UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEG
12 MAR 1960
25 RUSSELL SQUARE
LONDON, W.C.1.

4/1959

No. 19 of 1958

In the Privy Council

55595

ON APPEAL from the Supreme Court of New South Wales in its Equitable Jurisdiction in Suit instituted by Statement of Claim No. 1231 of 1956

BETWEEN

THE COMMISSIONER FOR RAILWAYS - - - - - - - - - *Plaintiff*

AND

AVROM INVESTMENTS PTY. LIMITED
and JOHN BONAVENTURE LIMERICK - - - - - - - - *Defendants*

AND BY AMENDMENT made the Eleventh day of April 1957 pursuant to leave granted on the Ninth day of April 1957

BETWEEN

THE COMMISSIONER FOR RAILWAYS - - - - - - - (*Plaintiff*) *Appellant*

AND

AVROM INVESTMENTS PTY. LIMITED,
JOHN BONAVENTURE LIMERICK
and JOHN BIRKETT WAKEFIELD - - - - - - - (*Defendants*) *Respondents*

CASE FOR THE APPELLANT

RECORD.

1. This is an appeal pursuant to leave granted by the Supreme Court of New South Wales from a judgment and decree in Equity of the said Supreme Court given and made on the Eleventh day of February 1958 dismissing the suit of the Appellant brought against the Respondents to restrain alleged breaches by the Respondent Company of a Lease dated the 26th June 1941 between the Appellant and the Respondent Company and of the said Respondent's contractual obligations arising therefrom. p. 599 pp. 467 & 597 p. 596, l. 42

2. The Appellant is a body corporate charged with the duty of administering the Railway system of the State of New South Wales, including the real estate owned and used in connection therewith. p. 467, l. 14

3. At all material times there was vested in the Appellant for an estate in fee simple two areas of land in a principal part of the City of Sydney, one running from George Street, a main thoroughfare of that City, to Wynyard Lane, and the other from Wynyard Lane to Carrington Street, a principal street of that City. p. 467, ll. 20–24

p. 468, l. 1
p. 468, l. 2
4. In the year 1927 an underground railway system was in course of construction in Sydney and one of its principal stations was planned to be placed adjacent to the said areas of land.

p. 479, l. 7
5. At the same time the Appellant was possessed of a licence to sell liquor upon certain premises then standing on a part of one of the said areas of land.

p. 469, l. 13
6. At that time the Appellant called for tenders for a lease of the said areas of land for a term of 60 years, the successful tenderer to build an hotel upon such areas and to expend thereon at least the sum of £150,000, and the Appellant to vest the said licence in the lessee subject to its return to the Appellant on default under the lease or on its expiration.

p. 467, l. 43
p. 467, l. 44
7. An agent for one, Gardiner, through whose deceased estate the Respondent Company derives its title to the existing lease of the said areas, was the successful tenderer.

p. 475, l. 27
p. 475, l. 21
p. 475, l. 44
8. Shortly after acceptance of Gardiner's tender, Gardiner represented to the Appellant that he intended to erect an hotel on the lands estimated to cost £600,000 but requiring extensive excavation of the land and the erection of certain heavy steel columns in certain specific positions to accord with the design of an hotel then proffered by Gardiner to and approved by the Appellant. Gardiner requested the Appellant to make such excavations and to erect such steel columns to his specification and design.

p. 475, l. 31
p. 475, l. 39
9. Upon such representation and request the Appellant agreed to do the said work at its own capital cost but subject to the payment by Gardiner of interest upon so much of it as was attributable to Gardiner's requirements.

p. 470, l. 14
p. 470, l. 27
p. 470, l. 10
p. 480, l. 11
10. The Appellant intended to construct entrances to the said railway station through the said lands and the area to be occupied by such entrances was at all times to be and in fact was excluded from the area demised. Some excavation of these areas and the placement of some columns would in any event have been necessary in making such entrances.

p. 479, l. 39
p. 480, l. 9
p. 480, l. 3
11. Pursuant to the said agreement the Appellant did the work desired by Gardiner and to his specification and design at a cost in excess of £109,134 5s. 9d. but such sum was agreed upon between the Appellant and Gardiner as the cost of the work done for Gardiner's purposes.

p. 475, l. 7
p. 476, l. 18
p. 475, l. 22
p. 476, l. 19
12. The structural designs submitted by Gardiner to the Appellant for the purpose of doing the said work were appropriate for a building to occupy the whole of the said areas, into the ground to the extent of the agreed excavation and approximately to the then permissible height of one hundred and fifty feet from ground level, with the exception of the railway entrances and of Wynyard Lane.

RECORD.

13. On the 24th June, 1941, the Appellant executed in favour of p. 488, l. 5
the Executors of the said Gardiner, who had died in the meantime, a p. 486, l. 15
lease of the said areas, including the improvements resulting from the Appellant's work as mentioned in paragraphs 8 to 12, for a term of sixty years computed from 1st July, 1941, at the rental therein set forth p. 489, l. 34
but reserving thereout the passageways forming the entrance to the said railway station.

14. By virtue of certain statutory powers the Appellant was p. 488, l. 10
enabled to and did at the same time grant to the Executors of the said
10 Gardiner the right to construct under and over the said Wynyard Lane, p. 488, l. 18
a minor thoroughfare approximately twenty feet wide.

15. By this lease the lessee covenanted within two years from p. 493, l. 1
the date of its commencement to expend a sum of not less than £150,000 p. 493, l. 3
in erecting constructing and completing to the satisfaction of appropriate authorities and the Appellant a new building " on in under over through p. 493, l. 9
or along " the demised premises in accordance with such building design plans and specification as such authorities or the Appellant might in their absolute discretion approve, the plans and specification to be p. 493, l. 18
submitted for the approval of the appellant within sixteen weeks from the p. 493, l. 20
20 date of the commencement of the lease and such building to be commenced within a period of six months from the date of commencement of the p. 493, l. 22
lease and to be completed within two years from such date. The full p. 493, l. 27
text of Clauses 4, 16 and 37 of the lease are to be found on pages 493 to 495; 497 and 505 to 506 of the record. pp. 493–506

16. The lease contained suitable covenants to protect the licence pp. 500–505
then attaching to premises on part of the said land and to be attached to the building built in conformity with the covenants of the lease.

17. The lessee covenanted to pay interest at certain agreed rates p. 492, l. 1
to the Appellant during the term of the lease on the sum of £109,134 5s. 9d. p. 492, l. 27
30 which the lessee acknowledged to have been expended by the Appellant at p. 493, l. 3
his request and on his behalf in the erection or construction of permanent improvements on the demised land and under part of Wynyard Lane
which said improvements by Clause 4 of the lease were included in the p. 493, l. 11
description of the building to be erected.

18. Between the date of the acceptance of the said tender and the date of the lease Gardiner, and on his death his executors, had been put in possession of the said licensed premises and of the licence to sell liquor p. 479, ll. 9, 22–38
thereon and also progressively of other parts of the said areas but separate tenancy arrangements were made as to such various parts.

40 19. Shortly after the execution of the lease, the lessee, in compliance with certain requirements of the licensing authorities made p. 486, l. 26
prior to such execution, made alterations to the licensed premises on p. 513, l. 40
the demised land to provide limited bedroom accommodation on the portion of the area fronting George Street, such additional accommodation p. 512, l. 17

p. 512, l. 11 being intended by the lessee to form part of the main structure to be built on the land. The licensed premises, having been known originally p. 479, l. 6 as "Cafe Francais", became known and are now known as "The p. 481, l. 22 Plaza" Hotel.

p. 512, ll. 11–18 20. The alterations thus effected by the lessee did not interfere with or preclude the construction of an hotel utilising the whole demised area up to the full permissible building height, or, in particular, with the construction of an hotel according to the design submitted by Gardiner and approved by the Appellant.

p. 513, l. 42 21. On the 10th July 1942 the Respondent Company agreed to 10
p. 514, l. 4 purchase the unexpired term of the said lease and to indemnify the Executors of Gardiner against the rents and covenants of the lease and p. 514, l. 22 on 24th February 1943 the said Executors with the consent of the p. 514, l. 23 Appellant assigned the lease to the Respondent Company which in p. 514, l. 4 consideration of such consent covenanted with the Appellant to perform the covenants of the lease.

p. 523, l. 36 22. The personal respondents have been the successive holders of p. 564, ll. 31–38 a publican's licence granted under the Liquor Act 1912 in respect of the said areas of land. Such licence has been held by the said p. 523, l. 37 Respondents on behalf of the Respondent Company. All applications 20 made in respect of such licence to the Metropolitan Licensing Court and all appeals from orders of such court have necessarily been made in the name of one of such respondents and any injunction granted to restrain any such application must necessarily extend to one of such respondents.

In this case however for brevity the appellant completely identifies the respondent Company with the activities of the personal respondents in respect of such licence and such applications and appeals and treats the same as having been done or made by the respondent Company.

23. From the date of the execution of the lease until the p. 519, l. 38 30th September 1952 by virtue of wartime and transitional legislation 30 p. 519, l. 38 an hotel building in terms of the lease could not lawfully have been built except with the consent of certain designated authorities. Such p. 520, l. 4 consent would not at any time during that period have been obtained by the lessee or by the Respondent Company.

The alterations mentioned in paragraph 19 were made with the p. 512, l. 34 appropriate consent which did not go beyond the work actually performed.

24. The Liquor Act, 1912, of New South Wales, which has at all material times governed and still governs the sale of liquor and the p. 520, l. 20 control of licensed premises contained at material times Section 40A 40 p. 523, l. 19 which was in November 1953 in the form set out on page 520 of the record. Certain material amendments were made in 1954 some of which are set out at page 522 of the record.

25. On 14th July 1953 the Metropolitan Licensing Inspector gave p. 520, l. 14 notice of intention to apply under the said Section 40A for an order directing construction of "inter alia" 200 bedrooms on the demised

premises, and on 9th November 1953 the Metropolitan Licensing Court made an order that the Appellant construct an additional 100 bedrooms p. 523, l. 39
on the licensed premises, detailed plans therefor to be lodged with that p. 524, l. 4
Court by 31st March 1954 and the work itself to be completed by 31st March 1955. p. 524, l. 5

26. Between the date of the said order and the 26th May 1954 (suitable extensions of time having meantime been granted by the Metropolitan Licensing Court) the Respondent Company prepared and submitted to the Appellant and, as the Appellant submits, the Appellant p. 525, l. 5
approved, certain detailed plans for the erection of a building or additions p. 525, l. 45
to the existing building such building or additions to extend in certain horizontal planes over the whole of the demised areas. Such building or additions utilised but did not exhaust the utility of the said columns erected by the Appellant as mentioned in paragraphs 8 to 12 hereof and would not interfere with the completion of a building over the whole p. 532, l. 20
area of the demised premises up to the permissible building height, and down to the full extent of excavations and in particular with the completion of a building in accordance with the design mentioned in paragraph 8.

27. On 26th May 1954 the Metropolitan Licensing Court approved p. 528, l. 4
the said plans as approved by the Appellant and embodied them in its order made under the said Section 40A on 9th November, 1953. p. 524, l. 27

28. On 6th May 1955 the Respondent Company let a contract for p. 532, l. 16
certain structural work in connection with the making of additions in conformity with the approved plans and the said order of the Metropolitan Licensing Court and certain work was done on the said land p. 532, l. 23
in pursuance of such contract.

29. The Respondent Company unsuccessfully made applications to the Licensing Court for an extension of time to complete the work p. 533, l. 26
ordered to be done and thereafter called for tenders for the construction p. 533, l. 31
of the whole of that work which then remained to be done.

30. The Respondent Company received certain tenders for such construction of which the lowest was £525,881, a sum much in excess of p. 533, l. 34
what the Respondent Company anticipated such work would cost. p. 535, l. 10

31. Thereupon the Respondent Company refused to proceed with p. 553, l. 31
such work and as a result the Metropolitan Licensing Court on 29th May 1956 made an order cancelling the Publican's license held in respect of p. 538, l. 11
the premises as from the close of business on 21st June, 1956. p. 538, l. 12

32. On 19th June, 1956 an application by the Respondent Company
for renewal of the publican's license (which is an annual license) was p. 538, l. 18
refused by the said Court.

33. The Respondent Company thereupon lodged appeals to the p. 538, l. 20
Court of Quarter Sessions against both these orders of the Metropolitan Licensing Court. Such an appeal is by way of re-hearing.

p. 545, l. 13 34. On the 1st August, 1956 the Respondent Company tendered to the Appellant fresh plans for a different building to occupy part only
p. 544, ll. 19–23 of the demised area and which would not include within it or utilise the majority of the columns built by the Appellant as mentioned in paragraphs 8 to 12 hereof and which in the Appellant's submission would preclude the effective development of the demised area in the future and in particular the full use of the columns constructed by the Appellant as mentioned in paragraphs 8 to 12 hereof.

p. 545, l. 17 35. The Respondent Company required the Appellant to approve such plans in substitution for the plans already approved by the Appellant and by the Metropolitan Licensing Court.

p. 548, l. 10 36. The Appellant refused to approve the plans thus sought to be substituted for the already approved plans and required the Respondent Company to carry on with the completion of the work according to such last mentioned plans.

p. 557, l. 34 37. On the 28th August, 1956 the Respondent Company's appeals to the Court of Quarter Sessions were both upheld subject to the performance of certain undertakings then given by the Respondent Company to that Court in the following terms :—

p. 557, l. 42–
p. 558, l. 13 (1) Within seven days from that date to make an application to the Metropolitan Licensing Court under Section 40A (ii) to vary the terms of the order of that Court made on the 9th November 1953 by ordering the commencement and erection of a building in accordance with the plans marked " Exhibit 1 " as varied by the requirements of the Council of the City of Sydney marked " Exhibit 2 ".

(2) Immediately upon such application being made, to apply to the said Metropolitan Licensing Court for its approval of the said plans as so varied.

(3) Within two months from the date of the Metropolitan Licensing Court's approval of the said plans as so varied to use its best endeavours to obtain the approval of all necessary authorities, including the lessor (the Appellant), to the erection of a building in accordance with such plans as so varied.

p. 558, l. 14 The Respondent Company stated to the Court of Quarter Sessions as part of its undertaking that " it is intended between us (meaning Counsel for the Licensing Inspector and Counsel for the Respondent Company) that, if in fact we are unable to satisfy the Metropolitan Licensing Court that we can either get the lessor's approval or build without approval, the licence must be cancelled ".

38. The Appellant sought to participate in the hearing of the said appeals to the Court of Quarter Sessions in order to protect its interests in the matter, but, upon the objection of the Respondent Company, the Appellant was excluded from such hearing and the said orders upholding the Respondent Company's appeals were made and the said undertakings were accepted in the absence of the Appellant.

39. The plans referred to in the said undertakings as marked " Exhibit 1 " were the plans referred to in paragraph 34 hereof of which the Appellant disapproved. p. 558, l. 4

40. The requirements of the Council of the City of Sydney referred to in the said undertaking as " Exhibit 2 " and as variations of the said lastly mentioned plans were not at any time submitted to the Appellant. p. 558, l. 5

41. The said Lease contained a covenant, namely Covenant 5 which the Appellant submits bound the Respondent Company as between itself and the Appellant to do the work ordered by the Metropolitan Licensing Court to be done under the order made under Section 40A of the Liquor Act. The full text of Clause 5 is to be found at p. 495 of the Record. p. 495, l. 1

42. On the 5th September 1956 the Respondent Company made an application to the Metropolitan Licensing Court for a variation of the existing order of that Court made on 9th November, 1953 and for approval of the plans referred to in paragraph 34 hereof. p. 558, l. 20 p. 523, l. 39

43. On the 19th September, 1956 the Respondent Company lodged an application with the said Metropolitan Licensing Court for authority under Section 40A (ii) (*d*) to carry out the work specified in the Court's order under Section 40A. p. 559, l. 21

44. The order under Section 40A is an order that the Appellant do the prescribed work and any variation of such order would result in an order that the Appellant do the work prescribed by the order as varied. p. 523, l. 39– p. 524, l. 43

45. On the 4th October 1956 the Appellant commenced in the Supreme Court of New South Wales in Equity the present suit inter alia to restrain the Respondent Company from building a building on the demised land other than in accordance with plans and specifications approved by the Appellant and to restrain the said Respondent Company from proceeding further with the said application to the Metropolitan Licensing Court to vary the existing order made under Section 40A. p. 559, l. 24 p. 568, l. 4 p. 568, l. 7

46. The Appellant claimed inter alia that it was a breach by the Respondent Company of the covenants in the lease or was contrary to the contractual obligations of the Respondent Company for it to seek an order that the Appellant should build upon the land a building of which it disapproved and for it to seek from the Metropolitan Licensing Court an authority itself to build such a building of which the appellant disapproved. p. 567, l. 41

47. The pleadings in the suit are reproduced in the judgment of Mr. Justice McLelland at pages 560 to 581 of the Record and upon them the following principal issues arose :— pp. 560–581

(a) Whether the Respondent Company at the commencement of the suit was bound to build upon the whole of the demised land a

building to the approval of the Appellant and all Licensing, Local Government and other appropriate authorities and to expend thereon not less than £150,000.

(b) Whether the Respondent Company was able without breach of the lease to build on the demised land or any part of it a building of which the Appellant disapproved.

(c) Whether the Respondent Company was bound to build on the land a building either :—

(i) according to the design mentioned in paragraph 8 hereof, or

(ii) according to the plans and specifications referred to in paragraph 26 hereof.

(d) Whether the Appellant was bound to approve the plans proffered to it by the Respondent Company on 1st August, 1956.

(e) Whether the Appellant at the commencement of the suit was entitled to build a building on the demised land in accordance with the plans mentioned in Clause 26 hereof in default of the Respondent Company doing so.

(f) Whether an application by the Respondent Company to the Metropolitan Licensing Court for an order that the Appellant build upon part of the demised land a building of which the Appellant disapproved was a breach or threatened breach of the lease.

(g) Whether an application by the Respondent Company to the Metropolitan Licensing Court for authority itself to build a building of which the Appellant disapproved on part of the demised land was a breach or threatened breach of the lease.

(h) Whether Section 133B (2) of the Conveyancing Act 1919–1943, is applicable to the covenants of the lease.

p. 594 Section 133B (2) is to be found at page 594 of the Record.

(i) Whether, if Section 133B (2) is applicable to the covenants of the lease, the Appellant had in all the circumstances unreasonably refused to approve of the plans tendered to it on the 1st August, 1956.

48. The hearing of the suit by Mr. Justice McLelland, a Judge of the Supreme Court sitting in Equity, occupied a number of days and concluded on 20th May 1957, on which date His Honour reserved his decision.

p. 466
p. 465, l. 21

49. His Honour delivered his reserved judgment on 11th February 1958 and thereby dismissed the Appellant's suit with costs.

pp. 467–596
p. 596, l. 42

50. His Honour without expressly so deciding assumed that an obligation of some kind to build in accordance with Clause 4 of the lease still subsisted, notwithstanding the matters mentioned in paragraph 23 hereof and the lapse of time. He concluded that the positive covenant

p. 590, l. 4

implied a negative covenant not to build unless the plans and specifications were approved by the Appellant in accordance with Clause 4, such clause being "read so far as the section may be material in the light of Section 133B of the Conveyancing Act 1919–1943". p. 590, l. 6 p. 590, l. 9

51. His Honour considered Clause 5 of the lease is concerned only with the repair and maintenance of the building once it had come into existence under the lease and that, although the words of the covenant literally covered the work ordered to be done by such an order as was made in this case by the Metropolitan Licensing Court, the clause on its right construction was not intended to and did not cover such work. p. 495 p. 591, ll. 10–24

52. Accordingly His Honour held that the Respondent Company came under no obligation to the Appellant by virtue of Clause 5 of the lease and the order made under Section 40A of the Liquor Act by the Metropolitan Licensing Court to build a building according to the plans and specifications approved by that Court. p. 591, ll. 21–24

53. It followed that in His Honour's opinion the Appellant derived from Clauses 5 and 37 of the lease no right as against the Respondent Company itself to build a building according to such approved plans and specifications.

54. His Honour construed Clause 4 of the lease as not giving to the Appellant an absolute discretion as to what he would or would not approve but that the Appellant could only insist that the plans submitted by the Respondent Company conformed to the Appellant's reasonable requirements. p. 593, l. 30

55. His Honour found that the Appellant had not finally approved the plans mentioned in paragraph 26 hereof and having so held felt himself at liberty to consider whether the Appellant was bound to approve the plans tendered to him in August 1956. p. 592, l. 32

56. His Honour concluded that the plans tendered by the Respondent Company to the Appellant in 1956 were tendered under the lease and that the Appellant unreasonably refused approval thereof. p. 595, l. 26

57. His Honour so decided because the Appellant had insisted erroneously as His Honour thought, that any plan submitted must provide for a building to occupy the whole area of the demised land and because the detailed complaints and criticisms of the plans actually tendered by the Respondent Company were not such as to entitle the Appellant to refuse to approve such plans. p. 595, l. 21 p. 595, l. 40

58. His Honour held that upon the true construction of Clause 4 the Respondent Company was not bound to erect a building which covered the whole site but on the contrary the Respondent Company could in conformity with the clause insist on building a building on any part of the site, as a satisfaction of the obligation created by Clause 4. p. 587, l. 31

p. 595, ll. 1–5

59. His Honour was also of opinion that Section 133B (2) of the Conveyancing Act 1919–1943 applied to the lease so that the negative covenant which His Honour implied from the existence of a positive covenant in Clause 4 was subject to the proviso set out in the said subsection.

p. 595, l. 26

60. His Honour concluded that the Appellant's refusal to approve the plans tendered in August 1956 was unreasonable.

p. 596, ll. 33–36

61. His Honour concluded: "It is possible that in the future circumstances may arise in which the plaintiff (Appellant) may be able to obtain relief in this Court, but that at the present time I do not think that the plaintiff (Appellant) is entitled to any of the relief which it claims in the suit".

62. There was a great deal of expert and also documentary evidence given on the issues of fact arising in the suit. In the Appellant's respectful submission this material cannot usefully and conveniently be extracted and canvassed in this book. The Appellant therefore merely indicates in the succeeding paragraphs what are its submissions on such of those matters of fact as remain controversial.

63. The Appellant submits:—

(a) That the representation made to it by the said Gardiner to induce the promise of the Appellant to do the work of excavation and construction mentioned in paragraphs 8 to 12 hereof was that the said Gardiner would build an hotel consisting of 13 storeys up to the full permissible building height over the whole of the demised area.

(b) That the said Gardiner promised the Appellant that he would so build.

(c) That the work done on the land between the date of the lease and the date in 1955 when columns were extended for the 1954 building was work which was part of such a building over the whole of the demised area.

(d) That the work provided for in the plans submitted to the Appellant and to the Metropolitan Licensing Court in 1954 was a further part of such a building.

(e) That the Appellant did approve in 1954 the plans and specifications for a building proffered by the Respondent Company and that all conditions minor variations and substitutions in respect of such plans were approved and accepted by the parties prior to September, 1955.

(f) That the erection of a building in accordance with plans approved by the Appellant would have permitted the full use of the columns built by the Appellant as mentioned in Clauses 8 to 12 hereof.

(g) That the erection of a building in accordance with the plans proffered by the Respondent Company in August 1956 would not have resulted in the full use of such columns.

(h) That the erection of a building in accordance with such last mentioned plans would have prevented the full and effective use and development of the demised area.

(i) That the erection of a building in accordance with such last mentioned plans would have left the greater part of the demised area in an undeveloped or unsightly condition for an indefinite time, perhaps for the full unexpired term of the lease.

(j) That the plans and specifications as submitted by the Respondent Company in August 1956 were not fit to be approved by the Appellant.

(k) That the Appellant did not make any unreasonable requirement in respect of such lastmentioned plans.

(l) That the Appellant did not unreasonably refuse to approve such lastmentioned plans.

(m) That such last mentioned plans were not proffered by the Respondent Company to the Appellant under the lease but merely in order to obtain evidence to avoid cancellation of the publican's licence.

(n) That, if contrary to the Appellant's submission, the Appellant's motives in bringing the suit are relevant, there was no evidence as to any improper motives of the Appellant.

64. The Appellant submits that the findings and conclusions of His Honour as mentioned in paragraphs 50 to 61 hereof are in error.

65. Upon the questions of law arising in the suit the Appellant respectfully makes the following principal submissions :—

(1) The lease upon its true construction bound the Respondent Company at the date of commencement of the suit to build a building to the approval of the Appellant occupying the whole of the demised area and in conformity with the requirements of the Licensing Local Government and other relevant authorities and to expend thereon not less than the sum of £150,000.

(2) At the date of the commencement of the suit the Respondent Company was bound to build on the demised land a building in conformity with the plans and specifications submitted to and approved by the Appellant as mentioned in paragraph 26 hereof.

(3) In the further alternative the Respondent Company at the date of the commencement of the suit was bound to build on the foundations and columns erected by the Appellant as mentioned in paragraphs 8 to 12 hereof a building according to the design mentioned in paragraph 8 hereof.

(4) That the obligations imposed by Clause 4 of the lease were neither frustrated by the intervention of wartime and transitional legislation forbidding building operations except with the appropriate consent, nor were they affected or terminated by lapse of time.

(5) That the lease on its true construction implied a negative covenant that the Respondent Company would not build any building on the demised land or on any part thereof without the approval of the Appellant.

(6) That upon its true construction the Appellant was at liberty in its absolute discretion to grant or withhold any such approval.

(7) That Section 133B (2) of the Conveyancing Act 1919–1943 did not apply to the express or implied covenants of the lease nor were any of them subject to the proviso that the Appellant should not unreasonably refuse to approve of plans submitted to him by the Respondent Company.

(8) That if the said Section 133B (2) of the Conveyancing Act applied to such covenants of the lease the Appellant was entitled at the hearing of the suit to rely upon any reasonable objections to such plans whether or not any such objection was in fact raised by the Appellant at any time prior to such hearing. Furthermore that the Appellant was not bound to approve any such plans subject to conditions or alterations or modifications.

(9) That so long as the Respondent Company retained the licence granted in respect of the subject premises it was at all material times bound by virtue of Clause 5 of the lease to build on the land whatever the order under Section 40A of the Liquor Act required it to build.

(10) That at the time of the commencement of the suit the Appellant had the right by virtue of Clause 37 of the lease to construct a building in accordance with the plans and specifications proffered by the Respondent Company and approved by the Appellant as mentioned in paragraph 26 hereof.

(11) That the tender of the 1956 plans by the Respondent Company was inconsistent with the obligation of the said Respondent Company in respect of the plans already approved by the Appellant.

(12) That the Respondent Company was not entitled to require the Appellant to approve the plans proffered by it in August 1956.

(13) That the building proposed by such lastmentioned plans does not comply with the requirements of the lease.

(14) That an application by the Respondent Company to the Metropolitan Licensing Court for an order that the Appellant build on the demised land or part of it a building of which the Appellant disapproved was in breach of the Respondent Company's covenants in the lease both positively to build to the Appellant's approval and negatively not to build without the Appellant's approval.

(15) Such an application is also in breach of the covenant of the lease which entitled the Appellant to build upon the demised land a building proposed by the Respondent Company and of which the Appellant had approved but which the Respondent Company had failed to build.

(16) That the application mentioned in paragraph 14 hereof is inconsistent with and calculated to deny the continued availability of the demised land in such a condition as would permit the performance of the covenants of the lease.

(17) That an application by the Respondent Company to the Metropolitan Licensing Court for authority to build a building according to that Court's order is in breach of the covenants of the lease unless the Appellant has approved of such building.

CONCLUSIONS.

The Appellant therefore submits that the judgment and order of the Supreme Court of New South Wales in Equity (*McLelland, J.*) is erroneous and insupportable and ought to be reversed, that this appeal should be allowed and the said judgment and order set aside, and, in lieu thereof, the injunctions and declarations sought in the Statement of Claim should be granted and made, for the following amongst other

REASONS.

(a) Because the Respondent Company at the date of the commencement of the suit was bound to build upon the demised land a building according to a design plan and specification approved by the Appellant as mentioned in paragraph 8 or alternatively, that mentioned in paragraph 26 hereof.

(b) Because the Respondent Company was not entitled to build on the demised land or any part of it a building of which the Appellant disapproved.

(c) Because the applications to the Metropolitan Licensing Court mentioned in paragraphs 42 and 43 hereof were an attempt by the Respondent Company to build or to cause to be built upon the demised land or part thereof a building of which the Appellant disapproved.

(d) Because such applications were in breach of the covenants and obligations of the lease between the Appellant and the Respondent Company.

(e) Because the Respondent Company threatened to build or to cause to be built on the demised land or a part thereof a building not in conformity with the respondent Company's covenants in the said lease.

(f) Because the Respondent Company threatened to build or to cause to be built on the demised land or part of it a building not in conformity with the contractual arrangements subsisting between the parties and the Appellant's rights arising thereunder.

(g) Because of the reasons hereinbefore set forth particularly in paragraphs 63, 64 and 65 hereof.

(h) Because the judgment of *McLelland J.* was erroneous.

G. E. BANWICK.
HERMANN JENKINS

Sydney: V. C. N. Blight, Government Printer—1958

No. 19 of 1958

In the Privy Council

ON APPEAL

from the Supreme Court of New South Wales in its Equitable Jurisdiction in Suit instituted by Statement of Claim No. 1231 of 1956

BETWEEN

THE COMMISSIONER FOR RAILWAYS

Appellant

AND

AVROM INVESTMENTS PTY. LIMITED AND JOHN BONAVENTURE LIMERICK

Respondents

AND BY AMENDMENT made the Eleventh day of April 1957 pursuant to leave granted on the Ninth day of April 1957

BETWEEN

THE COMMISSIONER FOR RAILWAYS

Appellant

AND

AVROM INVESTMENTS PTY. LIMITED, JOHN BONAVENTURE LIMERICK AND JOHN BIRKETT WAKEFIELD . *Respondents*

Case for the Appellant

LIGHT & FULTON,
24 John Street,
London, W.C.1,
Solicitors for the Appellant The Commissioner for Railways