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LONDON, W.C.1

4,1959

No. 19 of 1958.

In the Privy Council

55594

**On Appeal from The Supreme Court of
New South Wales in its Equitable Jurisdiction**

BETWEEN THE COMMISSIONER FOR RAILWAYS... *Appellant*

AND

AVROM INVESTMENTS PROPRIETARY
LIMITED and JOHN BONAVENTURE
LIMERICK *Respondents.*

10 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 PROPRIETARY
LIMITED, JOHN BONAVENTURE
LIMERICK and JOHN BIRKETT
WAKEFIELD *Respondents.*

20 **Case for the Respondent**
Avrom Investments Proprietary Limited

INTRODUCTORY (PARAGRAPHS 1 TO 6).

1. This is an Appeal from the judgment and decree of McLelland, ^{RECORD.}
J., sitting as the Supreme Court of New South Wales in Equity, delivered
on the 11th February, 1958, in a Suit between the Commissioner for
Railways of New South Wales as Plaintiff and Avrom Investments
Proprietary Limited, John Bonaventure Limerick and John Birkett
Wakefield, as Defendants. His Honour dismissed the Suit with costs. p. 596, l. 41.

RECORD.
p. 559, l. 24.

2. The suit was commenced by a Statement of Claim filed on 4th October, 1956. On 5th October, 1956 the Plaintiff filed a Notice of Motion for an Interlocutory Injunction, the principal relief asked for being an injunction to restrain the Defendant, Avrom Investments Proprietary Limited, from proceeding with an application made by it on 19th September, 1956 pursuant to Section 40A of the Liquor Act, 1912, as amended, and then pending before the Licensing Court of the Metropolitan District of New South Wales. The Motion was heard on the 14th, 15th, 16th and 17th days of October, 1956 and at the conclusion of this hearing His Honour held that he was not satisfied that on the 10
p. 559, l. 30. balance of convenience any order for an injunction should be made. He did not at that stage make any final order in the Motion but adjourned it until the hearing of the Suit, with liberty to either party to restore the Motion to the list at any time. On 2nd November, 1956 the Plaintiff applied for an order finally disposing of the Motion at that stage, and after hearing some additional evidence His Honour dismissed the Motion and reserved questions of the cost of the Motion and of the application. p. 559, l. 40. The Plaintiff then applied to the High Court of Australia for special leave p. 559, l. 44. to appeal from this order and on 23rd November, 1956 the High Court granted special leave to appeal "subject to the condition that if the 20
appeal pursuant to such leave be dismissed on any ground other than the ground that it was or would be right to refuse an interlocutory injunction on the balance of convenience, then the proposed Appellant will submit to the dismissal of the Suit in the Supreme Court in its equitable jurisdiction". The High Court also ordered, in the said application for special leave to appeal, that if the Applicant declined to accept the said condition the application was to be dismissed with costs and gave the Applicant until 8th February, 1957 to make the election. p. 560, l. 12. The Plaintiff elected not to pursue the appeal so that the application for special leave stood dismissed with costs. 30

3. On 5th March, 1957 the suit came on for hearing before McLelland, J. The hearing extended over a long period and judgment was reserved on 9th May, 1957. His Honour delivered judgment on 11th February, 1958. pp. 467-596.

4. On 14th March, 1958 His Honour, sitting as the Supreme Court of New South Wales in Equity, granted to the Plaintiff, the present Appellant, under the provisions of Order in Council dated 2nd April, 1909 conditional leave to appeal from his said judgment and decree to Her Majesty in Council.

p. 599. **5.** On 1st May, 1958 His Honour, under the provisions of the said 40
Order in Council, gave final leave to the said Appellant to appeal to Her Majesty in Council.

6. The persons who were Defendants to the said suit, other than Avrom Investments Proprietary Limited, and who are now Respondents to this Appeal, were successively nominees of Avrom Investments Proprietary Limited as licensees under the provisions of the said Liquor Act of the hotel premises at Wynyard Station hereinafter referred to and have no interest in the proceedings independent of that of Avrom Investments Proprietary Limited. RECORD.
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SUBJECT MATTER OF SUIT (PARAGRAPHS 7 TO 17).

7. (A) The questions involved in the suit and in the present appeal arise out of a lease of certain land situated at Wynyard Railway Station in the City of Sydney which land is partly under the provisions of the Real Property Act, 1900 (Torrens System) and partly under Old System Title. Wynyard Railway Station was constructed by or under the authority of the Commissioner for Railways and comprises a group of very busy underground platforms which first became available for public use at the time of the opening of the Sydney Harbour Bridge in 1932.

(B) The lease was granted on 26th June, 1941 by the Appellant The Commissioner for Railways, to Rachel Gardiner and Permanent Trustee Company of New South Wales Limited, the executrix and executor of the will of one Reuben Gardiner deceased and on 24th February, 1943 the lease with the consent of the Appellant was transferred and assigned by the said Rachel Gardiner and Permanent Trustee Company of New South Wales Limited to the Respondent Avrom Investments Proprietary Limited. Upon the transfer of the lease the said Respondent covenanted, *inter alia*, that any and every covenant condition proviso stipulation and agreement of the lease to be performed or observed by the lessee should be binding upon it as fully and effectually as in the lease set forth. p. 586, l. 16.
p. 514, l. 22

8. The Appellant is a body corporate and is the successor in title to, and of the office of, an earlier body corporate. The Respondent is a body corporate incorporated under the Companies Act, 1928, of the State of Victoria.

9. The lease is a lengthy printed document; the material provisions thereof are set out at pages 489 to 511 of the Record of Proceedings herein. The lease is for a term of sixty years commencing from 1st July, 1941 and under Clause 4 thereof the lessee had an obligation to build on the demised land. This clause is set forth in full at pages 493 and 494 of the Record of Proceedings herein. pp. 489-511.
pp. 493, 494.

RECORD.

10. Part of the land the subject of the lease when the lease was granted and at the commencement of the suit comprised licensed premises in respect of which a publican's licence had been granted under the provisions of the Liquor Act, 1912, as amended. The licence at the commencement of the Suit was in the name of the defendant John Bonaventure Limerick and it was subsequently, during the course of the suit, transferred to John Birkett Wakefield, who was thereafter added as a defendant to the suit. Both the said licensees held the licence as nominees for the Respondent Avrom Investments Proprietary Limited. Clauses 29 to 36, both inclusive, of the lease and Clause (1) thereof deal specifically with the position of part of the demised premises as licensed premises. Clause 1 provides, *inter alia*, that the lessee can at its option and subject to giving a prescribed notice to the lessor, cease to carry on "the trade or business of an hotel inn or public house" upon the demised premises. 10

pp. 500-505.

p. 507, l. 8.

11. (A) The Respondent has at all material times been anxious to retain the licence in respect of the said licensed premises and has not given any notice as aforesaid. On 9th November, 1953, the Metropolitan Licensing Court, on the application of the Metropolitan Licensing Inspector made the following order pursuant to s.40A of the said Liquor Act : 20

" ORDER TO CARRY OUT WORK AT PREMISES IN RESPECT OF WHICH A PUBLICAN'S OR AN AUSTRALIAN WINE LICENCE IS HELD

LIQUOR ACT, 1912, SECTION 40A.

PREMISES : ' PLAZA ' HOTEL,
293 George Street, SYDNEY.

LICENSING DISTRICT : METROPOLITAN.

OWNER : Commissioner for Railways.

OCCUPIER : John Bonaventure Limerick. 30

IN PURSUANCE of the provisions of Section 40A of the Liquor Act, 1912, THE COURT DOTH ORDER that the work specified in the Schedule hereunder shall be carried out by the owner of the premises herein named by the 31st March, 1955.

Schedule of work to be carried out :

RECORD.
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Construct an addition to the building in brick or concrete and to contain the undermentioned accommodation :—

100 public bedrooms.

four sitting rooms.

adequate toilet blocks complete with baths, shower recesses, water closets and wash basins.

(PLANS TO BE LODGED BY 31ST MARCH, 1954)

10 GIVEN under my hand and the Seal of the said Court at 42 Bridge Street, Sydney this ninth day of November, 1953.

J. BLISS

Chairman and Licensing Magistrate constituting the Licensing Court for the Metropolitan Licensing District "

(B) The terms of s. 40A of the Liquor Act, 1912, as they from time to time appeared, are set out at pages 520 to 523 of the Record of Proceedings herein. pp. 520-523.

(C) The work referred to in the said order has not yet been commenced.

20 (D) After further applications to the Licensing Court by the said Licensing Inspector and by the said Respondent, and the making of certain orders by the Licensing Court, which applications and orders are more fully referred to hereafter, the said John Bonaventure Limerick as licensee as abovementioned, and the Respondent Avrom Investments Proprietary Limited as lessee of the said premises on the 29th August, 1956 gave the following undertakings to the Quarter Sessions Appeal Court (Exhibit O) :

30 (1) The lessee undertakes within 7 days from the date hereof to make application to the Licensing Court under Section 40A (2) to vary the terms of the order of the Court made on the 9th of 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) The Lessee undertakes immediately upon such application being made to apply to the said Court for its approval of the said plans as varied.

RECORD.
p. 558, l. 9.

(3) The lessee undertakes within 2 months from the date of the Court's approval of the said plans as varied to use its best endeavours to obtain the approval of all the necessary authorities, including the lessor, to the erection of the said building in accordance with the said plans as varied.

(E) The plans referred to in paragraph (1) of the said Order are those hereinafter referred to as the 1956 plans.

12. The Respondent duly applied to the Metropolitan Licensing Court pursuant to its said undertaking to the Quarter Sessions Appeals Court, but the Appellant commenced the present suit and filed the abovementioned Notice of Motion, to restrain the hearing of the Respondent's said applications. After the Appellant failed to obtain relief in the Notice of Motion he sought the adjournment of the said proceedings before the Licensing Court, the Respondent at all times appearing and objecting to such an adjournment being granted, and eventually, on 10th April, 1957 the further hearing of the said proceedings was adjourned and they still stand adjourned. 10

13. The Plaintiff (the present Appellant) sought in the said suit certain declarations and injunctions which appear at pages 567 and 568 of the said Record of Proceedings. 20

14. (A) In addition to filing a Statement of Defence, which appears at pages 568 to 579 of the said Record, Avrom Investments Proprietary Limited, on 4th April, 1957 filed a Notice of Motion in the suit under s. 89 of the Conveyancing Act, 1919-1954. The said s. 89 is in the following terms : p. 581, l. 5.

89. (1) Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied— 30

(a) that by reason of change in the user of any land having the benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement or restriction without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction, or would, unless modified, so impede such user ; or

10 (b) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part or waived the benefit of the restriction wholly or in part ; or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, or to the benefit of the restriction.

(2) Where any proceedings by suit or otherwise are instituted to enforce an easement or restriction or to enforce any rights arising out of a breach of any restriction, any person against whom the proceedings are instituted may in such proceedings apply to the Court for an order under this section.

20 (3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement or restriction, and the nature and extent thereof, and whether the same is enforceable, and if so by whom.

(4) Notice of any application made under this section shall, if the Court so directs, be given to the Council of the municipality or shire in which the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the Court, either generally or in a particular instance, may order.

30 (5) An order under this section shall, when registered as in this section provided, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement, or interested in enforcing the restriction and whether such persons are parties to the proceedings or have been served with notice or not.

(6) This section applies to easements and restrictions existing at the commencement of the Conveyancing (Amendment) Act, 1930 or coming into existence after such commencement.

RECORD.
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(7) An order under this section may be registered in the register of causes, writs and orders affecting land. No such order shall release or bind any land until it is so registered.

(8) This section applies to land under the provisions of the Real Property Act, 1900 and in such case the Registrar-General may, of his own motion and on the prescribed application shall make all necessary amendments and entries in the register-book for giving effect to such order in respect of all grants, certificates of title, and other instruments affected thereby and the duplicates thereof, if or when available.

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For the purposes of this subsection a duplicate grant, certificate of title, or other instrument which is not in the possession of the Registrar-General shall be deemed to be wrongfully retained within the meaning of section one hundred and thirty-six of the Real Property Act, 1900, and the provisions of that Act applicable in respect of a grant, certificate of title, or instrument wrongfully retained shall apply in respect of such duplicate.

(9) In the case of other land a memorandum of such order shall be endorsed on such of the instruments of title as the Court directs.

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(B) The declarations and orders sought were in the following terms :

“ 1. Declarations as to whether or not the demised land the subject of the said suit is affected by any restrictions as to its user contained in the lease referred to in the Statement of Claim filed in the said suit, and if so,

(a) The nature and extent thereof ;

(b) Whether the same is or are enforceable, and if so, by whom.

2. If and in the event of it being declared that the said demised land is subject to restrictions arising as aforesaid and that the same are enforceable, for an order that the restrictions which may be declared as aforesaid be modified

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(a) so as to allow of the erection of a building on the said demised land substantially in accordance with the plans being Exhibit 12 in the said suit, the drawings being Exhibit 10 in

the said suit and the specifications being Exhibit R in the said suit without the approval of the lessor to the said designs plans or specifications ;

RECORD.

(b) so as to allow of the erection of a building on the said demised land which is not in accordance or substantially in accordance with the plans being Exhibit H in the said suit ;

10 (c) so as to allow of the erection of a building on the said demised land which is not in accordance or substantially in accordance with the plans being Exhibit W1-6 in the said suit ;

(d) so as to allow of the erection on the said demised land of a building in accordance with designs plans and specifications not approved by the lessor if the lessor should unreasonably refuse or fail to consent to the said designs plans and specifications ``.

(c) The plans referred to in paragraph (2) (a) above of the Notice of Motion are the plans herein referred to as the 1956 plans.

(d) The plans, being Exhibit H, referred to in paragraph (2) (b) thereof are the plans hereinafter referred to as the 1954 plans.

20 (e) The plans, being Exhibit W1-6, referred to in paragraph (2) (c) thereof are the plans hereinafter referred to as the Innes Kerr plans.

15. In dismissing the suit His Honour did not find it necessary to, nor did he, deal with certain alternative contentions of Avrom Investments Proprietary Limited or the said application under s. 89 of the Conveyancing Act, 1919-1954.

16. The Statement of Claim as amended is set out, except as to the more formal parts thereof, at pages 560 to 568 of the said Record ; the Statement of Defence as amended is set out at pages 568 to 577 thereof ; and the Replication of the Appellant is set out at pages 579 to 581 thereof. The Rejoinder was a simple joinder of issue.

17. (A) The facts and circumstances material to the suit which occurred after the execution of the lease are fully set out and discussed by His Honour in his judgment and appear at pages 467 to 596 inclusive of the said Record.

RECORD. (B) The facts and circumstances prior to the execution of the
 — said lease (which the Respondent submits are irrelevant to the decision
 to be given on this appeal) are set forth in the said judgment and appear
 pp. 467-488. at pages 467 to 488 of the said Record of Proceedings. His Honour held
 that such facts and circumstances could not legitimately be referred to
 p. 588, l. 15. in order to construe Clause 4 of the lease.

MATERIAL EVENTS (PARAGRAPH 18).

18. The more material events and their respective dates are set
 pp. 468-560. forth in the Judgment and appear at pages 468 to 560 of the said Record.
 A summary of events on and after the date of the lease is as follows :— 10

26th June, 1941—Date of lease the subject of the suit.
 (Exhibit A).

30th November, 1942—Building additions to the demised
 pp. 513, l. 39. premises of a value of approximately £10,493 completed. Such
 additions were carried out with the approval of the Commissioner
 for Railways.

24th February, 1943—Assignment of lease to Defendant.

12th June, 1946—Order made by the Licensing Court under
 s. 40A of the Liquor Act, 1912, as amended, requiring certain work
 to be done in the dining room, kitchen and bars of the licensed 20
 premises. This work was finally completed by January, 1950.

21st March, 1953—Approval given by the Licensing Court, on
 application of Avrom Investments Proprietary Limited, to carry
 out work of remodelling certain bars in the licensed premises and
 on the construction of a new cool room.

14th July, 1953—Metropolitan Licensing Inspector applies for
 an order under s. 40A of the Liquor Act, 1912, as amended, directing
 the construction on the licensed premises of, *inter alia*, 200 bedrooms.

9th November, 1953—Application by Licensing Inspector came
 pp. 523, l. 38. on for hearing before the Licensing Court and with the consent of 30
 Avrom Investments Proprietary Limited, the order was made
 (Exhibit F) which is set out in paragraph 11 (A) hereof. The time
 for complying with the order was subsequently extended to 30th
 September, 1955.

1st March, 1954—On the application of Avrom Investments Proprietary Limited the time for lodging plans under the above-mentioned order was extended by the Licensing Court to 30th April, 1954. RECORD.
p. 525, l. 1.

21st May, 1954—Commissioner for Railways approved subject to conditions and qualifications of plans submitted to him by Avrom Investments Proprietary Limited for a building to comply with the abovementioned order of the Licensing Court (Exhibit 14). p. 525, l. 42.
p. 607, l. 15.

10 26th May, 1954—The Licensing Court approved of the same plans as were submitted to the Commissioner for Railways subject to certain minor additions (Exhibit G). The plans (Exhibit H) provided for 62 bedrooms additional to those then existing, with lounges and auxiliary facilities and are hereinafter referred to as the 1954 plans. p. 527, l. 22.

4th June, 1954—Avrom Investments Pty. Limited let a contract for certain subsidiary constructional work on certain of the columns on the premises. The contract price of this work was £16,237 and it was completed in May, 1955.

20 18th April, 1955—The Licensing Court on the application of Avrom Investments Proprietary Limited approved of substituted plans which were a variation of, but did not differ in general principle from those approved by that Court on 26th May, 1954. p. 532, l. 13.

6th May, 1955—Avrom Investments Proprietary Limited entered into a contract with a building contractor for further structural work on columns on part of the demised land for a total amount of £32,020 10s. 3d. This work was subsequently completed. p. 532, l. 16.

30 28th September, 1955—Avrom Investments Proprietary Limited made an application to the Licensing Court for a further extension of time within which to comply with the said order of 9th March, 1953 (Exhibit J). This application was subsequently refused. p. 532, l. 24.
p. 533, l. 23.
p. 614.

12th March, 1956—Tenders closed for the erection of the main building. When opened the lowest tender was for £525,881.

March, April and May, 1956—Letters and conferences between Commissioner for Railways and Avrom Investments Proprietary Limited arising out of and relative to the very high cost of the tender (Exhibit N). p. 623.

- RECORD.
p. 538, l. 11.
p. 543, l. 34.
- 21st May, 1956—Publican's Licence in respect of the premises ordered to be cancelled by the Licensing Court as from close of business on 21st June, 1956.
- p. 538, l. 33.
- 8th June, 1956—Avrom Investments Proprietary Limited retained a new Architect, Mr. E. M. Nicholls, to design a new type of building to comply with the requirements as to accommodation of the Licensing Court.
- p. 538, l. 20.
p. 543, l. 38.
- 18th June, 1956—Appeal lodged to Quarter Sessions against the cancellation of the licence (Exhibit O).
- p. 538, l. 18.
p. 543, l. 37.
- 19th June, 1956—Metropolitan Licensing Court refused to renew the publican's licence. An Appeal to Quarter Sessions was thereafter lodged.
- 28th June, 1956—Appeal to Quarter Sessions lodged against the refusal to renew the licence (Exhibit O).
- pp. 541-543.
- 31st July, 1956—The Commissioner for Railways served upon the defendant a Notice of that date under s. 129 of the Conveyancing Act, 1919-1954, in respect of certain alleged breaches by Avrom Investments Proprietary Limited of the terms of the lease. The said Notice is set forth at pages 541 to 543 inclusive of the said Record of Proceedings. 20
- p. 543, l. 16.
- 1st August, 1956—Fresh plans (herein referred to as the 1956 plans) (Exhibit L) submitted by Avrom Investments Proprietary Limited to the Commissioner for Railways for approval, with long explanatory letter (Exhibit N).
- p. 546, l. 25.
- 15th August, 1956—Avrom Investments Proprietary Limited wrote to the Commissioner for Railways asking that urgent consideration be given to the 1956 plans and to the other matters mentioned in that letter (Exhibit N).
- p. 547, l. 16.
- 17th August, 1956—The Commissioner for Railways wrote to Avrom Investments Pty. Limited persisting that a building be erected in accordance with plans approved by the Licensing Court on 26th May, 1954 (Exhibit N). 30
- p. 548, l. 15.
- 22nd August, 1956—Avrom Investments Proprietary Limited wrote to the Commissioner for Railways requesting urgent consideration of the 1956 plans (Exhibit N).

24th August, 1956—Avrom Investments Proprietary Limited entered into a conditional contract with a building contractor for the construction of a building in accordance with the 1956 plans at a price of £443,800 (Exhibit Q). RECORD.
p. 551, l. 40.

24th August, 1956—Council of City of Sydney approved the 1956 plans (These plans had prior thereto been approved by the Board of Fire Commissioners and the Chief Secretary). p. 551, l. 44.

10 27th August, 1956—Commissioner for Railways wrote to Avrom Investments Proprietary Limited insisting upon the latter building according to the 1954 plans and with regard to the aforementioned notice under s. 129 of the Conveyancing Act to remedy the alleged breaches (Exhibit N). p. 552, l. 7.

20 28th August, 1956—Appeals to Quarter Sessions came on for hearing. Upon undertakings being given on behalf of Avrom Investments Proprietary Limited the Chairman of Quarter Sessions set aside the order for cancellation of the licence and set aside the order refusing the continuation of the licence and renewed the licence for the following year on payment of the prescribed fees (Exhibit O). The undertakings were as set out at pages 557 and 558 of the said Record of Proceedings. p. 557, l. 34.

30 5th September, 1956—Pursuant to its said undertakings, Avrom Investments Proprietary Limited made an application to the Licensing Court for a variation of the order made under s. 40A of the Liquor Act, 1912, as amended, on 9th November, 1953 “so as to require in lieu of the 100 bedrooms, 4 sitting rooms and other facilities as required by the said order the construction of 76 bedrooms and other facilities set out in plans prepared by Mr. E. M. Nicholls and lodged herewith at an estimated cost of £434,800 the work thereon to be commenced and completed on such dates as the Court considers reasonable; in lieu of the dates of commencement and completion specified in such order” (Exhibit K). The hearing of this application was fixed for 18th October, 1956. p. 558, l. 18.

40 19th September, 1956—Application made by Avrom Investments Proprietary Limited to the Licensing Court under s. 40A (2) (d) of the Liquor Act, 1912, as amended, for authority to carry out the work specified in the order of the 9th November, 1953 on the ground that the Commissioner for Railways, being the owner of the said licensed premises, had failed to carry out the same in the time allowed by the Court (Exhibit M). This application was also listed to be heard on 18th October, 1956. p. 559, l. 2.

RECORD.
p. 596, l. 1.

4th October, 1956—Present suit commenced by Commissioner for Railways.

CONTENTIONS (PARAGRAPHS 19 TO 25).

19. The substance of the main submission for the Plaintiff The Commissioner for Railways, was that he had a right to specific performance of an agreement by Avrom Investments Proprietary Limited to build on the demised land and that the application to the Licensing Court by the last mentioned Company was a threat to build contrary to the right which the Commissioner had. The Plaintiff, did not, and does not, however, seek a decree for specific performance. The Plaintiff contended that he had a right to have built by the Defendant one of the following buildings, in the alternative :

(a) A large building covering substantially the whole of the area of the demised land and utilising the whole of certain columns which had been erected on the land prior to the lease, the building to be in accordance or substantially in accordance with certain plans prepared many years before the lease was granted by a Mr. Innes Kerr. The building was in the Plaintiff's submissions, and is in His Honour's judgment referred to as the Innes Kerr building and the plans therefore as the Innes Kerr plans. This submission was based on a construction of Clause 4 of the lease as referring to a particular building, the plans and specifications for which had come into existence before the lease was granted. Evidence relating to correspondence and events prior to the grant of the lease was tendered by the plaintiff in support of this submission. His Honour was of the view that this evidence was inadmissible for the purpose for which it was tendered. His Honour was also of the view, that, in any event, the evidence so tendered did not establish the Plaintiff's submission. Evidence accepted by His Honour (subject to the question of its admissibility) showed that in 1928 the cost of the Innes Kerr building was estimated at £600,000. His Honour decided that the cost of such a building at the date of the lease would have been approximately £1,500,000 and that in 1954 the cost of such a building would probably have been several millions of pounds. His Honour rejected the contention that Clause 4 of the lease referred to the Innes Kerr building.

(b) A building covering substantially the whole of the area of the demised land and utilising the columns provided for in the Innes Kerr plans. This contention also depended upon a special construction of Clause 4 of the lease and was rejected by His Honour.

- (c) (i) The building provided for in the plans and specifications approved by the Licensing Court on 26th May, 1954 (the 1954 plans). This obligation was said to arise either from an express agreement or by way of accord and satisfaction or by force of the Licensing Court Order itself, or from the fact (as it was alleged) that the plans had been approved by the Plaintiff. His Honour found as a fact that there was no express agreement to build according to the 1954 plans, either by way of accord and satisfaction or otherwise. RECORD. — p. 586, l. 20, l. 24.
- 10 (ii) His Honour further held that there was in fact no unconditional approval of the 1954 plans by the Plaintiff as the approval he did give was subject to many conditions and qualifications. p. 586, l. 22. p. 592, l. 33.
- (iii) His Honour further held on the construction of the lease that mere approval of plans did not create a binding obligation on the lessee to build according thereto either generally or in the present case. p. 592. p. 593.
- (iv) His Honour also held that the provision of the lease relied upon by the Plaintiff (Clause 5) did not have the effect of casting upon the lessee the obligation to carry out the order of the Licensing Court. p. 591, l. 8.
- 20 (v) His Honour further held that even if Clause 5 of the lease did have that effect, the Plaintiff did not thereby derive any right to relief. p. 591, l. 25.
- 20.** (1) His Honour found in Clause 4 an implied negative stipulation that the Defendant would not build unless the plan and specification was approved by the Plaintiff in the manner provided for in Clause 4 which was to be read, so far as the section may be material, in the light of s. 133B of the Conveyancing Act, 1919-1954. The Plaintiff barely, if at all, relied upon such an approach, but His Honour considered it on the assumption that an obligation to build subsisted in 1953 and there- p. 590, l. 6. p. 590, l. 4.
- 30 after, and held on the construction of the lease that the right to refuse to approve of plans was not absolute, but that the Plaintiff's discretion was limited to the making of "reasonable requirements". His Honour pp. 593, 594. reached a similar conclusion in reliance upon the qualifications introduced by s. 133B (2) of the Conveyancing Act, 1919-1954. This provision is set out at page 594 of the said Record of Proceedings.
- (2) His Honour further found as a fact that the Plaintiff had p. 595, l. 25. unreasonably failed or refused to approve of the plans submitted in 1956 by the Defendant, and that the requirements insisted upon by the Plaintiff in 1956 as to proceeding with the 1954 plans and generally were p. 594, l. 22.
- 40 not reasonable requirements.

RECORD. **21.** His Honour made the following specific findings of fact material
— to the Plaintiff's submissions and to the present appeal :

p. 481, l. 8. (a) The foundation work done in relation to the building and
the columns erected prior to the commencement of the lease were
adaptable for practically any use to which the site might be put.

p. 582, l. 19. (b) The 1956 plans are plans of a substantial modern building,
with modern bedrooms and with adequate facilities, which would
be built over an area of about one-third of the site to be used in
conjunction with the buildings already on the site, the erection of
which would not prejudice the reasonable future development of 10
the site and in particular would not interfere with the reasonable
future development of the centre of the site.

pp. 582, 583. (c) That the 1956 plans have substantial advantages over the
1954 plans in particular respects which His Honour enumerated at
pages 582 and 583 of the said Record. These advantages are :

(a) The design is better and more modern.

(b) Provision is made for a greater number of bedrooms.

(c) All the bedrooms have private bathrooms, whereas a
considerable number in the 1954 plans have not.

(d) The bedrooms are of better design. 20

(e) There is more first-class accommodation.

(f) They make provision for a coffee lounge suitable for
the provision of light meals. The 1954 plans make no such
provision.

(g) They make greater use of the Carrington Street frontage
which is more suitable for an entrance to an hotel than George
Street, this frontage being more suitable for commercial develop-
ment.

(h) They make provision for a greater number of shops.

(j) They would permit of extensions to the building at less 30
cost.

(k) They would permit more flexibility so far as future
development is concerned.

p. 583, l. 13. (d) That the 1954 plans were not and could not reasonably be
considered to be an instalment of the Innes Kerr plans.

(e) That a building according to the 1956 plans would be a very much better economic proposition than a building according to the 1954 plans. RECORD.
p. 583, l. 20.

(f) That no officers of the Plaintiff gave consideration to the 1956 plans as plans presented to the Plaintiff by the Defendant for approval. p. 584, l. 32.
p. 595, l. 21.

(g) That the real desire of the Plaintiff is to bring the legal relations between the Defendant and itself under the lease to an end. p. 584, l. 42.

10 (h) That except for a representation made in 1928 (See P. 585 of the Record of Proceedings) by a Mr. McFadden, then acting for those tendering for the lease, that the proposed lessee's then intention was to erect an hotel which was estimated to cost £600,000, the allegation by the Plaintiff in paragraph 5 of the Statement of Claim that "the said lessee then represented to the Plaintiff that if the Plaintiff would agree to do the said work within the times and upon the conditions then stipulated, the said lessee would erect upon such columns and substructure, a building of thirteen floors to the maximum permissible building height according to certain designs then produced by the said lessee to the Plaintiff, and would spend in the construction of such building a sum of £600,000", was not established. p. 585, l. 36.

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(j) The "Agreement" alleged in paragraph 5A of the Statement of Claim to be constituted by the representation alleged in paragraph 5 thereof, and action pursuant to it, was not established. p. 585, l. 40.

30 (k) That although the then lessees (Reuben Gardiner and Permanent Trustee Company of New South Wales Limited) did erect a building at a cost of £11,130 to meet the requirements of the Licensing authorities and in accordance with plans and specifications submitted to and approved by the Plaintiff, the allegations in paragraph 5D of the Statement of Claim that the Plaintiff's said approval was given without prejudice to the Plaintiff's rights or in derogation of the lessee's obligations under Clause 4 of the said lease and that such building was in part in accordance with the plans and designs referred to in paragraph 5A of the Statement of Claim and in such part in performance *pro tanto* of the lessee's obligation under the said clause, were not, nor was any of them, established. p. 586, l. 6.

RECORD.
p. 586, l. 12.

(l) In relation to paragraph 10 of the Statement of Claim, it was not established that by mutual consent of the Plaintiff and the lessee that the time for compliance by the lessee with clause 4 was extended.

p. 586, l. 15.

(m) That the allegation in paragraph 10A of the Statement of Claim, namely, that at the request of the lessee, the Plaintiff, before the expiry of the two years referred to in Clause 4 of the lease acceded to a postponement of the time for compliance by the said lessee with Clause 4, had not been made out.

p. 586, l. 16.

(n) The allegation in paragraph 11A of the Statement of Claim, 10
namely, that at the request of Avrom Investments Proprietary Limited the Plaintiff before the expiry of the said two years acceded to a postponement of the time for compliance by the said Defendant with Clause 4 of the said lease had not been made out.

p. 586, l. 17.

(o) That the approval given by the Plaintiff to the 1954 plans was a conditional approval.

p. 586, l. 20.

(p) That the allegation in paragraph 12A of the Statement of Claim that “ thereafter it was agreed between the Plaintiff and the Defendant that the Defendant should build the building referred to in paragraph 5C or a building utilising the columns and substructure 20
referred to in Clause 5 (of the Statement of Claim) on the full available area of the demised land to the Plaintiff’s approval within a reasonable time and that the Plaintiff should accept the said promise of the Defendant in discharge of the Plaintiff’s rights against the Defendant consequent upon the failure of the Defendant to build a building on the said land in accordance with Covenant 4 of the said lease within the said period of two years ” was not made out.

p. 586, l. 22.

(q) That the allegation in paragraph 12B of the Statement of Claim that “ the plaintiff agreed in and about May 1954 that the Defendant might build on the land a building according to certain 30
plans and specifications then proffered by the Defendant to the Plaintiff and approved by the Plaintiff but so that such agreement and approval of the Plaintiff and the building of such building in accordance with such lastly mentioned plans should not release the Defendant from the agreement referred to in paragraph 12A (of the Statement of Claim)” was not made out.

(r) That the allegation in paragraph 12BB of the Statement of Claim that “ thereafter it was agreed between the Plaintiff and the Defendant that the Defendant should build the building according to certain plans and specifications approved by the Plaintiff at the request of the said Defendant on 21st May, 1954 and that the Plaintiff should accept the said promise of the Defendant in discharge of the Plaintiff’s rights against the Defendant consequent upon the failure of the Defendant to build the building on the said land in accordance with Covenant 4 of the said lease within the said period of 2 years ” was not made out.

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RECORD.
p. 586, l. 26.

(s) That the allegation in paragraph 12C of the Statement of Claim that, pursuant to one of the agreements set forth in paragraphs 12A and 12BB thereof or the approval mentioned in paragraph 12 thereof or the approval mentioned in paragraph 12B thereof, commenced to erect the building referred to in paragraph 12A thereof, was not made out.

p. 586, l. 28.

(t) That from the commencement of the lease until 30th September, 1952 it would not have been lawful for the Defendant to have erected constructed or completed a building in the terms of Clause 4 of the lease without a permit to build issued by the appropriate authority, and that at all relevant times from the date of the lease until 30th September, 1952 it would not have been any use for the lessee to attempt to make an application for a permit to build a building of the nature described in Clause 4 of the lease because such an application would have been foredoomed to failure.

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p. 519, l. 37.

p. 589, l. 5.

22. The principal submissions made on behalf of the Defendant Avrom Investments Proprietary Limited at the hearing (which said submissions are also relied upon in this Appeal) were as follows :—

(a) (i) If the said Defendant has any subsisting obligation to build it is pursuant to Clause 4 and not otherwise.

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(ii) That no provision in the lease has the effect of casting upon the said Defendant the burden of complying with any order made in the present case by the Licensing Court for the provision of increased accommodation or the carrying out of building work.

(b) That Clause 4 leaves the initiative as to important matters including the nature type and size of the building and the amount the building is to cost in excess of £150,000 to the lessee.

RECORD.

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(c) That any discretion the lessor has to disapprove or fail to approve of the building design plan and specification must be exercised reasonably.

(d) That any such right cannot be exercised by the lessor arbitrarily or capriciously or on a wrong legal basis or so as to defeat the purposes of the lease.

(e) (i) That so far as the building design plan and specification are concerned the only right of the lessor, is to make “reasonable requirements” with regard thereto. His Honour upheld this submission. 10

p. 593, l. 30.

p. 594, l. 15.

p. 594, l. 22.

(ii) That the requirements stipulated for by the lessor at the time the 1956 plans were submitted for his approval were unreasonable. His Honour upheld this submission.

(f) That it is not necessary in all cases that the lessor should actually approve of the said design plan and specification before the lessee can build.

(g) (i) That if the lessee is under a duty to submit the building design plan and specification referred to in Clause 4 for the approval of the lessor, the lessor is under a correlative duty properly to consider them and to approve or disapprove of them on a proper basis and according to proper principles. 20

p. 595, l. 25.

(ii) That the Plaintiff (i) unreasonably, (ii) capriciously, (iii) arbitrarily, (iv) on a wrong view of the law, refused to approve the 1956 plans. His Honour held that the Plaintiff had unreasonably withheld his approval of the said plans.

p. 595, l. 1.

(h) That any requirement of the lease that the lessee shall not erect a building on the demised land unless the prior consent of the lessor to the building design plan and specification has been obtained is subject to the proviso contained in s. 133 (B) (2) of the Conveyancing Act, 1919–1954 that such consent shall not be unreasonably withheld. His Honour upheld this submission. 30

(j) The fact that the lessor has once approved plans does not give him a right to compel the lessee to build in accordance with those plans and no others.

(k) The Plaintiff did not approve of the 1954 plans within the meaning of Clause 4 of the lease. His Honour upheld this submission. RECORD.
p. 586, l. 17.
p. 592, l. 33.

(l) That the effect of the Plaintiff not complying with the agreement so far as approval of the plans was concerned, was to free the Defendant from the obligation to have those plans approved before it could build in accordance therewith. His Honour upheld this submission. p. 595, l. 27.

10 (m) The Licensing Court did not order a building to be erected in accordance with the 1954 plans because (i) that was not the form of its order (ii) the 1954 plans were varied in 1955 and substituted plans were then approved by the Licensing Court and (iii) the Licensing Court has no jurisdiction under s. 40A of the Liquor Act, 1912 as amended, to approve plans submitted by a lessee, at least if the plans are for a building having less accommodation than that provided for in a previous order under the same section. His Honour dealt with these submissions at pages 591 and 592 of the said Record of Proceedings but he did not find it necessary to reach a conclusion thereon.

20 (n) Any order made by the Licensing Court under s. 40A of the Liquor Act, 1912 as amended, was and is ineffectual so far as the Commissioner for Railways is concerned because he is an instrumentality of the Crown (*Wynyard Investments Pty. Limited v. Commissioner for Railways (N.S.W.)* 93 C.L.R. 376) and entitled to the rights privileges and immunities of the Crown and the said Act, or s. 40A thereof, does not bind the Crown. His Honour discussed this submission at page 596, but he did not find it necessary to reach a conclusion thereon.

30 (o) That the substantial obligation originally imposed by Clause 4, namely to expend a sum of not less than £150,000 in erecting a building within the time and after following the procedure and generally subject to the requirements therein set out is no longer capable of being given effect to, with the result that there is no subsisting obligation upon the lessee to build, or expend money in the erection of a building, upon the demised land. His Honour dealt with this submission at pages 589 and 590 of the said Record of Proceedings but did not find it necessary to reach a conclusion thereon. pp. 589, 590.

RECORD.

p. 589.

(p) That the Plaintiff has waived by acceptance of rent any right he had to rely, as a breach of condition, upon any breach of covenant committed prior to June, 1956, and in particular he can no longer rely upon any failure to build as a breach of condition. This submission was dealt with by His Honour at page 589 of the said Record of Proceedings.

(q) The Plaintiff is stopped by his conduct from alleging that the Defendant was in breach of Clause 4 upon failure to erect a building within 2 years of the date of commencement of the lease.

(r) That the Plaintiff has no equity to the relief he seeks and that under the law of New South Wales any right he has falls to be determined in the common law courts, for the reason, among others, that he does not seek specific performance of any agreement and, in any event, any agreement alleged by him is not such as a Court of Equity will decree to be specifically performed. 10

p. 596.

(s) That there was no evidence that the Defendant is threatening to build without the approval of the Plaintiff, as all the Defendant is doing is, pursuant to the undertaking given by it, to make an application to the Licensing Court for a variation of an earlier order of that Court, or some other order or approval enabling it, so far as that Court is concerned, to build in accordance with the 1956 plans. His Honour dealt with this submission at page 596 of the said Record of Proceedings. 20

p. 596.

(t) That the Court in the exercise of its discretion will not make a decree against the Defendant on the grounds (i) that the proceedings were not brought genuinely for their ostensible purpose but to force a position in which the Plaintiff could secure a forfeiture of the lease and itself regain possession of the subject premises, (ii) that it would impose undue hardship upon the Defendant. His Honour dealt briefly with these matters at page 596 of the said Record of Proceedings. 30

23. (1) The Defendant also contended before His Honour in reliance upon s. 89 of the Conveyancing Act, 1919-1954 (which is set out at pages 6-8 above), that if His Honour should find that there was a subsisting restriction on the erection of a building by the Defendant on the demised land then any such restriction should be varied or modified, depending upon the nature of the restriction, as follows :—

(a) so as to allow of the erection of a building on the said demised land substantially in accordance with the 1956 plans,

(b) so as to allow of the erection of a building on the said demised land which is not in accordance or substantially in accordance with the 1954 plans, RECORD. —

(c) so as to allow of the erection of a building on the said demised land which is not in accordance or substantially in accordance with the Innes Kerr plans,

10 (d) so as to allow of the erection on the said demised land of a building in accordance with designs plans and specifications not approved by the Lessor if the lessor should unreasonably refuse or fail to consent to the said designs plans and specifications.

(2) His Honour did not find it necessary to deal with this application, but the Respondent submits that if it becomes necessary to consider the said application the relief sought therein should be granted, or, alternatively, the said application should be referred back to the trial judge for determination by him. p. 596, l. 37.

24. The Respondent relies, *inter alia*, upon the findings of fact of His Honour and upon the reasons given by him in his judgment.

25. The Respondent Avrom Investments Proprietary Limited therefore respectfully submits that the appeal should be dismissed with 20 costs for the following amongst other

REASONS

- 30
- (1) Because the decision appealed from is correct in law and in fact.
 - (2) Because the said Respondent is not bound in law to erect any of the several buildings which the Appellant alternatively claims it is bound to erect.
 - (3) Because there is no evidence that the Respondent threatens to build without the approval of the Appellant.
 - (4) Because in the circumstances the Respondent is not bound in law to obtain the approval of the Appellant to the 1956 plans before seeking an order or orders from the Licensing Court ordering or approving the carrying out of work in accordance with those plans.
 - (5) Because in the circumstances the Respondent is not now bound to seek or obtain the approval of the Appellant to the 1956 plans before erecting a building in accordance therewith.

RECORD.
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- (6) Because any discretion given to the Appellant to refuse to approve of the design plan and specification of a building which the Respondent seeks to erect is limited to a right to make “reasonable requirements” with regard to same, and the requirements stipulated for by the Appellant in respect of the 1956 plans were unreasonable.
- (7) Because any discretion given to the Appellant to refuse to approve of the design plan and specification of a building which the Respondent seeks to erect must be exercised reasonably, and the refusal of the Appellant to approve of the 1956 plans was unreasonable. 10
- (8) Alternatively to Reasons (4), (5) and (6), because any restriction which would give the Appellant the right or a power to prevent the Respondent from erecting a building in accordance with the 1956 plans should be modified so as to allow of such building being erected.
- (9) Alternatively to Reasons (4), (5), (6) and (7) because any restriction which would give the Appellant an absolute discretion to refuse approval of the 1956 plans should be modified so as to require that the discretion can only be exercised reasonably. 20
- (10) Because the Appellant has no equity to the relief claimed.
- (11) Because in its discretion the Equity Court would refuse to grant the relief sought by the Appellant.

GORDON WALLACE.

R. W. FOX.

In the Privy Council

On Appeal from The Supreme Court of
New South Wales in its Equitable Jurisdiction

BETWEEN

THE COMMISSIONER FOR RAILWAYS
Appellant

AND

AVROM INVESTMENTS PROPRIETARY
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 PROPRIETARY
LIMITED. JOHN BONAVENTURE
LIMERICK and JOHN BIRKETT
WAKEFIELD *Respondents.*

**Case for the Respondent Avrom
Investments Proprietary Limited**

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