Privy Council Appeal No. 19 *of* 1958

The Commissioner for Railways - - - - - - *Appellant*

v.

Avrom Investments Proprietary Limited and others - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MARCH, 1959

Present at the Hearing:

VISCOUNT SIMONDS
LORD MORTON OF HENRYTON
LORD COHEN
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment and decree of McLelland, J. sitting as the Supreme Court of New South Wales in Equity dismissing a suit brought by the Plaintiff for an injunction and declarations. His Honour gave leave to appeal.

The appeal turns on the construction of a lease and the application of its provisions to the facts which led up to the dispute.

The lease was granted on 26th June, 1941 to Rachel Gardiner and Permanent Trustee Company and was assigned to the defendant corporation on 24th February, 1943.

The appellant hereinafter called the plaintiff is a body corporate charged with the duty of administering the railway system of the State of New South Wales. It owned an estate in fee simple in the land leased which is in the city of Sydney. In 1927 an underground railway system was in course of construction and one of its stations was to be constructed near the land. There were premises on the land for which the plaintiff had a liquor licence. The land goes from George Street to Carrington Street being divided by Wynyard Lane. Carrington Street is about two stories higher than George Street. Beneath the surface of the land there were subways and passages to the station.

The plaintiff called for tenders for a lease of the land for a term of 60 years, the successful tenderer to build an hotel to cost at least £150,000. The prospective lessee was to have the licence vested in him. The successful tenderer was a Mr. Gardiner. He died in February, 1941 and the original lessees were his executors.

Protracted negotiations took place. The following facts are relevant for the purpose of understanding some of the provisions of the lease and how the dispute arose.

Mr. Gardiner obtained a design for an hotel to be constructed on heavy steel columns. The hotel as then planned would have covered the site to the full building limit. It would have been carried over Wynyard Lane but at a height that would not impede traffic. The plaintiff was

at that time doing its own excavations and work and it was agreed that it should construct the steel columns and do excavation work necessary for the then contemplated building. The cost of this work done for the defendant's predecessor was to carry interest. The cost as agreed is set out in the lease in Covenant 3 as £109,134 5s. 9d.

In 1938 the Minister of Transport intervened on the question of the extent of the licensed premises and liquor advertisements. There were further difficulties in 1939 with the licensing authorities as to the lack of accommodation, and on 3rd July, 1939 the Licensing Court refused to renew the licence. By this time Mr. Gardiner was claiming specific performance of an agreement for a lease. On the 27th June, 1940 an appeal from the Licensing Court's refusal to renew the licence was successful.

On 18th November, 1940 building became controlled. There had been previous weekly tenancies for part of the land, and Mr. Gardiner, later his executors, were in possession of the licensed premises and the licence. The lease was executed on 26th July, 1941. The Licensing Court renewed the licence on condition that bedroom and ancillary accommodation costing about £10,000 would be constructed by the licencee. This work was approved by the Authorities and the plaintiff and completed by the defendant by 30th November, 1942.

The lease was for a term of 60 years. For the first two years the rent was £9,000. For the following five years it was £15,000. From the eighth to the twelfth year it was £19,200. There was a proviso that if the profit to the lessees from the demised premises for these five years was less than 10 per cent. on the capital invested there were to be reductions in rent. Thereafter the rent was to be £19,200.

The licensed premises originally known as Café Francais became known as The Plaza Hotel.

The appeal turns mainly on clause 4 of the lease which reads as follows :—

> THAT the Lessee will within two (2) years from the date of the commencement of this lease expend a sum of not less than one hundred and fifty thousand pounds (£150,000/–/–) in erecting constructing and completing in a workmanlike and substantial manner in every respect complying with any provision of any law statutory or otherwise having application thereto and to the satisfaction of any civic licensing local public or statutory authority (hereinafter called the said authority) and the Lessor a new building on in under over through or along the demised premises (hereinafter included in the expression "said building" which expression shall include also the permanent improvements erected or constructed or other constructional work which has been carried out by the Lessor on the land hereby leased) and the said building shall be erected constructed and completed with external walls of stone brick concrete or other approved material and shall at all times be in accordance with such building design plan and specification as the said authority or the Lessor may in their absolute discretion approve and the plan and specification shall be completely prepared and submitted by the Lessee for the approval of the Lessor within sixteen weeks from the date of commencement of this lease and the Lessee will within a period of six months from the commencement of this lease commence or cause to be commenced the erection and construction of the said building and shall thereafter diligently and continuously proceed with or cause to be proceeded with such erection and construction so that at the expiration of the said period of two (2) years from the date of the commencement of this lease the Lessee without cost to the Lessor shall have erected constructed and completed on in under over through or along the demised premises the said building hereinbefore mentioned and shall have expended thereon the sum of not less than one hundred and fifty thousand pounds (£150,000/–/–) within the time aforesaid and the said building design plan and specification shall provide for the complete safety

of the Lessor's passageway and the Lessee will only build subject to any requirement of the Lessor concerning the absolute stability safety and well being in every respect of the Lessor's passageway AND so that the space between the said building and the column known as Number 155 of the Lessor on the George Street level will be not less than six feet (6') AND there shall be no openings of any description onto any splayed alignment of the said building on or near the George Street frontage unless approved in writing by or on behalf of the Lessor AND the Lessee will at any time or from time to time produce and show to the Lessor on demand any book document paper bill account voucher and evidence relating to any money expended as aforesaid for material labour or any other item used or employed or upon which expenditure has been made in and about the said building AND the said building shall be erected constructed and completed in a good workmanlike and substantial manner in accordance with the said building design plan and specification and in accordance with any requirement and subject at every reasonable time to inspection and approval of the said authority and the Lessor and in accordance with any provision of any law statutory or otherwise having application to such erection construction and completion AND the Lessee will use no old or second-hand material therein except such as shall be approved by the said authority and the Lessor AND the Lessee will if the said building be three or more storeys in height provide the same with ample cut-off escapes to the requirement and satisfaction of the said authority and the Lessor AND the Lessee will in case of any shop and dwelling in combination so arrange them as to permit of the two portions being absolutely cut off from one another by a fire resisting wall floor and ceiling or other thing of separation or partition AND the Lessee will erect or construct any awning to be erected of the cantilever or suspended type in accordance with a building design and plan and specification approved by the said authority and the Lessor AND the Lessee will use damp courses if any be required of material approved by the said authority and the Lessor AND the Lessee will not erect or construct a roof on the said building which contains any corrugated iron excresence or tank or any tower or other cowl cupola dome cistern or thing unless treated ornamentally and specially approved or permitted by the said authority and the Lessor AND the Lessee will in the course of such erection and construction as aforesaid make construct and complete any necessary drain and other convenience of the like or a different kind as may be required by the said authority and the Lessor and in accordance with any provision of any law statutory or otherwise having application thereto AND notwithstanding anything hereinbefore contained the building design plan and specification of the said building shall be subject to the reasonable requirements of the Lessor AND if during the erection construction and completion of the said building it shall in the opinion of the said authority or the Lessor be necessary for the purpose of providing for the stability safety or well being thereof in any respect that any alteration or amendment should be made in or to the building design or plan or specification thereof then and on every such occasion the Lessee at his own expense will immediately carry out such alteration or amendment as may be required by the said authority or the Lessor.

Arguments were based on other clauses but they can be referred to later.

On the 24th February, 1943 the then lessees with the consent of the plaintiff transferred and assigned the lease to the defendant corporation which expressly covenanted with the plaintiff to observe the covenants in the lease. The individual defendants are nominees for the purpose of holding the licence.

Building control came to an end on 30th September, 1952. The learned judge was satisfied that no application to erect a building as contemplated

by Clause 4 of the lease would have succeeded from the date of the lease until the end of control.

The learned judge found the hotel as originally contemplated, which had been estimated to cost £600,000, would have cost approximately £1,500,000 at the date of the lease and probably several millions by 1954. As the figures show substantial profits were being made from the hotel and shops already in existence.

It is convenient to set out Section 40A (1) of the Liquor Act as it then stood :—

> "40A. (1) (a) Upon proof that public convenience requires additional accommodation in, or the renovation, structural alteration, or re-building of any premises in respect of which a publican's license is held, the licensing court may order the owner of the premises to carry out, within a reasonable time to be set out in the order, the work specified in the order.
>
> (b) Not less than thirty days' notice of intention to make application for any order under this subsection shall be given to the owner and to the occupier of the premises, and to the clerk of the licensing court for the licensing district.
>
> (c) The Notice shall set out reasonable particulars of the work which it is proposed to ask the court to order to be done."

A power to revoke or vary the terms of an order made under sub-section 1 (a) was conferred by an amending Act in 1954. Prior to 1954 certain work had been done by the defendant with the approval of the plaintiff and the Licensing Court for remodelling the southern bars.

On the 14th July, 1953 the Metropolitan Licensing Inspector gave notice of intention to apply under the above section for an order directing the construction *inter alia* of 200 bedrooms. The hearing was on 9th November. On 3rd November the solicitors for the defendant wrote to the solicitors for the plaintiff saying that their clients proposed to consent to an order for the construction of one hundred bedrooms with ancillary sitting rooms and bath and toilet facilities, with plans to be submitted within six months and work to be carried out within twelve months. The letter went on to say that if the plans were approved by the Licensing Court they would be submitted to the plaintiff for his approval and then to the City Council for its approval. In the Order the dates were varied. The plans were to be lodged by 31st March, 1954 and the building to be completed by 31st March, 1955. The Order in accordance with the Act put the obligation to carry out the work on the owner. The date for lodging plans was later extended to the 30th April.

The plans were sent to the plaintiff on the 21st April. The building did not cover the whole site but about two-thirds. One of the matters in issue is whether the planitiff approved the plans. This will be dealt with later. On the 21st May, 1954 the solicitor to the plaintiff wrote approving the plans subject to modifications and conditions one of which at least was substantial. On the 26th May the Licensing Court approved plans providing for 62 additional bedrooms with lounges and ancillary facilities. These plans with alterations subsequently made to them are conveniently referred to by the learned Judge as the 1954 plans. Discussions took place between the parties and in a history of the matter prepared by the defendant for a later application to the Court for extention of time it is stated that on 5th October, 1954 the plaintiff agreed to modification of his demands—that is in relation to the 1954 plans.

It is unnecessary to detail the various matters which led up to the application referred to above which was made on the 29th September, 1955. The Licensing Court apparently refused the application. An appeal to Quarter Sessions was lodged and not prosecuted.

The defendant had anticipated the cost of the building would be about £388,000. Tenders were called for and the lowest was £525,881. This

was more than the defendant was prepared to spend. It put forward various proposals including a surrender of the licence, and extension of the lease or a less costly type of construction.

On the 25th May, 1956 the plaintiffs' solicitors expressed the view that under clause 4 of the lease the defendant was bound to construct a building in accordance with the 1954 plans, these plans having been approved it was said by the plaintiff. The plaintiff required the defendant to construct such a building within eighteen months or be treated as having broken his contract.

On the 29th May, 1956 the Licensing Court cancelled the licence as from the 21st June. At this hearing the defendant made it clear that for financial reasons it did not propose to build in accordance with the 1954 plans. The defendant appealed to Quarter Sessions.

Rent and interest were paid and accepted up to the 30th June, 1956. For subsequent periods rent was tendered but refused.

In June, 1956 the defendant retained a new architect who produced new plans. These were for a building of three storeys on the Carrington Street frontage with its back to Wynyard Lane. They made provision for 76 bedrooms with a public bar lounge and a coffee lounge, with a shopping court on either side of Wynyard Lane. These are referred to as the 1956 plans. The cost was estimated at £420,000.

On 31st July, 1956 the plaintiff served a notice on the defendant under section 129 of the Conveyancing Act, 1919-1943 in respect of alleged breaches of the lease. It is unnecessary to set these out in detail. They were based on an alleged failure to put up the building as provided by clause 4, and failure to keep the licence in existence.

On 1st August, 1956 the solicitors for the defendant wrote denying that they were in breach. They reiterated the defendant's financial inability to go on with the 1954 plans. They then referred to the new plans which were enclosed. The plaintiff's approval was asked for. Details were given and it was stated that if the plaintiff's approval was given the appeal to Quarter Sessions was likely to succeed.

The letter in reply dated 14th August is as follows :—

> " Your letter of 1st August instant is acknowledged. The allegations therein and particularly in the sixth paragraph thereof are, on my instructions, completely unfounded.
>
> The Commissioner takes the view that the lessee was bound to erect the building which has been approved by him under the lease and which the Licensing Court on 31st May 1953 ordered the lessee to build, and the Commissioner does not propose to diminish his rights in this regard or to waive the breaches of covenant on the part of the lessee."

A further letter from the plaintiff's solicitor dated 17th August, 1956 reiterated the position taken up in the earlier letter and added :—

> " It is pointed out that the Commissioner has spent £109,134 at the request of the lessee in the erection of columns and substructure (vide clause 3 of the lease) to support a building which would occupy substantially the whole of the land the subject of the lease, and the Commissioner has, in his view, always been entitled to have a building erected which would be based upon the whole of such columns and substructure. It was further pointed out that the expenditure of £109,134 was at a time when currency was at its pre-war value, and that the value of this expenditure today approximates £450,000.
>
> In 1953 when the plans for a building were submitted to the Commissioner by the lessee, the Commissioner, in approving such plans, made substantial concessions to the lessee in that the building would only occupy approximately two thirds of the site. It is certainly not now proposed by the Commissioner that his rights in

respect of such building should be jettisoned so that, in lieu of such building, there will be erected by the lessee a building which will occupy, at the most, no more than one third of the site.

It is not agreed that the lessee's present proposal is in accordance with the requirements of the Notice of Breach of Covenant herein, but, on the contrary, the lessee has indicated in no uncertain manner that it does not propose to remedy the breaches of covenant.

The lessee is required at the hearing of the appeal to undertake to the Court that it will forthwith commence the erection of the building approved by the Commissioner and the Licensing Court in 1954, and to satisfy the Court that it will complete such building with a minimum of delay."

On the 24th August, 1956 a contract was entered into between the defendant and a building contractor to construct a building in accordance with the 1956 plans. On that day the plans were approved by the Council of the City of Sydney and no objection had been raised by the Fire Board.

On 28th August, 1956 Quarter Sessions set aside the order cancelling the licence on the defendant's undertaking to apply to the Licensing Court to vary the terms of the Order of the 9th November, 1953 by ordering a building in accordance with the 1956 plans. The defendant further undertook to use its best endeavours to obtain the consent of all parties including the plaintiff. The defendant applied on the 5th September and the hearing was fixed for the 18th October.

On the 4th October the plaintiff began the present suit by statement of claim filing a notice on the following day for an interlocutory injunction. The learned judge refused an injunction. The plaintiff appealed to the High Court of Australia. On the learned Judge fixing the hearing of the case for the 5th March, 1957 the plaintiff elected not to pursue his appeal. The application before the Licencing Court was adjourned.

The relief claimed is as under :—

" 1. That it may be declared that the Defendants are not entitled to build a building on the demised premises other than in accordance with plans and specifications approved by the Plaintiff.

2. That it may be declared that the Defendant Avrom Investments Proprietary Limited was and is bound under the said lease of the demised premises to build the building approved by the Plaintiff on the twenty first day of May, 1954, and by the Licensing Court on the twenty sixth day of May, 1954.

3. That it may be declared that an application by the Defendant under Section 40 or Section 40A of the Liquor Act, 1912, to the Licensing Court for its approval of plans and specification which have not been approved by the Plaintiff for a building to be erected on the subject land is inconsistent with the performance by the Defendant of its covenants express and implied in the lease.

4. That it may be declared that an application by the Defendant to the Licensing Court for an Order under Section 40A of the Liquor Act, 1912, that the Plaintiff build upon the subject land a building according to plans and specifications not approved by the Plaintiff is inconsistent with the performance by the Defendant of its covenants express and implied in the lease.

5. That the Defendants may be restrained from building a building on the demised lands other than in accordance with plans and specification approved by the Plaintiff.

6. That the Defendant Avrom Investments Proprietary Limited by itself or through any servant agent or person holding a licence under the Liquor Act 1912 as amended in respect of the demised land may be restrained from making or further proceeding with an application to the Licensing Court of the Metropolitan District for variation of the Order of that Court made on 9th November, 1953,

under Section 40A of the Liquor Act 1912 as amended in respect of additions to the demised premises or for variation of the approval of that Court of 26th May, 1954, of certain plans for additions.

7. That the Defendant Avrom Investments Proprietary Limited by itself or through any servant agent or person holding a licence under the Liquor Act 1912 as amended in respect of the demised land may be restrained from making or further proceeding with an application to the Licensing Court of the Metropolitan District for approval of plans which have not been approved by the Plaintiff.

8. That the Defendant Avrom Investments Proprietary Limited by itself or through any servant agent or person holding a licence under the Liquor Act 1912 as amended in respect of the demised land may be restrained from making or proceeding with applications to the Licensing Court which are inconsistent with the Plaintiff's rights under the irrevocable power of attorney as set forth in the said lease.

8A. THAT an inquiry may be held as to damages suffered by the Plaintiff and that the Defendant Avrom Investments Proprietary Limited may be ordered to pay the same to the Plaintiff.

9. That the Defendants may be ordered to pay the costs of the Plaintiff of this suit.

10. That the Plaintiff may have such further or other relief as the nature of the case may require."

The pleadings are voluminous and many amendments were allowed in the course of the hearing which lasted for thirty-eight days. The learned Judge dismissed the suit.

The issues which arise for decision on this appeal may be summarised.

(1) Were the 1954 plans approved within the meaning of clause 4 of the lease?

(2) If so did the defendant thereupon become liable under the contract to build the building in accordance with these plans having no right to submit further plans for consideration?

If the plaintiff succeeds on these two points the question would then arise whether it was entitled in equity to the Declarations asked for in paragraph 2 and paragraph 4 and to the Injunction asked for in paragraphs 5 and 7.

If the plaintiff fails on these two points further questions arise. The plaintiff has clearly not approved the 1956 plans. Is the defendant entitled to proceed with its application to the Licensing Court to approve them and if so approved to construct a building in accordance with them? The learned Judge decided that it was on the following grounds :—

(3) He decided that the plaintiff's refusal to approve must be reasonable. He relied on the terms of the contract and alternatively on section 133B of the Conveyancing Act 1919-1943.

(4) He also held that the plaintiff's refusal was unreasonable.

One other point can be disposed of first. The defendant submitted that the obligation to build had come to an end on principles analogous to those applied in frustration cases. This contract was entered into at a time when building restrictions made the contemplated building impossible. The original time limit for the building expired fifteen or sixteen years ago. Their Lordships are of opinion that both parties have proceeded on the basis that the times were extended and that at all relevant times the obligation to build remained. The question therefore whether frustration can ever apply to a lease does not arise (see *Cricklewood Property & Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.* [1945] A.C. 221, 234).

Their Lordships will now consider the first two points as set out above.

It is plain that the plaintiff approved the general scheme of the 1954 plans. He insisted on modifications. It is clear from a document drawn up by the defendant in 1955 that the plaintiff's original demands were

modified and in October, 1954 engineering and architectural plans and specifications were ordered "pursuant to the modified structural plan agreed upon by the plaintiff.".

On 23rd March, 1955 substituted plans were lodged with and approved by the Licensing Court. These plans did not differ in principle from the former ones. They may have been sent to the plaintiff but there is no evidence that they were approved either by it or the City Council or other statutory bodies concerned. In these circumstances the learned Judge held that there was no approval of the plans sufficient to justify the submission set out in (2) above and their Lordships agree.

In any event however their Lordships do not accept the submission that under clause 4 there was no right in the defendant to ask the plaintiff to consider new plans. The plaintiff might have had a right to refuse on the ground of unreasonable delay, or on the ground that it had altered its position in some way which made it a breach of contract for the defendant not to proceed in accordance with the approved plans. The point taken in the letters and at the hearing was that the approval of plans in itself precluded the lessee from asking that the matter should be reconsidered. Their Lordships do not find anything in the contract which justifies this submission. Nor do their Lordships find anything in the circumstances which would have entitled the plaintiff to refuse to consider the plans.

The plaintiff then submits that it did not consider them; that he had an absolute discretion to approve or disapprove and that it disapproved. The defendant under the contract cannot build except in accordance with plans that have been approved and the plaintiff is therefore it submits entitled to the relief claimed under paragraphs 1, 3, 4, 5 and 7.

The plaintiff sought to support its submission that the defendant became bound to build in accordance with the 1954 plans by arguing that under clause 5 of the lease, the order made by the Licensing Court in relation to the 1954 plans became binding on the defendant under that clause. It reads as follows:—

> "THAT the lessee will during the said term well and sufficiently repair maintain pave cleanse amend and keep the demised premises and the said building with any appurtenance of either of them and any fixture or thing or any fitting thereto belonging or which at any time during the term shall be erected or constructed or made by the Lessor or the Lessee when where and so often as need shall be in good clean and substantial repair and condition in all respects and replace any such fixture or thing or any fitting as is requisite and as shall during the said term become useless or unsuitable for use because of being worn out broken beyond repair damaged beyond repair obsolete or out of date with a new or suitable one in keeping with the premises approved by the Lessor AND will also make and carry out any cleansing and any amendment alteration reparation or addition whether structural or otherwise which by virtue of any provision of any law statutory or otherwise having application thereto now or hereafter in force or by virtue of any requirement of the said authority may be required to be made or carried out by either the Lessor or the Lessee in or upon the demised premises or the said building or any appurtenance of either of them."

The learned Judge held that the words of the clause were not intended to cover an order made under section 40A. In their Lordships' opinion neither the Order made in relation to the 1954 plans nor an Order, if made, in relation to the 1956 plans would come within the general words of clause 5 because their subject matter is the building to be constructed under the special provisions of clause 4. Whether other Orders if made would come under clause 5 must be left to be decided if and when a dispute on the point arises.

The words "absolute discretion" in lines 11 and 12 of clause 4 are rightly contrasted by the plaintiff with formulae to be found in several places in the Lease where a right in the lessor is qualified by words

negativing an absolute right. In clause 6 for example it is provided that the lessor "shall not unreasonably withhold permission" for extending the interval between paintings of the building. It is contended for the defendant that the words "absolute discretion" are qualified by the express words to be found towards the end of the clause; "And notwithstanding anything hereinbefore contained the building design plan and specification of the said building shall be subject to the reasonable requirements of the lessor." The plaintiff submitted that this refers to requirements after approval has been given. As the learned Judge pointed out it would have been simple so to provide if that had been meant. Further it is *inter alia* the plan itself which is to be subject to the requirements, presumably before approval. In their Lordships' opinion the opening words clearly indicate the cutting down of a right "hereinbefore contained". It is then said that the words should be construed as applying only to the "requirements" expressly referred to earlier in the clause. The first of these deals with the lessor's passageway, the second "requirement" is in addition to the obligation to build in accordance with the said building design plan and specification. It seems impossible therefore to restrict the words to "requirements" as referred to expressly. As against that it is the "building design plan and specification" which in the words "hereinbefore contained" are to be subject to the lessor's approval in its absolute discretion. It would not probably be contemplated that plans would be rejected *in toto*. The lessor would "require" this or that modification or addition. As these later words have to be given effect to "notwithstanding anything hereinbefore contained", their Lordships, agreeing with the learned Judge, are of opinion that the lessor if he disapproves plans must have reasonable grounds for so doing.

Alternatively the defendant relied on the principle that general words must if necessary be limited so as not to defeat the main object of the contract (*Glynn* v. *Margetson & Co.* [1893] A.C. 351). It is not necessary to deal with this argument.

The learned Judge found that section 133B of the Conveyancing Act applied. That section would import a provision that approval was not to be unreasonably withheld, if such a provision was not to be found in the contract. Counsel for the appellant was prepared to accept that the building in question might be "improvements" within the section. He also accepted that one did not have to find a covenant which was in form a covenant against making improvements. (*Balls Brothers Ltd.* v. *Sinclair* [1931] 2 Ch. 325.) He relied, however, on these words in support of a submission that it did not apply to "improvements" which under the lease the lessee had covenanted to make, although of course subject to consent as to plans. It did not, in other words, apply to leases under which the lessee undertakes to build. It is not necessary to determine this question which is one of difficulty and importance.

Was the plaintiff reasonable in refusing to approve the 1956 plans? The learned Judge held that the 1956 plans had the following advantages over the 1954 plans:—

(*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.

(*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 development.

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

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

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

The learned Judge also found that a building according to the 1956 plans was a very much better economic proposition than a building according to the 1954 plans.

The plaintiff submitted that under the contract the building had to cover the whole site. Their Lordships do not accept this. The building has to be on the demised premises and cost not less than £150,000. Both these conditions are fulfilled.

The reason put in the forefront by the plaintiff, namely that the defendant had no right to ask for consideration of further plans was for the reasons given based on a misconstruction of the contract.

There were of course some disadvantages as set out in the letters cited. The learned Judge found that approval was unreasonably withheld by the plaintiff. There was ample evidence to support this conclusion with which their Lordships agree.

In *Balls Brothers Limited* v. *Sinclair* [1931] 2 Ch. 325 Luxmoore, J. held that consent having been unreasonably withheld by the lessor to an alteration, the alteration could in the circumstances have been made by the lessee without any further application to the lessor. This applies here though there are authorities including the Licensing Court whose approval is necessary.

On the above findings it is unnecessary to deal with other points raised.

Their Lordships would like in this complicated case to express their indebtedness to the full and clear judgment of the learned Judge.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

(39699) Wt. 8021—25 100, 4/59 D.L.

In the Privy Council

THE COMMISSIONER FOR RAILWAYS

v.

AVROM INVESTMENTS PROPRIETARY LIMITED AND OTHERS

DELIVERED BY

LORD SOMERVELL OF HARROW

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