land in front of the hotel without interfering with the hotel building itself. Mr. McGregor thereafter submitted that, as an alternative to possession of the whole of what is occupied by the Defendants, the Plaintiff should have possession of the unoccupied space included in the demise and lying in front of the present building. Mr. Henderson had been cross-examined on the question as to the giving of access to a new site for the hotel at the rear of the land and the alteration of the building plan in order to provide for that access (although it was later intimated on behalf of the Defendants that to move the building is impracticable and that they are not interested in that suggestion) and Mr. Henderson had also been cross-examined on the question of whether the Plaintiff could not satisfactorily carry out its building

In the Supreme Court of New Zealand.

No. 11. Reasons for Judgment of Cooke, J. 4th December, 1953— *continued.*

operations by using only half of the two chain frontage. Upon the latter aspect of the matter he did not depart from his evidence in chief to the effect that it is fundamental to the Plaintiff's plans that it should have the whole frontage. Mr. Hardie Boys, however, very fairly conceded that it was not really put to Mr. Henderson that the plan could be amended so as to provide for use of the vacant land in front of the hotel in such a way as not to interfere physically with the hotel building itself.

The situation that thus arose appeared to give rise to some difficulty and counsel thereupon agreed that, if I were against the Plaintiff in its claim to possession of the whole of the land included in the demise, the hearing of this case should be further adjourned to enable the question of the alternative claim to be considered and further evidence to be called. I am not sure that this agreement, which I think was suggested by myself at the time with the object of enabling some progress to be made with this protracted litigation, was a satisfactory way of dealing with the situation, because logically the very fact—if it were the fact—that the Plaintiff could reasonably do with less might well be a reason for refusing it possession of the whole. I think, however, that, apart from any agreement between counsel, the resolution of whatever difficulty arises in connection with the alternative claim is to be found in the following considerations. In the first place it is to be remembered that until after the conclusion of the evidence the case was conducted by both parties without reference to the question whether the Plaintiff's plans could be altered in such a way as to provide for the erection of the proposed new building by still using the whole two chain frontage but without actually interfering with the existing building and no suggestion was made on behalf of the Defendants that the Plaintiff's plans could be redrawn to provide for such a thing. In that state of affairs it seems to me that, the Plaintiff, having by Mr. Henderson's evidence coupled with the plan established a *prima facie* case that it reasonably required the whole property for its own occupation, less than justice would be done if its claim for possession of the whole were allowed to be defeated by a suggestion that it should alter its building proposals, when that suggestion was made late and is unsupported by any evidence as to its practicability and allied matters. Taking that view, it is unnecessary to consider the wider question as to whether the Court should not in any circumstances be slow to entertain a suggestion that the long term building plan of a landlord who has established a *prima facie* case for possession should be altered to avoid interference with an existing but old and decayed wooden structure occupied by his tenant. In the second place, I think that in the circumstances the agreement of 16th April, 1946, even if *ultra vires* of the Council, cast a moral obligation on the other parties to it to comply with its terms and therefore to demolish or permit to be demolished on three months notice, and it seems to me that, in relation to questions of hardship and the exercise of the discretion under sub-section (2) of Section 24, such a moral obligation must be taken into account and that, for the purposes of the exercise of the discretion under that sub-section, the hotel building must therefore be regarded as one that both parties were

under an obligation to demolish. For the reasons I have given, then, I do not think that the question of the alteration of the plan so as to leave the existing building untouched should be taken into account in the present proceedings.

There remains for consideration the question of hardship " to any other person." It is common ground that there are no sub-tenancies in the hotel and that those who avail themselves of the accommodation in it are all boarders. It is, however, contended for the Defendants that the expression " any other person " includes not merely the boarders at present in the hotel but also people generally, the members of the public, who may require accommodation as boarders in this type of private hotel, and that the Court must therefore take into account not only hardship to the existing boarders but also hardship to the public. Upon this aspect of the matter I heard evidence from leading citizens of Palmerston North that satisfies me that the hotel fulfils a very useful function in the community. I have already held this year in *Baudinet* v. *Parsloe and Another* that the interest of the public, having regard to the existing shortage of accommodation, in the carrying on of a house as a boarding house in the City of Wellington is not a relevant matter within the meaning of sub-section (2) of Section 24 and I see no reason to depart from that view. I, therefore, for present purposes, exclude from consideration the hardship that an order for possession would cause to the public. It is necessary, however, to take into account the hardship to the existing occupants. The evidence shows that there is accommodation for 31 adults and 7 children, apart from the proprietors and the staff, that the place is usually " pretty well full " and that most of the people who avail themselves of the accommodation are " casuals " who come and go. I do not think that the ephemeral hardship that would be caused to the casual boarders who might be in the hotel at the time an order for possession had to be complied with is a matter that is very material for present purposes ; but it is necessary also to consider the hardship that such an order would cause to those who stay some length of time. There is no evidence as to the numbers of these except that they are few, and there is no evidence as to how long any of them have been there, except that one of them, who gave evidence, says he has been there eight years. There is no doubt that an order for possession would cause hardship to these people in varying degrees ; but in my view that hardship would be reduced to a degree that for present purposes would be comparatively small if the operation of any order for possession were postponed for a reasonable period.

I have already expressed the view that looking at the matter only as between the Plaintiff and the Defendants, there should be an order for possession ; and I think that, for the reasons I have just given, any hardship " to any other person " would not be great enough to turn the scales against the Plaintiff. It follows then that there must be an order for possession. I understand that, if the Plaintiff succeeds it is prepared to concur in suspension of the order for six months. On the whole, however, I think it should be suspended until 30th June, 1954.

In the Supreme Court of New Zealand.

No. 11. Reasons for Judgment of Cooke, J. 4th December, 1953—*continued.*

There is one further matter. In addressing the Court after the close of the evidence counsel for the Plaintiff said that the Plaintiff has offered and still offers to pay the Defendants " everything expended for compliance " with requisitions and preservation of the building or necessary to continue " their business as determined by Mr. Wilson." I understood it to be clear that the above offer is confined to expenditure incurred since the date of the hearing of the previous action before Mr. Justice Hutchison. I do not think I have jurisdiction to make the refunding to the Defendants of such expenditure a condition of the order I propose to make and I have not taken the foregoing offer into account in reaching my conclusions on the case. I do not doubt, however, that the Plaintiff will carry out its offer.

There will be an order for possession, execution of which will be suspended until 30th June, 1954, and the question of costs will be reserved.

No. 12. Formal Judgment. 4th December, 1953.

No. 12.

Formal Judgment.

Friday the 4th day of December, 1953.

Before The Honourable Mr. Justice COOKE.

THIS ACTION coming on for trial on the 26th day of May, 1953, and 27th day of October, 1953, before the Honourable Mr. Justice Cooke without a jury after hearing the parties and the evidence then adduced and judgment being reserved unto to-day IT IS THIS DAY ORDERED that the Defendants do give to the Plaintiff possession of the premises described in the Statement of Claim herein on or before the 30th day of June, 1954, and that the question of costs be reserved.

By the Court,

A. R. C. CLARIDGE,
Registrar.

No. 13.

Notice of Appeal.

IN THE COURT OF APPEAL OF NEW ZEALAND.

Between

MATTHEW JAMES McKENNA and VINCENT LEO GIFFORD of Palmerston North, Private Hotel Proprietors ... ... *Appellants*

and

PORTER MOTORS LIMITED a duly incorporated Company having its registered office at Palmerston North and carrying on business as Garage Proprietors ... ... *Respondent.*

TAKE NOTICE that this Honourable Court will be moved on Tuesday the 8th day of June 1954 at 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard on appeal from the whole of the judgment of the Supreme Court of New Zealand delivered by the Honourable Mr. Justice Cooke at Palmerston North and sealed on the 27th day of April 1954 in the matter of an action under Number A. 10/1953 in the Palmerston North Registry of the Wellington District of the Supreme Court of New Zealand wherein the Appellants were Defendants and the Respondent was Plaintiff UPON THE GROUNDS that the judgment is erroneous in fact and in law.

DATED at Wellington this 12th day of May 1954.

R. HARDIE BOYS,
Solicitor for the Appellant.

To : The Registrar of the Court of Appeal of New Zealand.

AND : To the Registrar of the Supreme Court of New Zealand at Palmerston North.

AND : The Respondent and its Solicitor.

This Notice of Motion on Appeal is filed by Reginald Hardie Boys, Solicitor for the Appellant whose address for service is at the offices of Messrs. Hardie Boys, Scott & Haldane, T. & G. Building, Grey Street, Wellington, or at the offices of Messrs. Innes, Innes and Oakley, Rangitikei Street, Palmerston North.

In the Court of Appeal of New Zealand.

No. 14.

Reasons for Judgment (Gresson, Hay, Turner, JJ.) per Turner, J.

No. 14. Reasons for Judgment (Gresson, Hay, Turner, J.J.) *per* Turner, J. 8th December, 1954.

This is an appeal from a decision of Cooke, J. sitting at Palmerston North, wherein on the landlord's application he made an order for possession to be given by the tenants of certain urban property known as the Rangitikei Private Hotel. It is not necessary to set out the facts at any length. The Statement of Claim prayed for possession to be given to the Plaintiff Company (in this Court the Respondent) on three grounds—(*a*) that Defendants (in this Court, Appellants) had failed to perform or comply with the conditions of the tenancy (para. 11 of the Statement of Claim: Section 24 (1) (*a*) of the Act); (*b*) that the premises were reasonably required by the Respondent for its own occupation (para. 12 of the Statement of Claim: Section 24 (1) (*h*) of the Act); (*c*) that possession was required of a part of the premises in excess of the reasonable requirements of the Appellants (para. 12 of the Statement of Claim: Section 24 (1) (*e*) of the Act). There was no claim on the ground that the premises were reasonably required by Respondent for demolition or reconstruction (Section 24 (1) (*m*) of the Act): such a claim could not have succeeded as no offer of alternative accommodation had been made such as is necessary to support this ground.

On ground (*a*) (that Appellants had failed to perform or comply with the conditions of the tenancy) the learned trial Judge found against Respondent and, as there is no cross-appeal, it is unnecessary to devote any consideration to this cause of action. On the ground (*c*) (that possession was required of a part of the premises in excess of the reasonable requirements of Appellants) he came to no definite decision. Ground (*c*) does not seem to have been the subject of any substantial evidence, or of any submissions by either party, until the concluding addresses of Counsel when it was belatedly discussed for the first time. It was at this late stage apparently agreed between Counsel that in the event of the Court's decision being against Respondent on grounds (*a*) and (*b*), there should be a further hearing including further evidence, if necessary, on ground (*c*). This latter ground, therefore, is not dealt with on the facts; and could not be the subject of any argument in this Court as the matter at present stands.

On ground (*b*) (that the premises were reasonably required by Respondent for its own occupation) judgment was given in favour of Respondent. The learned trial Judge held on the facts that Respondent desired to have possession in order to demolish the existing buildings. No attempt was made, however, as has been pointed out, to found Respondent's claim on Section 24 (1) (*m*). The Judge also held that Respondent's intention to demolish the buildings did not preclude its succeeding on the grounds set out in Section 24 (1) (*h*). An order was made accordingly, granting possession, and it is against this order that the present appeal is brought.

The same point had been previously canvassed in an action between the same parties, which came before Hutchison, J. in 1949: *Porter Motors Ltd.*

v. *McKenna & Anor.* 1950 N.Z.L.R. 8. Hutchison, J. held in favour of Defendants. He said at page 15 :

" It was contended that the Plaintiff, who wishes to demolish " the Rangitikei Private Hotel, cannot claim to require it for its " own occupation. I think that this contention is sound. The " grounds stated in paras. (*h*) and (*m*) of Section 24 (1) seem to me " to be alternative grounds, which in this case, at any rate, cannot " be treated as cumulative. The ' premises ' are the private " hotel ; as the landlord wishes to demolish the ' premises,' it " may not claim that it requires to occupy the ' premises ' itself."

This view of the law was attacked before Cooke, J., who, after careful consideration, found himself bound to come to the opposite conclusion. He said :

" It seems to me, too, that circumstances may exist in which " a landlord would not speak inconsistently if he made assertions " that brought his case within each of the two paragraphs. Thus, " in the present case, the landlord has in one breath said in effect " that ' the premises ' are required for its own occupation and " that ' the premises ' are required for demolition ; and I think " that in the circumstances the first of these assertions means " that ' the premises ' that are required for occupation are the " land and that the second of those assertions ' the premises ' " means the buildings that are themselves to be demolished. The " Plaintiff, having, as I think, established both the ground " contained in paragraph (*h*) and the ground contained in para- " graph (*m*) is entitled to have its case dealt with as it asks that it " should be dealt with, on the footing that it rests on the former " ground alone."

This Court is now asked to review the differing conclusions of Hutchison, J. and Cooke, J., and the case for Appellants is that the decision of Hutchison, J. was right in law, and that the appeal should accordingly be allowed and the order for possession vacated, at least so far as it rests on ground (*b*).

In examining the merits of the opposing arguments, the obvious starting point is the text of the relevant parts of Section 24. These are worded as follows :

" 24. (1) An order for the recovery of possession of any " dwellinghouse or urban property or for the ejectment of the " tenant therefrom, may, subject to the provisions of this Part " of this Act, be made on one or more of the grounds following, " but shall not be made on any other ground :—

" . . . (*h*) In the case of an urban property, that the premises " are reasonably required by the landlord . . . for his . . . " own occupation :

" (*m*) That the premises are reasonably required by the " landlord for demolition or reconstruction or for removal to " another site."

In the Court of Appeal of New Zealand.

No. 14. Reasons for Judgment (Gresson, Hay, Turner, J.J.) *per* Turner, J. 8th December, 1954—*continued.*

It will be noticed at once that the words " the premises " are used in both subsections. As is pointed out in the judgment appealed from, however, the meaning of the word cannot be the same in each case. It is by no means unprecedented for a Court to decide that the same word used more than once in one Act, or even in the same section, may have different meanings : see, for instance, *Maxwell on the Interpretation of Statutes* 10th Edn. page 322, and *Doe* v. *Angell* (1846) 9 Q.B. 328. In subsection *(m)* " premises " can mean only the *buildings* on the land, since it is clear that only buildings can be demolished or reconstructed. (The words " or for removal to another site " have now been added by the Tenancy Amendment Act (No. 2) 1953, but we do not take into account these words, which have been added to the section since the hearing of the action, to assist in interpreting it). In sub-section *(h)* however, " premises " must mean the land with any buildings thereon, since *(h)* can undoubtedly have reference to urban land upon which no buildings are erected of which possession is sought.

In the present case, the area covered by the tenancy is not specifically defined in the lease. It was said in argument before us, however, that the area occupied by Appellants had dimensions of some 63 ft. frontage by some 147 ft. deep—i.e., it was the land upon which the hotel is actually built and a substantial surrounding area which is defined upon the ground itself The area occupied by Appellants was said to be something less than one-fourth of the whole area owned by Respondent.

It was contended in the first place by Mr. Hardie Boys that the very fact of sub-section *(m)* being included in Section 24 precludes the argument advanced in the Court below by Respondent. If Cooke, J.'s judgment were right, he said, there should be no need for sub-section *(m)* at all. In our opinion this argument must fail, because sub-section *(m)* will in any case have application (as has been pointed out by Williams, J in the High Court of Australia in *Burling* v. *Chas. Steele & Company Pty Ltd.* (1948) 76 C L R. 485, 490) to cases where a landlord not wishing to occupy at all, desires nevertheless to demolish or reconstruct—e.g. where a shop let to a tenant is to be demolished and a new shop erected in its place also for letting.

Alternatively, Mr. Hardie Boys argued that a landlord cannot be said to require premises for his occupation when he really intends to demolish the buildings which form a part of those premises. He contended that occupation of the premises meant occupation of each part of the premises, and that this is inconsistent with an intention to demolish any substantial part. We do not think that there is any inconsistency. It may be worth noticing that, while in the case of a dwellinghouse sub-section *(g)* provides that the premises must be reasonably required by the landlord . . . for his occupation as a *dwellinghouse*, in sub-section *(h)*, the corresponding provision relating to urban property, there are no words corresponding to those italicised. A landlord may, in our opinion, enter into occupation of premises intending as part of his enjoyment thereof to demolish the buildings, and substitute others therefor which he in turn will occupy : he is occupying

the premises if he occupies the land and such buildings as from time to time are situate thereon. In the case of urban property, we do not find any words in the section which conflict with this view.

We are therefore led to prefer the view of Cooke, J., to that of Hutchison, J on this point, and to conclude that " premises "—i.e., land and the buildings upon it—may be required by the landlord for his own occupation when it is the intention of that landlord, upon obtaining possession, to demolish or reconstruct the " premises "—i.e., the buildings situate upon the land. This conclusion disposes of the appeal insofar as it is based on the construction of Section 24 (1) (*h*) and (*m*).

A further alternative ground of appeal, however, is advanced by Mr. Hardie Boys—namely, that even assuming that Cooke, J. had jurisdiction to make an order, he misdirected himself in the exercise of the discretion given to him under Section 24 (2). It was common ground that Respondent had given one year's notice to Appellants of its intention to institute the present proceedings, thus excluding the provisions of Section 25, if possession was sought under Section 24 (1) (*h*) The discretion given to the Court by Section 24 (2), however, still remains, even when this ground is invoked, though in these circumstances, it appears that the onus of proving the greater hardship will no longer rest on Respondent In support of this alternative ground of appeal, it was first contended that Cooke, J. was wrong in taking into account as " a matter which must go " pretty heavily into the scale in favour of the Plaintiff " the fact that at the previous trial Appellants had given to Hutchison, J. an assurance that they had always been, and in the future still would be, prepared to vacate the premises if Respondent obtained a building permit and that at the hearing before Cooke, J. they had withdrawn that assurance. It was contended that in taking this into account, Cooke, J. ignored the effect of Section 47 of the Tenancy Act 1948 which expressly provides that no covenant or agreement entered into before or after the commencement of that Act shall have any force or effect to deprive any tenant of any right, power, privilege or other benefit provided by the Act. An appellate Court may review the exercise of a discretion vested in a trial Judge if it is satisfied that he has exercised it on irrelevant considerations: *Stevens* v. *Walker* (1936) 2 K.B. 215, 223; *Societe des Hotels Reunis* v. *Hawker* 30 T.L.R. 423, 425. If Appellants had been able to show that Cooke, J. had been manifestly influenced in the exercise of his discretion by the breach of an undertaking to vacate given by Appellants *to Respondent*, this argument might have been tenable to support the present appeal; but it appears clear from a perusal of the judgment appealed from that the considerations which moved Cooke, J. was that Appellants had blown hot and cold in the course of the proceedings, and had retracted an assurance deliberately given to the Court. The realities of the situation compel the conclusion that the two actions, though separate in form, and divided by an interval of some four years, were only two successive stages of the same litigation. Appellants were asked by Hutchison, J. at one stage to define their attitude in the event of a building permit being granted, and they then gave an assurance

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No. 14. Reasons for Judgment (Gresson, Hay, Turner, J.J.) *per* Turner, J. 8th December, 1954—*continued.*

that in that event they would vacate and that they had always been willing to do this. At a later stage, when the permit had in fact been granted, they were asked the same question by Cooke, J. and they declined to renew the assurance previously given. It is true that the assurance given to Hutchison, J. in the first proceedings does not appear to have influenced his decision, which went in favour of Appellants purely on the point of construction which has already been dealt with ; but an assurance of this kind is not lightly to be given to a Judge in the course of the hearing of an action, and, once given, it is not lightly to be retracted. It was the fact of retracting which influenced Cooke, J. in the exercise of his discretion against Appellants, and we are unable to conclude that it has been shown that in allowing it to influence him he exercised his discretion on a wrong principle.

In the second place it was contended that Cooke, J. was wrong in allowing himself to be influenced in some degree by the failure of Appellants to comply with the City Council's requisition to demolish the premises, founded on the agreement in writing dated April 16, 1946, executed jointly by Appellants and Respondent. It must be noted, however, that the learned trial Judge does not appear to have taken this factor into account in the first part of his judgment, in which he decided to make an order against Appellants on the claim of Respondent for possession under Section 24 (1) *(h)*, (the section under which the claim succeeded)—or if he did so, it is clear that he was not substantially influenced by it. The matter was mentioned by Cooke, J. only at a later stage in his judgment when he was examining the contention of Appellants that if an order had to be made, it should be rather under Section 24 (1) *(e)* in respect of a portion only (but the major portion) of the premises, and insofar as he took it into account at all, it influenced him on this point. This second submission of Appellants would perhaps be more worthy of examination if Appellants had rested any substantial part of their case at the trial on Section 24 (1) (*e*) ; but, as has been mentioned above, the matter was not even adverted to by either party at the trial, until in the course of the concluding addresses it was submitted by Mr. Hardie Boys that with very little alteration of the plan, Respondent's needs could be met by giving possession of something less than the whole of the land. Neither Respondent nor Appellants, however, had adduced any evidence on this aspect of the case, nor had Appellants cross-examined Respondent's witnesses upon the practicability of the suggestion ; and Cooke, J. was, in our opinion, well justified on this ground alone in declining (as he did) to consider the matter on the basis of Section 24 (1) (*e*). Where both Counsel (as here) so shape their cases before the trial Judge as to leave out of consideration some argument which might have been developed had it been thought expedient, and where, moreover, the evidence which would support such an argument is deliberately not placed before the Court, an appellate Court will, we think, generally be well justified in declining to give much consideration to an appeal based upon it, and we therefore disallow the arguments of Appellants under this head and decline to re-examine the exercise of his discretion by Cooke, J.

Mr. Hardie Boys also submitted on this aspect of the appeal that the

learned trial Judge had misdirected himself in several other respects in the exercise of his discretion under Section 24 (2); but the other matters which he put forward appear to us to be either findings of fact or applications of the Court's discretion in weighing the comparative importance of facts—decisions with which this Court will be most reluctant to interfere, and which in this case we do not think it should attempt to review. Mr. Blundell correctly invoked in this regard such decisions as *Chandler* v. *Strevett* (1947) 1 All E.R. 164, 166, and *Robinson* v. *Donovan* (1946) 2 All E.R. 731, 732.

In the result therefore the appeal will be dismissed. Respondent will have the costs of the appeal, on the higher scale as from a distance. In view of the approach of the Vacation, the order dismissing the appeal may not be sealed until after January 31, 1955.

In the Court of Appeal of New Zealand.

No. 14. Reasons for Judgment (Gresson, Hay, Turner, J.J.) *per* Turner, J. 8th December, 1954— *continued.*

No. 15.

Formal Judgment.

No. 15. Formal Judgment. 8th December, 1954.

Wednesday the 8th day of December, 1954.

Before

The Honourable Mr. Justice GRESSON.
The Honourable Mr. Justice HAY, and
The Honourable Mr. Justice TURNER.

This Appeal coming on for hearing on the 2nd July, 1954 UPON HEARING Mr. R. Hardie Boys of Counsel for the Appellants and Mr. E. D. Blundell of Counsel for the Respondent IT IS ADJUDGED that the Appeal be and the same is hereby dismissed and it is ordered that the Appellants do pay to the Respondent costs on the highest scale as on a case from a distance.

BY THE COURT
"V. J. HITCHCOCK,"
Deputy Registrar.

L.S.

No. 16.

Motion for Leave to Appeal to Her Majesty in Council.

No. 16. Motion for Leave to Appeal to Her Majesty in Council. 21st December, 1954.

TAKE NOTICE that this Honourable Court will be moved by Mr. R. Hardie Boys of Counsel for the Appellants on day, the day of 195 , at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER granting to the Appellants leave

In the Court of Appeal of New Zealand.

No. 16. Motion for Leave to Appeal to Her Majesty in Council. 21st December, 1954—*continued.*

to appeal to Her Majesty in Council upon such conditions as this Honourable Court may think fit to impose from the Judgments of this Honourable Court delivered on the 8th day of December, 1954, herein UPON THE GROUNDS

(*a*) That the Appeal involves directly or indirectly a claim or question respecting property amounting to or of the value of Five hundred pounds (£500) sterling or upwards,

or alternatively—

(*b*) That the question involved in the Appeal is one which by reason of its great general or public importance ought to be submitted to Her Majesty in Council for decision.

AND FOR A FURTHER ORDER that execution on the Order for Possession made in the Supreme Court by the Honourable Mr. Justice Cooke on the 4th day of December, 1953, be suspended pending the decision of Her Majesty in Council upon such terms as to security as to the Court shall seem just and upon the grounds set forth in the Affidavit of Vincent Leo Gifford sworn and to be filed herein.

DATED at Wellington this 21st day of December, 1954.

" R. HARDIE BOYS,"
Solicitor for Appellants.

To : The Registrar of this Honourable Court.

AND TO : Messrs. McGregor and McBride, Solicitors, Palmerston North, Solicitors for the Respondent.

No. 17. Affidavit of Vincent Leo Gifford in support of Motion for Leave to appeal to Her Majesty in Council. 20th December, 1954.

No. 17.

Affidavit of Vincent Leo Gifford in support of Motion for Leave to Appeal to Her Majesty in Council.

I, VINCENT LEO GIFFORD of Palmerston North, Private Hotel Proprietor, make oath and say as follows :

1.—THAT I am one of the abovenamed Appellants.

2.—THAT the value of the property involved in this Appeal amounts to £500 sterling or upwards.

3.—THAT it is shown in the evidence in the Court below that the premises in respect of which possession is sought to be obtained herein have a frontage of 63 ft. to Rangitikei Street, Palmerston North, by a depth of 147 ft. out of a total frontage of 132 ft. and a total depth of 330 ft.; it is further shown in such evidence that the whole site was purchased by the Respondent in the year 1941 for £6,500 the same being vacant land except

for the premises of the private hotel occupied by the Appellants ; it is further shown in such evidence that the land upon which the Rangitikei Private Hotel now stands is worth at least £200 per foot of frontage.

4.—THAT the value of the Appellants' tenancy of the premises involved in this Appeal is above the sum of £500 sterling in that such tenancy enables the Appellants together with the wife and child of the Appellant, Matthew James McKenna to reside therein and derive therefrom a gainful living and no comparable tenancy of alternate premises even if available could be acquired except at a price greatly in excess of £500 sterling.

5.—THAT the question involved in this Appeal is one of great general or public importance affecting every tenant of urban property who until the Judgment appealed from was delivered had been entitled to rely upon the Judgment of the Supreme Court of New Zealand between the same parties as hereto delivered by the Honourable Mr. Justice Hutchison on the 12th day of August, 1949, wherein it was adjudged that a landlord requiring to demolish premises for the purposes of rebuilding upon the same site was required to provide the tenant with suitable alternative accommodation.

6.—THAT the matter in question in this Appeal affects every tenant of urban property in New Zealand whose landlord is able to obtain a permit to build new premises upon demolition of existing tenanted premises including necessarily persons whose landlords have hitherto brought no action against them by reason of the said Judgment delivered in the year 1949.

7.—THAT execution on the order for possession made in the Supreme Court on the 4th day of December, 1953, by the Honourable Mr. Justice Cooke should be suspended pending the decision of Her Majesty in Council by reason of the hardship which would be caused to the Appellants in the event of a favourable decision from Her Majesty in Council were the Respondent prior to such decision permitted to evict the Appellants from the Rangitikei Private Hotel and demolish the same.

SWORN at Wellington this 20th day of December, 1954, before me :

" V. L. GIFFORD."

" J. A. WILSON,"
A Solicitor of the Supreme Court of New Zealand.

In the Court of Appeal of New Zealand.

No. 18. Affidavit of Alan Desmond Long in support of Motion for Leave to appeal to Her Majesty in Council. 10th March, 1955.

No. 18.

Affidavit of Alan Desmond Long in support of Motion for Leave to Appeal to Her Majesty in Council.

I, ALAN DESMOND LONG of Palmerston North, Valuer, make oath and say as follows :

1.—THAT I am a valuer practising in Palmerston North and am well acquainted with the premises at 108 Rangitikei Street, Palmerston North, known as the Rangitikei Private Hotel, of which I have made various inspections in and since the year 1947.

2.—THAT on the 4th day of March, 1955 I again inspected the same for the purpose of valuing improvements and erections either known to me as being or pointed out to me by the abovenamed Appellants as having been installed or erected in or upon the premises known as the Rangitikei Private Hotel by the Appellants.

3.—THAT for the purposes of my said valuation I have taken account of (*a*) the original cost, (*b*) depreciation, and (*c*) salvage value on removal where removal is possible and available to the Appellants and have arrived at a resultant figure of the amount of money spent by the Appellants which would be lost to them on being evicted from the Rangitikei Private Hotel.

4.—THAT I value the said amount which would be lost to the Appellants upon eviction as £1029 made up as shown in the schedule hereunto annexed marked with the letter " A."

SWORN at Palmerston North this 10th day of March, 1955, before me :

" A. D. LONG."

" E. L. EVANS,"
A Solicitor of the Supreme Court of New Zealand.

"A."

SCHEDULE.

Item.	*Approximate date of construction or installation.*	*Initial cost where known.*	*Present depreciated value.*	*Salvage value nett.*	*Loss.*
1. Two bedrooms built of rusticating, iron roof, part wood and part concrete floor, lined with composition board and painted. Electric light installed and with two casement windows. Size 145 square feet. This room is built on to the rear of the existing building	1935	—	168	Nil	681
2. Room built using one wall of existing building. This room is built of weatherboard lined internally with rough lining, scrim and paper with composition board, ceiling, electric light, two casement windows and two squat windows ...	1935	—	60	Nil	60
3. External passage built with weatherboard to a height of four feet and four feet in fixed glass with wood floor and iron roof. 188 square feet... ...	1935	—	40	Nil	40
4. Room converted into a bathroom, lined with hardboard, a bath and hand basin and electric light installed and a separate W.C. with pan, seat and cistern and all connected to the sewerage	1950	—	62	Nil	62
5. Two concrete tubs installed in laundry and laid concrete floor, approximately 100 square feet	1950	—	18	Nil	18
6. New bathroom exterior G.C. iron, interior lined with hardboard, installed bath, hand basin, electric light and power, kauri tub and ironing bench, hot and cold water and connected to sewer. Area 45 square feet	1950	—	78	Nil	78

In the Court of Appeal of New Zealand.

No. 18. Annexure "A" to Affidavit of Alan Desmond Long in support of Motion for Leave to appeal to Her Majesty in Council. 10th March, 1955—*continued.*

Item.	*Approximate date of construction or installation.*	*Initial cost where known.*	*Present depreciated value.*	*Salvage value nett.*	*Loss.*
7. Lavatory built of rusticating with iron roof and concrete floor complete with pan, seat and cistern, electric light and connected to sewerage... ...	1950	—	18	Nil	18
8. Five opening squat windows installed	1950	12.10.0	7	Nil	7
9. Built a wood and glass partition at the end of the entrance hall and provided new flush door	—	13.7.6	10	Nil	10
10. Extended three rooms on the first floor to take in an open verandah and glassed in same, also built new floor to existing floor level, provided nine casement windows	1950	—	60	Nil	60
11. Converted a bedroom into a bathroom and lavatory, each lined with hardboard and with concrete floor; the bathroom has porcelain bath and hand basin and the lavatory has pan, seat and cistern and all is connected to sewerage	—	—	58	Nil	58
12. Built fire escapes to the requirements of the local authority	1950	90	70	Nil	70
13. Installed fire system providing water to a point on each floor complete with fire hose and alarm bell system	1950	—	30	Nil	30
14. Erected close boarded fencing at an average height of 6 feet for a distance of 100 feet and a low cyclone wire fence at the front for a distance of 40 feet ...	—	—	35	Nil	35
15. Laid concrete paths and concrete yards to a total area of 200 square feet...	—	—	50	Nil	50

Item.	*Approximate date of construction or installation.*	*Initial cost where known.*	*Present depreciated value.*	*Salvage value nett.*	*Loss.*
16. Built bicycle shed of casing on a concrete upstand with malthoid roof and open front. Area 200 square feet	1952	—	60	Nil	60
17. In 1946 the kitchen and part of the dining room had to be rebuilt as the result of a fire at a cost of £250. The tenants would have the timber, cupboards, sink bench, lining materials, and iron from the roof to sell and the cost of dismantling would almost equal the sale value of the materials	1946	250	200	20	180
18. Eight huts erected two of which have the brick wall of the adjoining building as a back wall. The tenants are permitted to remove these huts; cost of removal and re-erection elsewhere	—	—	—	—	25
			Total		£1029

This is the schedule marked "A" referred to in the annexed Affidavit of Alan Desmond Long sworn at Palmerston North this 10th day of March, 1955, before me :

"E. L. EVANS,"
A Solicitor of the Supreme Court of New Zealand.

In the Court of Appeal of New Zealand.

No. 19. Reasons for Judgment on application for Leave to Appeal to Her Majesty in Council. 3rd June, 1955.

No. 19.

Reasons for Judgment on Application for Leave to Appeal to Her Majesty in Council (Finlay, North and Turner, JJ.) per North, J.

This is a motion for conditional leave to appeal to Her Majesty in Council from a judgment of this Court dismissing an appeal from the judgment of Cooke, J., who ordered the Appellants to give to the Respondent possession of certain premises situated at 108 Rangitikei Street, Palmerston North, occupied by them as tenants.

The Appellants' primary submission was that an appeal lay as of right as the appeal involved directly or indirectly a claim or question to or respecting property amounting to or of the value of £500 sterling or upwards. Alternatively, the Appellants sought leave to appeal as a matter of discretion on the ground that the question involved in the appeal was one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision. In our opinion the Appellants to succeed must bring their case within paragraph (*a*) of Rule 2 of the Privy Council Appeal Rules, for we are of opinion that the Appellants have not shown that the question in issue was of great general or public importance—*Associated Motorists Petrol Company Limited* v. *Bannerman No.* 2, 1943, N.Z.L.R. 664, 666. We do not think that there is any room for dispute as to the way the matter must be approached in determining whether the case falls within para. (*a*) of Rule 2 for it has been authoritatively settled that, in determining the question of the value of the matter in dispute upon which the right of appeal depends, the correct course is to look at the judgment as it affects the interests of the parties who are prejudiced by it and who seek to relieve themselves from it by an appeal—*Macfarlane* v. *Leclaire* 15 Moo. P.C. 181 ; *Allan* v. *Pratt* 13 A.C. 780. The Appellants' tenancy having been lawfully determined their right to remain in possession of the premises arises solely by virtue of the special provisions of the Tenancy Act, 1948. The Appellants have no " property " in the premises, but if they be right in their contentions, merely a personal right to retain possession of the premises—*Sutton* v. *Dorf*, 1932, 2 K.B. 304, 306. In *Meghji Lakhamshi & Brothers* v. *Furniture Workshop*, 1954, A.C. 80, their Lordships in Privy Council were required to consider in similar circumstances the position of a landlord desiring to appeal, and it was there argued for the Respondent tenants that, where the Appellants are the owners of land subject to a statutory tenancy and are seeking possession thereof, it is necessary to deduct from the value of the land with vacant possession the value of the land subject to the statutory tenancy. This contention was, however, rejected, their Lordships being of opinion that the case fell within the latter part of an article very similarly expressed to our own Rule, namely, " some claim or question to or respecting property " . . . of the said value or upwards," and it was held that, on the true construction of the article, it was the value of the property not the value of the claim or question which was the determining factor. Lord Tucker,

who delivered the judgment of the Board, pointed out that a case may fall in whole or in part within more than one limb of the Rule and that under whichever limb any case may fall the " value " must be looked at from the point of view of the Appellant. Thus an appeal may sometimes lie where the landlord is the Appellant although there could be no appeal by the tenant. In that case Lord Tucker accordingly was careful to say that it by no means necessarily followed that the result would have been the same if the tenants had been the Appellants, and he added that the Board did not intend to imply any doubt as to the correctness in this respect of the decisions of the Court of Appeal of East Africa in *Popatlal Padamshi* v. *Shah Meghji Hirji*, Civil Appeal No. 32 of 1951 and *Chogley* v. *Baines*, Civil Appeal No. 57 of 1952.

Counsel were good enough to make available to the Court transcripts of the judgments in these two cases. In the first their Honours said :

> " Our problem then in this appeal is to ascertain what is " at stake, or in other words, to determine in terms of money the " extent to which the intending Appellant is prejudiced by the " judgment which terminates his statutory right to remain in " occupation of the suit premises . . . the assessment of the value " of a statutory tenancy presents difficulties . . . not only does " the tenancy rest on the unknown factor of the continuance in " force of the rent restriction legislation, particularly in relation to " business premises, but also we must consider that failure of one " application for possession by the landlord does not necessarily " debar him from making another. . . . It does not seem to us " that the capital vaue of the premises is relevant to the matter " since the right of ownership is not in issue and the only question " is what is the value of the right of occupancy."

In the second case their Honours said :

> " Clearly the matter at issue involves directly or indirectly " a claim or question to or respecting property but how is the " value of the matter in dispute to be assessed in monetary terms ? " Should the same test be applied for a tenant's as for a landlord's " application ? "

In that case, as in the former case, the Court declined to apply the same test and proceeded to value the right of occupancy and not the value of the property itself. In reaching this conclusion, their Honours relied very largely on the judgment of the Privy Council in *Lipshitz* v. *Valero*, 1948, A.C. 1, and they went on to say that " it would be adopting too narrow a " construction . . . to hold that we cannot take into account in assessing " the value of the right of occupancy . . . anything more than their annual " rental value." The Court then proceeded to examine the particulars supplied by the tenants of their business returns and in granting leave to appeal it is apparent that the decision very largely turned on these figures.

Like the present case, *Lipshitz* v. *Valero* was a tenant's appeal. The Appellant was the owner of a cafe in Jerusalem and the Respondent was the owner of an adjoining piece of land. Originally the Appellant took

In the Court of Appeal of New Zealand.

No. 19. Reasons for Judgment on application for Leave to Appeal to Her Majesty in Council. 3rd June, 1955— *continued.*

part of this adjoining land on a yearly lease for use as a garden for his cafe. Later on the Appellant and the Respondent entered into a written lease and it would appear that it was during the term of this lease that the Appellant built on the land a winter garden at a cost exceeding £P.500. Finally a third agreement was entered into whereby the Appellant leased the land for a period of one month at a rental of £P.13.500 and this lease contained a special provision which seems to have been interpreted to mean that the lessee's construction was to remain his personal property and might be removed by him if he vacated the land on demand. In due course the Respondents did demand possession of the land but the Appellant declined to vacate and invoked the provisions of a Rent Restrictions Ordinance then in force in Palestine. The judgment of the Board was delivered by Lord Normand who said (page 5):

> " The Respondents maintain that the Board has no juris-
> " diction because all that is in dispute or in any way involved in
> " the appeal is the Appellant's right to occupy a small piece of
> " land, and that this right of occupation, having been granted
> " under a lease for one month terminable on three days' notice
> " and at a rent of only £P.13.500 a month, is worth £P.50 at most.
> " They maintain also that the value of the building erected by the
> " Appellant on the land leased by him does not enter into the
> " value of ' the matter in dispute ' or of the right claimed, since
> " there is no mention of the building in the statement of claim or
> " pleadings and no decision has to be made respecting it. Their
> " Lordships are of opinion that this is too harrow a construction
> " of art. 3, and that the true test under the article is whether it is
> " worth £500 to the Appellant that the Rent Restriction Ordinance
> " should be held to give him protection against an order to vacate
> " the land leaving on it a building which cost £450 to erect. This
> " is the test which was applied by the learned Judges of the
> " Supreme Court, who held that the tenancy right amounted in
> " value to at least £P.50 and the value of the building to £P.450."

Mr. Blundell agreed that the value of the right of continued occupancy of the premises was the determining factor but he argued that in assessing the value of that right regard should be had only to the interest of the tenants in the land and buildings as such and should not extend to the value of benefits alleged by them to flow from the fact of the occupancy. Having regard to the authorities which we have just cited, we are of opinion that this is too narrow a construction of the Rule and that the proper approach is to view the matter in the way that found favour with the East African Court of Appeal, for in our view the interpretation placed by that Court on a Rule similarly expressed to our own Rule is in accordance with *Lipshitz* v. *Valero*. We think then that the way this matter requires to be approached is to determine whether the Appellants have established that it was worth £500 sterling *to them* that the provisions of the Tenancy Act 1948 should be held to give them protection against an order to vacate the

land, and this we think necessarily means that all relevant circumstances relating both to the premises themselves and to the business conducted on the premises by the Appellants are considerations which require to be taken into account, for it is the value to the Appellants that is the test. Mr. Blundell's first submission therefore fails. Alternatively he argued that in any event the Appellants had failed to show that the value of the right of occupancy was in fact worth £500 sterling. In considering the matter we feel bound to say that there is considerable force in the criticisms made by Mr. Blundell of the affidavits filed by the Appellants and it would we think have been infinitely better and certainly of greater assistance to the Court if the different facts which the Appellants submitted should be taken into consideration had been more clearly set out. On the other hand we feel that the interests of justice require that we should have regard to the record where necessary to supplement the deficiencies in the affidavits.

Before discussing the various factors which Mr. Hardie Boys submitted should be taken into account in determining the value of the right of occupancy, several matters require to be noticed. First, the Appellants are occupying a valuable site in one of the principal business streets in Palmerston North. The land itself is said to be worth some £12,000 though the rental paid by them is only £5 per week. Secondly, there is at present on the land an old building which has been used by the Appellants for many years as a boarding house. The building is licensed by the City Council as a boarding house entitled to take 38 guests. Thirdly, in an earlier action for possession between the same parties, Hutchison, J., held that the Respondent could not succeed on the grounds set out in Section 24 (*h*) of the Tenancy Act 1948 as it could not establish that it required the premises for its own occupation, for the grounds stated in paras. (*h*) and (*m*) could not in his view in the instant case be treated as cumulative, and this being so it was necessary for the Respondent to satisfy the Court that suitable alternative accommodation was available for the Appellant and this had not been shown. In the present case, on the other hand, Cooke, J., took a different view, holding that the word " premises " in para. (*h*) included both land and buildings, whereas when the same word was used in para. (*m*) it referred only to buildings. In result he held that alternative accommodation need not be available and he disposed of the question of hardship in favour of the Respondent. It was not suggested before the Court of first instance that any alternative accommodation is or will be available and no such suggestion appears to have been made since, therefore from a practical point of view the Appellants, if they be right in their contention, would have a reasonable prospect of retaining the premises indefinitely so long as the Tenancy Act 1948 in its present form remains in force. It is in the light of these facts then that the matter requires to be considered.

The first submission of counsel for the Appellants was that, when regard was had to the value of the land as well as the rent paid by the Appellants, it could reasonably be inferred that the Appellants' right of occupancy must be worth £500 or more. Secondly, he argued that an order for possession—as Cooke, J., found—meant the extinction of the Appellants' business. Cooke, J., in the course of his judgment commented

In the Court of Appeal of New Zealand.

No. 19. Reasons for Judgment on application for Leave to Appeal to Her Majesty in Council 3rd June, 1955— *continued.*

on the fact that the Appellants had not chosen to give any particulars of the income derived by them from the boarding house business, but he said " nevertheless they have carried on the boarding house business for 26 years " and from that fact alone it is, in my view, reasonable to infer that they " have made worthwhile profits from it." In the present application the Appellants have maintained this attitude and were reluctant for some reason to supply information of their actual business returns and contended themselves with saying in an affidavit filed by one of them " the value of " the Appellants' tenancy of the premises involved in this Appeal is above " the sum of £500 sterling in that such tenancy enables the Appellants " together with the wife and child of the Appellant Matthew James McKenna " to reside therein and derive therefrom a gainful living and no comparable " tenancy of alternate premises even if available could be acquired except " at a price greatly in excess of £500 sterling."

On this information, however, Mr. Hardie Boys invited the Court to infer that the loss of their business must be worth at least £500. Finally, relying on *Lipshitz's* case, counsel submitted that certain expenditure incurred by the Appellants in the repair of the building following a fire and in complying with requisitions from the City Council should be taken into account. By way of explanation it is necessary to say that in 1945 a fire broke out and caused some damage to the building. The Respondent apparently was reluctant to apply the insurance moneys towards the re-instatement of an old building and finally it was agreed in writing that the tenancy should continue till 1st August 1946 and thereafter should continue subject to 3 months' notice, and that the Appellants should be entitled to remove any improvements they cared to make to the dining room and kitchen and also should be entitled to remove some huts in the grounds which were apparently used for the accommodation of some of the guests or staff. By way of consideration for this agreement the Appellants released their claim that the insurance moneys should be spent on the re-instatement of the premises. A valuer has valued the loss that the Appellants would sustain in respect of these improvements if they were required to vacate the premises at £205. In addition, there seems no doubt that the Appellants since 1945 have spent a considerable sum in complying with the requisitions by the City Council. According to the valuer's affidavit, the present value of these items of expenditure total £283. Some confirmation that this figure is not excessive is to be obtained from the admission of Mr. Henderson, one of the directors of the Respondent Company, who in cross-examination in the present proceedings appeared to agree that the Respondent's counsel in a certain prosecution proceedings had informed the Court that it would take between £500 and £600 to comply with the Council's requirements, and he further agreed that the Appellants had in the end more than carried out the requirements of the City Council. We agree with much that was said by Mr. Blundell concerning the unsatisfactory way in which this information was placed before the Court and the incomplete nature of that information but, on the other hand, we feel bound to say that when all these factors are considered and given their proper weight it cannot really be doubted that the Appellants have shown that this right of occupancy which they seek to maintain is worth more than

£500 sterling and this being the case conditional leave to appeal should be granted.

It remains to deal with the question whether there should be a stay of execution pending the disposal of the appeal. In the nature of things if a stay be not granted the right of appeal will be of little practical value to the Appellants. We agree that a stay should not lightly be granted but to refuse a stay if the Appellants should be right in their contention will cause them to suffer a heavy loss, for their existing business will be completely disrupted. While then we fully recognise that a further delay is a considerable hardship to the Respondent we feel obliged to order that execution of the order for possession shall be suspended pending the determination of the appeal. The appeal must, however, be prosecuted with the least possible delay and the Appellants are accordingly required to furnish security to the satisfaction of the Court in the sum of £500 within 21 days from this date for the due prosecution of the appeal in terms of Rule 5 (*a*). The further condition is imposed that within a period of two months from this date the Appellants shall take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England.

Costs are allowed to the Appellant in the sum of £21/0/0 and disbursements.

No. 20.

Order granting Final Leave to Appeal to Her Majesty in Council.

IN THE COURT OF APPEAL OF NEW ZEALAND. C.A. 16/54.

Between

MATTHEW JAMES McKENNA and VINCENT LEO GIFFORD of Palmerston North, Private Hotel Proprietors ... ... *Appellants*

and

PORTER MOTORS LIMITED, a duly incorporated Company having its registered office at Palmerston North and carrying on business as Garage Proprietors ... ... *Respondent.*

Before—The Honourable Mr. Justice FINLAY
The Honourable Mr. Justice COOKE
The Honourable Mr. Justice NORTH.

Tuesday the 6th day of September, 1955.

UPON READING the notice of motion filed herein for an order granting the abovenamed Appellants final leave to appeal to Her Majesty in Council and the affidavit of Lyndsay Ann Chadwick sworn and filed herein AND UPON HEARING Mr. R. Hardie Boys of Counsel for the abovenamed Appellants and Mr. L. Greig of Counsel for the abovenamed Respondent THIS COURT DOTH ORDER that final leave be and the same is hereby granted the abovenamed Appellants to appeal to Her Majesty in Council from the judgment of this Honourable Court pronounced herein on Wednesday the 8th day of December, 1954.

BY THE COURT.

L.S. V. J. HITCHCOCK
Deputy Registrar.

Exhibits.

"A." Agreement, 29th August, 1944.

EXHIBITS.

Exhibit " A " Agreement.

AGREEMENT made this 29th day of August One thousand nine hundred and forty four (1944) BETWEEN PORTER MOTORS LIMITED a duly incorporated company having its registered Office in the City of Palmerston North (hereinafter called " the Landlord ") of the one part AND MATTHEW JAMES MCKENNA and VINCENT LEO GIFFORD both of Palmerston North, Private Hotel Proprietors (hereinafter called " the Tenants ") of the other part WHEREBY the Landlord agrees with the Tenants and the Tenants jointly and severally agree with the Landlord as follows :—

1.—THE Landlord agrees to let and the Tenants agree to take as tenants premises known as the Rangitikei Private Hotel as at present occupied by the Tenants situated at No. 108 Rangitikei Street in the City of Palmerston North being part of Section 217 City of Palmerston North and being part of the land comprised in Certificate of Title Volume 3 Folio 294 for a term of one year from the first day of August One thousand nine hundred and forty four (1944). This agreement shall be deemed to include the four (4) open sheds for parking cars situate in the rear of the said Hotel.

2.—THE rental payable therefor shall be the sum of Three Pounds (£3) per week as and from the first day of August One thousand nine hundred and forty four (1944) payable every four (4) weeks at the office of the Landlord in Palmerston North free and clear of all exchange or any other deduction the first of such payments to fall due and be payable on the 29th day of August One thousand nine hundred and forty four (1944).

3.—THE Tenants will keep the said premises in at least as good and tenantable a state of repair and condition as the same now are (fair wear and tear and damage by fire flood tempest earthquake or enemy action excepted) and will in the like condition deliver up possession of the said premises to the Landlord or his nominees at the termination of the term hereby created.

4.—ALL rates taxes and other assessments levied in respect of the said premises (other than lessee's land tax) and all fire insurance premiums payable in respect of the said premises shall be paid by the Landlord.

5.—SHOULD during the continuance of the term hereby created the said premises be destroyed or so damaged by fire as to be untenantable then the term hereby created shall cease and determine as and from the date of the said fire and also if the said premises shall be only partially damaged

and the Landlord be unwilling to repair such damage then also the Tenants shall be entitled to terminate this lease by notice to the Landlord in manner hereinafter provided.

6.—THE Tenants will comply with all by-laws and regulations in respect of the said premises and in particular will comply with the requirements of any health or other inspector in respect thereof Provided Always that in the event of any notice or requisition being served by any competent authority upon the Landlord or the Tenants involving work to the extent in excess of £25 in any one year of the term and neither the Landlord nor the Tenants being willing to expend the amount in excess of that sum then either party hereto shall be entitled to terminate this lease upon giving one month's written notice in that behalf.

7.—THAT eight hutments on the said premises at the rear thereof are removable by the Tenants at the expiration of this tenancy.

8.—THAT in the event of the Tenants with the consent of the Landlord remaining in occupation of the said premises after the expiry of the period of one year before mentioned then the tenancy of the premises shall be deemed to be one terminable at the will of either party hereto by giving to the other of them three calendar months' notice in writing of such termination such notice to be deemed to be sufficiently given if signed by the party hereto giving the same or on behalf of such party by any agent servant or Solicitor of such party and delivered to the other of them or posted in a prepaid registered letter to such other at their or his last known place of abode or business PROVIDED ALWAYS and it is hereby specially agreed and declared that unless the Landlord shall require and said premises for the purposes of rebuilding the Landlord will not give notice terminating the tenancy earlier than the 1st day of August 1946 this provision however not to prevent any purchaser from the Landlord from terminating the tenancy hereby witnessed at an earlier date as provided by this clause.

9.—THE Tenant shall not during the term hereby created assign mortgage or part with the possession of the premises hereby let without the previous consent in writing of the Landlord had and obtained PROVIDED that such consent shall not be arbitrarily withheld without just cause affecting the respectability or solvency of any proposed assignee transferee or sub-tenant.

10.—IN the event of any dispute or difference as to whether in the event of fire the said premises shall be untenantable such dispute or difference shall be decided by the arbitration of a single arbitrator if one can be agreed on or failing that of two arbitrators one to be appointed by each party and their umpire.

Exhibits.

"A."
Agreement.
29th
August,
1944—
continued.

11.—If and whenever the said rent or any part or parts thereof shall be in arrear or unpaid for the space of twenty one (21) days after any of the days or times hereinbefore appointed for payment thereof whether the same shall have been legally demanded or not or in case the Tenants shall make breach or default in the performance or observance of any of the conditions or provisions hereof it shall be lawful for the Landlord to re-enter into and upon the said premises or any part or parts thereof in the name of the whole and to determine these presents and the estate and interest of the Tenants therein and the Tenants to expel and remove therefrom but without thereby releasing the Tenants from any liability for any rent in arrear at that time or for any previous breach of covenant or provision as aforesaid.

12.—The right of distress implied in leases shall be exercisable by the Landlord after default in payment of rent for seven days.

In Witness whereof these presents have been executed the day and year first before written.

The Common Seal of Porter Motors Limited was hereto affixed in the presence of:— "L.S."

R. PORTER.

Signed by the said Matthew James McKenna in the presence of:— "M. McKENNA."

L. LAURENSON,
Solicitor,
Palmerston North.

Signed by the said Vincent Leo Gifford in the presence of:— "L. GIFFORD."

B. J. JACOBS,
Solicitor,
Palmerston North.

Exhibit " D." Portions of Notes of Evidence taken before Hutchison, J.

Exhibits.

" D "
Portions of Notes of Evidence taken before Hutchison, J. on 27th May, 1948.

(From Page 50 of Record of Court of Appeal.)

Evidence of KENNETH ALLAN HENDERSON.

Certain repairs were then done by my company to comply with the requisition. I produce accounts received and paid by my company in respect of compliance with those requisitions. Ex. A. Some fire escape work is included in those accounts. The total figure is £82.16.4.

(From Page 54 of Record of Court of Appeal.)

Cross-Examination.

As a result of that agreement of the 21st December you the landlords collected the insurance moneys ? Yes. That was a substantial sum ? Just over £1000. Over £1100 ? I think it was £1070. You know that these tenants thereupon spent £250 of their own money in reinstatement of the kitchen ? I understood it was about £180. They put all their own work in and spent something in the vicinity of £200. Do you say that you believe that you collected between £1000 and £1100 insurance and the tenants spent £200 of their own money that they were still liable under the old lease as to repairs ? Yes, we didn't want the boardinghouse there at all.

(From Page 67 of Record of Court of Appeal.)

Evidence of VINCENT LEO GIFFORD.

A fire broke out in the premises on the 13th July, 1947. The kitchen was totally destroyed, the dining room and two bedrooms were partially destroyed, also the scullery. The cooking facilities were completely useless owing to the kitchen being destroyed. They had to be pulled down and taken out altogether. We didn't close down the premises. We carried on with an open fireplace and a small gas stove in a corner of the passage. That was for about six months until we got everything fixed up and going again. Pursuant to that agreement I proceeded with the building permit to reinstate the fire damage. We finished that about a month or six weeks after. We spent £255 of our own in making good the fire damage. I have made a calculation as to how much of that would be recoverable as salvage under our right to remove. That was about £50. In my estimation the salvage wouldn't be worth any more.

(From Page 69 of Record of Court of Appeal.)

Mr. Henderson referred us to Mrs. Nathan's place and also Adam Burgess Estate. Those places were empty prior to us signing the last Agreement in 1945. I have seen both of them. Mrs. Nathan's place—in my estimation that could not be turned into a comparable private hotel.

Exhibits.

"D"
Portions of Notes of Evidence taken before Hutchison, J. on 27th May, 1948—*continued.*

The place is not built in any way suitably. The rooms are very big. They couldn't be partitioned off suitably. I don't think there is any difference in the age of that place and the one we are in now. I think that is occupied now. The Burgess house has nine rooms. They were very big rooms and couldn't be partitioned. It was not suitable. It is useless the two of us thinking of taking a place like that. There would not be enough in it.

(From Pages 70 and 71 of Record of Court of Appeal.)

Cross-Examination.

Even then you recognised that you would have to vacate at an early date ? I think it was arranged on production of the permit. There is nothing in the lease about production of a permit ? You recognised then that Porters were wanting the premises to rebuild and you couldn't be there very long ? No, we said we would go as soon as they got a permit.

(From Page 73 of Record of Court of Appeal.)

Is it the position that you intend to occupy this property as long as you can get protection under the Tenancy Act ? Yes. That is your attitude in the matter ? Yes.

To His Honour : We have always said that once the landlords get their permit we will be quite agreeable to help them. I understood when they got their permit we would go. At present they don't seem to have much chance of getting a permit.

Evidence of Matthew McKenna.

I am one of the Defendants. I have heard the evidence of my partner, Mr. Gifford. I am able to corroborate that evidence as true.

(From Pages 77 and 78 of Record of Court of Appeal.)

Evidence of Allan Desmond Long.

I am an estate agent and valuer in Palmerston North. Early this year I made an inspection of this property having already made an inspection of it some two years previously. I inspected the work which the tenants put in in restoring the fire. I should say it cost about £250. I have made an estimate of the salvage value in that work. I compare my figures with Exhibit No. 16. No. 2 should be 324 sq. ft. Subject to that that is my own estimation of the salvage value. I have heard the evidence of Mr. Wilson. I do not differ from his opinion though the building now is in better order than it was when I inspected two years ago. The balconies, the rotted boards have been repaired. The building has been repainted. The expenditure of £80 odd has made quite a big difference to the building. In the course of my work I know something about the accommodation position in Palmerston North. If this place had to be closed down I should say that the accommodation problem would be that much more difficult. It is difficult. I know the copper at this place. It is in a condition requiring

Exhibits.

"D"
Portions of Notes of Evidence taken before Hutchison, J. on 27th May, 1948—*continued.*

repair—a condition worse than that. There are two causes. One is that the foundation of the copper is actually smaller than the area of the copper itself and consequently the copper is subsiding. I examined it in relation to the allegation that a crowbar had deliberately been used to make it worse. I don't agree with that. It could not be said properly that a couple of bricks would repair it.

Cross-Examination.

When did you inspect the property last ? At the time of the valuation on the 25th January of this year. When was your previous inspection ? At the time of the fixation of the rent. In June, 1947 ? Yes. So that property had improved in the meantime ? Yes. Part of that improvement was the balconies and fire escape ? Yes. That work was the work of the landlord ? I don't know who did the work. Had the property been painted since your last visit ? Yes. The whole of the exterior ? I think so. Do you know who did that ? No. As far as accommodation is concerned you are a land agent engaged in houses and flats and that sort of thing ? Yes. You are not in the unfortunate position of having to get casual accommodation for people ? No.

Exhibit " F." Letter, Respondent's Solicitor to Town Clerk, Palmerston North City Council.

Exhibits.

"F."
Letter, Respondent's Solicitors to Town Clerk, Palmerston North City Council. 4th March, 1952.

McKenna & McBride.

Palmerston North,
4th March 1952.
McB/DAS

The Town Clerk,
Palmerston North City Council,
Palmerston North.

Dear Sir,

re RANGITIKEI BOARDING HOUSE, PORTER MOTORS LTD. AND MCKENNA & GIFFORD :

As you are aware we act for Messrs. Porter Motors Ltd. Attached hereto is the copy of a duly stamped undertaking, the original of which is held by your Council, signed by the Directors of our client Company as landlord and by Messrs. McKenna and Gifford as tenants of the Rangitikei Boarding House.

Exhibits.

"F." Letter, Respondent's Solicitors to Town Clerk, Palmerston North City Council. 4th March, 1952—*continued.*

It will be recollected that in 1946 there was a fire at the property and no permit to rebuild was then available to Messrs. Porter Motors Ltd. The undertaking to which we have referred was subsequently executed by the parties to cover the situation until such time as a building permit should become available to our client company. Messrs. Porter Motors Ltd. now holds a permit to build and plans for the proposed new building are in course of preparation. It was the understanding between all parties concerned at the time when the undertaking was signed in 1946 that your Council would duly issue the notice, referred to in the undertaking, requiring the boarding house premises to be demolished, as soon as the landlord company was in a position to rebuild.

In accordance with the undertaking and the arrangement made in 1946 we now formally request your Council to serve on Messrs. McKenna and Gifford three months notice requiring demolition of the Rangitikei Private Hotel.

Yours faithfully,
McGREGOR & McBRIDE.
Per

"C" to Affidavit of Vincent Leo Gifford in Mandamus Proceedings, being requisition by Electrical Inspector. 25th September, 1947.

Exhibit "C" to affidavit of Vincent Leo Gifford in Mandamus Proceedings against Palmerston North City Council.

This is the requisition marked with the letter "C" referred to in the annexed Affidavit of Vincent Leo Gifford sworn at Palmerston North this 16th day of June 1952, before me :

G. CROSSLEY,
A Solicitor of the Supreme Court of New Zealand.

CITY OF PALMERSTON NORTH.

Notice to Repair Electrical Installations.

25.9.47.

No. 4268.

Memo. for Messrs. McKenna & Gifford,
Prop. Rangitikei House,
108 Rangitikei Street.

Kindly have the undermentioned repairs effected to your Electrical Installation on or before 25.10.1947. Failure to maintain the Electrical Installation in Proper Order may result in the supply of Electricity being

Exhibits.

"C" to Affidavit of Vincent Leo Gifford in Mandamus Proceedings, being requisition by Electrical Inspector. 25th September, 1947—*continued.*

cut off. The fact that the Installation has been previously passed does not relieve the owner of any responsibility in regard to subsequent tests.

Bathroom upstairs ; Insulated switch and new pendant reqd.
Room 10 ; Switch upside down, renew flex.
Renew pendants in rooms 1 to 9 also rooms 11, 12 and 15.
Run main earth from switch board to nearest water supply pipe.
3 core flex for iron in laundry.
Renew switch board wiring, refix 10 amp. fuse.
Block hole behind dishboard in kitchen.

This notice duly signed must be returned to the Electrical Engineer, P.O. Box 61 . . . "C. K. Byles" Inspector.

The above repairs have been carried out.

Signed.....Wireman.

Exhibit "E" to affidavit of Vincent Geo Gifford in Mandamus Proceedings against Palmerston North City Council.

"E" to Affidavit of Vincent Leo Gifford in Mandamus proceedings, being requisition by Building Inspector. 5th February, 1948.

This is the copy Notice marked with the letter "E" referred to in the annexed Affidavit of Vincent Leo Gifford sworn at Palmerston North this 16th day of June 1952, before me :—

G. CROSSLEY,
A Solicitor of the Supreme Court of New Zealand.

City Engineer's Office,
Palmerston North.
5th February, 1948.

Messrs. Porter Motors Ltd.,
10 Queen Street,
Palmerston North.

Dear Sirs,

An inspection of the property known as "Rangitikei House," and owned by you was inspected to-day, the 5th instant, and reveals that the existing fire escapes are in a state of disrepair.

The repairs required and the additional requirements to bring the fire escapes up to standard are as follows :—

FIRE ESCAPE AT REAR OF BUILDING :

Renew all decking, extra rail between decking and existing top rail, or netting stretched between decking and top rail in lieu thereof. Extend ladder so that top rung finishes 2 ft. 6 ins. above decking.

Exhibits.

"E" to Affidavit of Vincent Leo Gifford in Mandamus proceedings, being requisition by Building Inspector. 5th February, 1948—*continued.*

FIRE ESCAPE IN FRONT OF BUILDING:

Repair understructure, floor and railing of balcony on left-hand side.

Repair flooring of balcony on right hand side.

Connect both balconies across the front of building with structure similar to that at rear, and extend ladder rungs 2 ft. 6 ins. above decking.

Erect balcony outside of window to Bedroom No. 1, and extend ladder rungs 2 ft. 6 ins. above decking.

This will serve as thirty (30) days notice from date hereof to carry out the above requirements.

Yours faithfully,

(Sgd.) D. FINDLAY,
City Building Inspector.

"I" to Affidavit of Vincent Leo Gifford in Mandamus proceedings, being requisition by Sanitary Inspector. 8th July, 1949.

Exhibit "I" to affidavit of Vincent Leo Gifford in Mandamus Proceedings against Palmerston North City Council.

This is the copy requisition marked with the letter "I" referred to in the annexed Affidavit of Vincent Leo Gifford sworn at Palmerston North this 16th day of June 1952, before me:—

G. CROSSLEY,
A Solicitor of the Supreme Court of New Zealand.

Town Clerk's Office,
Palmerston North.

8th July, 1949.

Messrs. McKenna & Gifford,
Proprietors Rangitikei Boardinghouse,
Rangitikei Street,
Palmerston North.

Dear Sirs,

I hereby formally give you notice that the premises known as the Rangitikei Boardinghouse of which you are the proprietors do not comply in certain respects with "The Housing Improvements Regulations 1947" and the Palmerston North City By-laws.

Exhibits.

"I" to Affidavit of Vincent Leo Gifford in Mandamus proceedings, being requisition by Sanitary Inspector. 8th July, 1949 —*continued.*

This letter will serve as Notice that you are required by the Palmerston North City Council to attend to the following matters :—

1. An additional bath and lavatory basin and two additional W.Cs. are to be installed.
2. Room 5, the Staff Room off the verandah and also Hut No. 4 are not to be occupied as bedrooms.
3. That Huts Nos. 1 and 6 are to have their windows increased.
4. That the fowlhouse and run on the premises are to be dismantled and no fowls must be kept.
5. That the copper, fireplace and chimney be dismantled and the washhouse floor repaired.
6. That stormwater drainage be provided as required by the City By-laws.
7. That Rooms 2 and 16 be re-papered.

Unless the above matters are satisfactorily attended to within one calendar month from the date of the receipt of this notice by you, action will be taken against you.

Yours faithfully,

"T. G. TURLEY,"

City Sanitary Inspector.

In the Privy Council.

No. 44 of 1955.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

MATTHEW JAMES McKENNA
and VINCENT LEO GIFFORD
(Defendants) Appellants

AND

PORTER MOTORS LIMITED
(Plaintiff) Respondent.

RECORD OF PROCEEDINGS

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook, London, E.C.4,
Solicitors for Appellants.

WRAY SMITH PATERSON & CO.,
3 and 4 Adelaide Street,
Strand, London, W.C.2,
Solicitors for Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4 and Cursitor Street, Chancery Lane.
(A67525)