[HIGH COURT OF AUSTRALIA.]

OPERA HOUSE INVESTMENT PROPRIETARY LIMITED . . . . . Applicant, } Appellant;

AND

DEVON BUILDINGS PROPRIETARY LIMITED Respondent.
Respondent,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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Melbourne, *Mar.* 10.

Sydney, *April* 29.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Landlord and Tenant—Lease—Rent—Covenant—Additional rent equal in amount to interest payable by lessor on moneys borrowed on mortgage and applied towards erecting building on land—"And after expiration of . . . mortgage, to be at such higher or lower rate of interest as lessor may reasonably contract to pay" —Lessor able to renew mortgage at 4¼ per cent—Lessor borrowing greater amount at 4½ per cent—Reasonableness of lessor's action.

In a lease of lands the lessee covenanted to pay a certain fixed rent and also that he would during the continuance of the term pay "as and by way of additional rent sums equal in amount to the interest payable by the lessor on the moneys now about to be borrowed by him on mortgage of the said lands to be applied towards the cost and expenses of erecting" certain buildings, "such interest during the then currency of the said mortgage to be at the rate of four per cent per annum and after the expiration of the said mortgage to be at such higher or lower rate of interest as the lessor may reasonably contract to pay on the said moneys." When the mortgage fell due the lessor owed £16,245 to the vendors of the land on account of the purchase money in addition to £18,131 due under the mortgage. He could have renewed the mortgage at 4¼ per cent but in fact borrowed £35,000 at 4½ per cent for the term of five years.

Held, by *Latham* C.J., *Starke*, *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting), that the lessor was not bound to ignore his own interests in the matter, that he had acted reasonably in borrowing the larger sum at 4½ per cent for five years,

and that the lessee was bound to pay additional rent at the rate of 4½ per cent for five years on the amount of £18,131 which had originally been borrowed on mortgage and expended on the premises under the terms of the lease.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

In a lease of certain property in Melbourne made on 29th March 1900 for the term of fifty years from 1st March 1901, the lessee covenanted to pay a certain fixed rent and also that he would during the continuance of the term pay " as and by way of additional rent sums equal in amount to the interest payable by the lessor on the moneys now about to be borrowed by him on mortgage of the said lands to be applied towards the cost and expenses of erecting the said hotel, theatre and premises such interest during the then currency of the said mortgage to be at the rate of four per cent per annum and after the expiration of the said mortgage to be at such higher or lower rate of interest as the lessor may reasonably contract to pay on the said moneys."

The amount borrowed on mortgage of the lands and applied towards the erection of the hotel, theatre and premises mentioned was £18,131. The respondent, Devon Buildings Pty. Ltd., became the owner of the reversion on 31st July 1934. The appellant, Opera House Investments Pty. Ltd., was the assignee of the lease, having purchased the leasehold estate in 1927. The sum of £18,131 had been raised by a mortgage which fell due on 31st July 1934. There was also a balance of purchase money due by the respondent to the vendors of £16,245. This amount had fallen due on 26th July 1931, but by agreement with the vendors the time for payment was extended to 26th July 1934.

On 1st August 1934, the respondent borrowed £35,000 on mortgage of the land from the Colonial Mutual Life Assurance Society at 4½ per cent for the term of five years ending on 1st July 1939. The evidence showed that before the respondent made a binding contract for the mortgage at 4½ per cent an offer was made to the respondent to renew the mortgage for £18,131 at 4¼ per cent for three years.

The appellant, Opera House Investment Pty. Ltd., took out a summons to determine whether it was bound to pay any and, if so, what additional rent under the clause in the lease in consequence of

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the respondent entering into the mortgage of £35,000 at 4½ per cent. The summons was heard by *Martin* J. who held that the respondent was unreasonable in not renewing the mortgage at 4¼ per cent, and he held that the appellant was bound to pay additional rent at this rate. On appeal the Full Court held that the respondent had acted reasonably in borrowing £35,000 at 4½ per cent for five years and that the appellant was bound to pay 4½ per cent on the sum of £18,131 as additional rent.

From that decision Opera House Investment Pty. Ltd. now appealed to the High Court.

Wilbur Ham K.C. (with him *Herring* K.C.), for the appellant. The respondent did not act reasonably in agreeing to pay 4½ per cent for five years. As his action was not reasonable there is no obligation on the lessee to pay any additional rent under the covenant in the lease. The covenant is only to pay rent equivalent to the interest paid " on the said moneys," that is, on the sum of £18,131 borrowed and expended on the premises. The 4½ per cent was not agreed to be paid as interest " on the said moneys " but on a larger sum. For this reason also no additional rent is payable. Alternatively, the lessor did not act reasonably in refusing to renew the mortgage for three years at 4¼ per cent. As he could have done so, this is the maximum amount for which the lessee is liable. Reasonableness must be considered from the point of view of the lessee, whose interest may conflict with that of the lessor.

Fullagar K.C. (with him *Moore*), for the respondent. The lessor is entitled to consider his own legitimate interests and he is not bound to subordinate these to the interests of the lessee. In borrowing the larger sum for five years he acted reasonably and the lessee is bound to pay increased rent equivalent to 4½ per cent on £18,131.

Wilbur Ham K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. In a lease for a term of fifty years of certain property made on 29th March 1900 the lessee agreed to pay a certain fixed rent and also that he would during the continuance of the term pay "as and by way of additional rent sums equal in amount to the interest payable by the lessor on the moneys now about to be borrowed by him on mortgage of the said lands to be applied towards the costs and expenses of erecting the said hotel theatre and premises such interest during the then currency of the said mortgage to be at the rate of four pounds per centum per annum and after the expiration of the said mortgage to be at such higher or lower rate of interest as the lessor may reasonably contract to pay on the said moneys."

The amount borrowed on mortgage of the said lands and applied towards the erection of the hotel, theatre and premises mentioned was £18,131 3s. 9d. Devon Buildings Pty. Ltd., the respondent in this appeal, became the owner of the reversion on or about 31st July 1934. Opera House Investment Pty. Ltd., the appellant, is the assignee of the lease, having purchased the leasehold estate in 1927. The sum of £18,131 had been raised by a mortgage which fell due on 31st July 1934. There was also a balance of purchase money due by the respondent to vendors of £16,245 6s. 8d. This amount had fallen due on 26th July 1931 but by agreement with the vendors the time for payment was extended to 26th July 1934.

On 1st August 1934 the respondent borrowed £35,000 on mortgage of the land from the Colonial Mutual Life Assurance Society at 4½ per cent for a term of five years ending on 1st July 1939. The respondent claims that it is entitled to receive by way of additional rent from the appellant a sum equal to the amount of 4½ per cent on £18,131 for the period of five years constituting the currency of this mortgage. On the other hand the evidence shows that before the respondent made a binding contract for the mortgage at 4½ per cent an offer was made to the respondent to renew the mortgage for £18,131 at 4¼ per cent for three years. The appellant therefore contends that there is no obligation to pay an amount equal to the 4½ per cent for five years which is claimed by the respondent. The appellant advances three contentions :—

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1. The respondent did not reasonably contract to pay the said rate of 4½ per cent for five years and therefore there is no obligation ot pay any additional rent under the covenant in the lease.

2. Alternatively, the 4½ per cent claimed is not interest which the lessor (respondent) contracted to pay " on the said moneys " but on a larger sum of £35,000.

3. Alternatively, in view of the offer of a mortgage for £18,131 at 4¼ per cent for three years the lessor did not contract reasonably in agreeing to pay 4½ per cent for five years, and the lessee is bound to pay only 4¼ per cent.

His Honour Mr. Justice *Martin* held (and it is not disputed) that the covenant in question was inserted in the lease for the protection of the lessee. He found on the facts that seven weeks before the mortgage was due the lessee was advised that £18,131 at 4¼ per cent was available and he held that the lessor acted unreasonably in refusing that offer. He found that the lessor did not consider the reasonableness of its action from the point of view of the lessee at all. He decided against the first and second contentions which I have mentioned above but held that the lessee was bound to pay as additional rent 4¼ per cent for the five year period of the mortgage of 1st August 1934 and not 4½ per cent per annum as claimed by the lessor.

The Full Court reversed this judgment holding that " from every point of view of reasonable financial arrangement it was highly desirable that the lessor should get his indebtedness in one hand and under one security " and that the lessor did not act unreasonably in agreeing to pay 4½ per cent for five years on the sum of £35,000, which represented the financial requirements at the time when it became necessary to raise the £18,131. The Full Court also held that it was reasonable to borrow for a term of five years.

The learned Judge of first instance found that 4½ per cent was a common rate at the time, whether for £18,131 or for £35,000, when there was a margin such as existed in this case. It was not contended that five years was an unreasonable term in itself or that it was unreasonable from the point of view of the lessor, but it was contended that these considerations were not conclusive of the matter and that where money was available at a lower rate of interest though

only for a shorter term, either it was the duty of the lessor to contract on those conditions, or, at least, if he did not accept the offer made, he could not charge the lessee with any additional liability which had been incurred by reason of his own particular circumstances.

It is convenient first to deal with the contention that if the lessor made a contract but not a reasonable contract for the renewal of the mortgage he was entitled to no additional rent under the covenant.

In order to determine this question it is necessary to pay careful attention to the form of the clause. The clause may be expressed in a skeleton form as follows :—

The lessor will pay as additional rent sums equal to the interest payable by the lessor on the £18,131, but (1) such interest during the currency of the mortgage for £18,131 which was first entered into is to be at the rate of 4 per cent per annum ; and (2) after the expiration of that mortgage is to be at such higher or lower rate of interest as the lessor may reasonably contract to pay on the £18,131.

Thus there is in the first place an obligation to pay as additional rent an amount equal to the interest payable by the lessor, but subject to two limitations during the two periods mentioned. Thus if during the first period, the lessor pays more than four per cent as interest, e.g., if he pays a higher penalty rate, the lessee nevertheless need only pay the equivalent of 4 per cent as rent. During the second period, whatever the lessor may in fact pay by way of interest, the lessee is only to pay to him by way of additional rent an amount fixed in accordance with the standard described by the words "may reasonably contract to pay." Thus, in my opinion, the lessor does not lose his right to recover additional rent either by paying a higher rate than 4 per cent during the first period or a higher rate than that which it would have been reasonable for him to contract to pay during the second period.

The second contention for the lessee does not appear to me to be well founded. The lessor pays interest on the £18,131 even though that sum is part of a larger sum of £35,000 borrowed on a single mortgage.

The third contention raises more difficult questions. It is not contended that what the lessor did might not have been reasonable

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from his point of view, but it is contended that this fact, in itself, is irrelevant. If the lessor became financially embarrassed it might have been reasonable for him to pay even ten per cent per annum in order to obtain essential financial accommodation, but this, it is argued, does not entitle him to impose any additional burden upon the lessee for whose protection this particular clause was inserted. The word " reasonable " has often been declared to mean " reasonable in all the circumstances of the case." The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction. A circumstance which had no relation to the property which was the subject matter of the transaction but which depended entirely upon the personal position or personal desires of the owner of the property, would not, in my opinion, be a relevant circumstance in determining what was reasonable. If, to take an extreme example, the lessor had promised to pay to a favourite daughter the rent derived from this property and was anxious to pay her as much as possible, that circumstance should be excluded in determining what was reasonable under the clause in question. But if the lessor of a hotel refuses his consent to an assignment of the lease to a brewing company because he does not wish the hotel to become a tied house, he may be acting reasonably (*In re Marshall and Salt's Contract* (1)). In such a case the wish of the lessor has a direct practical relation to the property which is the subject matter of the transaction between the parties.

Under such a covenant as that now under consideration the lessor is not compelled altogether to disregard his own interests in relation to the mortgage to be effected. If, in his capacity as an intending mortgagor, but bound by this covenant, he acts reasonably, he complies with the covenant.

The matter should be judged by the actual result, whatever may have been the character of any negotiations that may have preceded that result. The learned Judge has found that an untrue statement was made when it was asserted on behalf of the lessor that arrangements had actually been made by the lessor with the Colonial Mutual Life Assurance Society for a mortgage at 4½ per cent before

(1) (1900) 2 Ch. 202.

the officers of the respondent were informed that the £18,131 could be obtained at 4¼ per cent. In my opinion, the effect of this fact is simply to entitle the Court to consider the matter upon the basis that the lessor was in fact able to obtain £18,131 at 4¼ per cent.

In order to arrive at a decision on the matter I place the opposing contentions in contrast, confining my attention to matters affecting the plaintiff in his double capacity as an intending mortgagor and as a landlord with right to charge the tenant as additional rent only such amount of interest as he may reasonably contract to pay.

(1) The contention for the lessee reduces itself to the proposition that in all the relevant circumstances, the lessor should have accepted the offer of a first mortgage for three years of £18,131 at 4¼ per cent.

(2) The contention of the lessor is that, if he had done this, he would have been compelled to obtain an additional £17,000 on second mortgage: he might not have been able to do this at all, and, if he did, he would have been forced to pay a much higher rate of interest. It is added that he would have lost the convenience of having a single loan and a single mortgagee.

I agree that if the lessor had accepted the offer at 4¼ per cent he might have placed himself in an almost impossible position, or at least in a very difficult position. The covenant requiring him to act reasonably, though inserted in the lease as it was in the interest of the lessee, does not require the lessor to ignore these considerations and accordingly I think that he acted reasonably in contracting to pay the rate of 4½ per cent upon a single mortgage for £35,000 (including £18,131) during five years, a quite normal period for mortgages.

In my opinion the judgment of the Full Court should be affirmed.

STARKE J. I concur in the opinion of the Chief Justice.

"Reasonable" is a relative term, and the facts of the case must be considered before what constitutes a reasonable contract can be determined. The respondent could have renewed a mortgage for £18,000 (in round figures) for a term of three, and probably five, years at 4¼ per cent, but at the same time it was necessary for it to provide a further sum of £17,000 (in round figures) to complete the purchase of the land the subject of the mortgage. As a matter

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of business, it was desirable, as *Mann* C.J. observed, that the respondent should have its indebtedness placed in one hand and under one security. So it raised £35,000 on the security of the land from the Colonial Mutual Society, for five years at a rate of 4½ per cent, which the trial Judge regarded as "a common rate at the time whether for £18,000 or £35,000 when there was at least a 50 per cent margin." The Full Court was right, in my opinion, in holding that the respondent acted reasonably in making such a contract, in all the circumstances of the case.

The appeal should be dismissed.

DIXON J. The appellant is the assignee of a lease for fifty years from 1st March 1901. The respondent is the transferee of the reversion. The demised premises included buildings which the landlord was to erect prior to the commencement of the term. It appears that two-thirds of the cost incurred in erecting the buildings was to be and was in fact borrowed by the landlord at four per cent per annum upon the security of a mortgage over the demised premises having a currency of five years. An annual rent was reserved by the lease. But in addition to the rent expressed in figures the reddendum required the lessee to pay a sum equal in amount to the interest payable or to be payable by the lessor on or in respect of the amount borrowed or to be borrowed by the lessor and applied towards the costs and expenses of erecting the buildings. The reddendum stated that the additional rent was payable in accordance with the covenant afterwards contained in the lease. It described the rate of interest as four per cent per annum during a term of five years from the date of the borrowing by the lessor and thereafter at such higher or lower rate as the lessor might contract to pay for the same. The covenant to which the reddendum referred varied the expression of the obligation to pay additional rent. It described the additional rent as equal in amount to the interest payable by the lessor on the moneys then about to be borrowed by him on mortgage of the lands to be applied towards the cost of building, such interest during the currency of the mortgage to be at the rate of four per cent per annum and after the expiration of the mortgage to be at such higher or lower rate of interest as

the lessor might reasonably contract to pay on the said moneys. As the reddendum describes the additional rent as payable in accordance with the covenant, the language of the covenant must prevail over that of the reddendum and govern the ascertainment of the amount. The sum actually borrowed for the purpose of building was £18,131 3s. 9d. and it is the interest payable upon this amount that forms the additional rent. The lease contained two provisions for avoiding difficulty in the future over the rate of interest. It provided for the submission of disputes to arbitration and it enabled the lessee to relieve himself of the payment of additional rent altogether or *pro tanto* by paying to the lessor the whole or part of the moneys borrowed. There appears to have been a covenant collateral to the lease and possibly it dealt further with the effect of such a capital payment. The parties, however, have not availed themselves of the machinery provided by their predecessors in title for dealing with a dispute as to the rate of interest, but have sought from the Courts of law a determination of their legal rights based upon the exact words of the covenant.

The matter in dispute is the rate of interest payable by the respondent, the reversioner, as from 31st July 1934. It is a rate of interest exceeding by a quarter per cent per annum that obtainable at the time by the respondent. The question is whether it was not incurred in circumstances which entitled the appellant, the tenant, to refuse to pay it as additional rent. On that date, or possibly five days earlier, the then existing mortgage by which the £18,131 3s. 9d. was secured became due and payable. The respondent had bought the reversion by a contract dated 8th April 1927 but had not obtained a transfer, and a balance of purchase money amounting to £16,245 6s. 8d. remained outstanding. The original date of payment had been extended to 26th July 1934. In addition, a sum of £409 3s. 6d. was payable for six months' interest on the balance of purchase money and another sum of £228 6s. 9d. was payable for three months' interest on the mortgage moneys. These four sums amounted to £35,014. The various parties entitled to receive them were represented by the same firm of solicitors. In April and May 1934 both the appellant and the respondent negotiated with this firm for the renewal of the mortgage and also for allowing

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the balance of purchase money to remain outstanding. What passed made it appear probable that in the case of both mortgage and purchase moneys an extension might be arranged at 4½ per cent per annum. The appellant, on 8th May 1934, wrote to the respondent that in the then present state of the money market the appellant considered that the mortgage moneys should be got for even less than 4½ per cent.

Shortly before 21st May 1934, the respondent told the solicitors that it could obtain the money at 4¼ per cent. They said they would communicate with their clients and in fact did so. On 5th June 1934 they verbally informed the respondent that the mortgage could be renewed for three years at 4¼ per cent, and, on the following day, confirmed this information by a letter in which they also said that three-fourths of the balance of purchase money might remain outstanding at 4½ per cent for another three years, but that payment of one-fourth (£4,061 6s. 8d.) on 31st July would be necessary.

In the meantime the respondent had applied to a financial institution for a loan of £35,000 on the security of the land. The request came before the directors on 30th May and, at their instance, the respondent, on 1st June, paid a valuation fee and submitted a formal application for the money at 4½ per cent. The application named ten years as the period proposed for the mortgage. On 14th June the institution agreed to lend £35,000 at 4½ per cent for five years. On the following day, the respondent notified the solicitors for the mortgagees and vendors of the arrangement, and, on 20th June, wrote informing the appellant, which at once objected to being saddled with the additional quarter per cent. On 31st July, or 1st August 1934, the respondent paid off the existing mortgage including the accrued interest and the balance of purchase money and interest secured thereon. It took a transfer and gave a mortgage for £35,000 at 4½ per cent for five years.

The question for decision is whether the appellant is obliged under the covenant in the lease to pay to the respondent by way of additional rent an amount equal to interest at 4½ per cent on the £18,131 3s. 9d., the cost of the buildings, as contained in the sum of £35,000. The appellant is so obliged only if the respondent's contract to pay 4½ per cent satisfies the conditions of the lessee's

covenant to pay as and by way of additional rent sums equal in amount to the interest payable by the lessor on the moneys then about to be borrowed by him on mortgage of the said lands to be applied towards the cost of erecting the buildings, such interest to be at such higher or lower rate (than that of the original mortgage) as the lessor may reasonably contract to pay on the said moneys.

The expression " lessor " is defined in the mortgage to include the grantor of the lease and his executors, administrators and transferees. The respondent for the first time brought itself within this definition on 31st July or 1st August 1934 when it obtained the transfer. On the same day it contracted to pay the rate of interest objected to. It did so in order to obtain the sum of £16,245 6s. 8d. in addition to the original mortgage moneys so that it might pay off the balance of purchase money and thus obtain the transfer which brought it within the description of " lessor " for the purposes of the covenant.

The rate of interest, 4½ per cent, which the respondent contracted to pay on the £35,000 was reasonable for that sum. It was a rate of interest commonly paid at the time on large sums of money. The security was ample for the amount borrowed and the rate was not influenced by such a consideration as greater risk. Money was obtainable at 4¼ per cent, but not as of course. If the respondent had failed after reasonable efforts to obtain an offer of 4¼ per cent, it could not have been said that it contracted unreasonably in agreeing to pay 4½ per cent, even if the loan had been limited to £18,131 3s. 9d. But, at the time when it agreed to pay 4½ per cent, it had before it an offer of 4¼ per cent on that sum. It was perfectly free both as a matter of law and as a matter of business propriety to accept the offer of 4¼ per cent. It was not in fact affected in its choice by the consideration that one offer was for three and the other for five years. Its decision was guided altogether by the circumstance that it needed the additional sum making up the £35,000 to cover balance of purchase money and interest. Apparently it was unwilling at the time to find in cash the fourth part of the balance of purchase money, payment of which would be necessary if it accepted the offer received from the solicitors for the mortgagee and for the vendors. A conflict, therefore, arose between the needs or desires of the respondent and the course that otherwise must have been followed if due regard were paid to the appellant as the party upon which the burden of the interest actually fell. Thus it appears

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that to answer the question whether the lessor acted reasonably in contracting to pay 4½ per cent per annum it is necessary to discover what are the considerations which might properly actuate the contract or, put in another way, what purposes the lessor was entitled to pursue in making it. The rate of 4½ per cent was actually accepted in order that the lessor as purchaser of the reversion might find at once the balance of the purchase money and the means of paying off the existing mortgage then due. If this was an admissible purpose and supplies a consideration by which the reasonableness of the contract may be judged, then it was plainly reasonable to agree to pay that rate of interest on all the moneys composing the £35,000.

On the other hand, if it is not the purposes of the lessor, but the interests of the lessee, that govern the reasonableness of the contract, a very different answer would be given.

To contract to pay a rate of 4½ per cent per annum on the original mortgage debt of £18,131 3s. 9d. seems altogether unreasonable when the contract is considered simply as one resulting in a burden, not upon the party making it, but upon the lessee. For it cast upon the lessee the obligation of paying a higher rate of interest than was offered, and it did so for no purpose in which the lessee was concerned.

A statement of these opposing views is enough to show that the reasonableness of the lessor's contract to pay 4½ per cent cannot be determined in the abstract. Some conception must be formed of the matters which may, and the matters which may not, be taken into account as affording the standard of reasonableness. It is evident that the qualification expressed by the word "reasonably" was introduced into the covenant because, during the currency of the lease, the rate of interest payable on the money borrowed for building would not be a matter of concern to the lessor who would actually contract to pay it, but to the lessee who, in effect, undertook to indemnify the lessor against its payment. The purpose of the qualification was to protect the lessee from the possible consequences of this situation. It by no means follows, however, that the lessor must, in contracting to pay a rate of interest, consider exclusively the lessee's advantage. For example, all the conditions of the mortgage affecting the principal sum and the security itself are the sole concern of the lessor. He is not obliged to disregard his own interests which so arise in order to obtain a low rate of interest for the lessee.

On the other hand, some matters tending to the lessor's advantage plainly are considerations which could not make it reasonable to contract to pay a higher rate of interest than otherwise he would pay. Thus, if the lessor were induced to do so by the lender's offering him some concession or other benefit in an independent transaction, I should think that the lessor could not impose the higher rate of interest upon the lessee, however reasonable it would be to agree to pay it in order to obtain the collateral advantage if the lessor alone were concerned. The question for decision, therefore, is, in my opinion, whether the matters that determined the rejection of the lower rate of interest and the acceptance of the higher fall outside the class of considerations which might make it reasonable to contract for the higher rate.

The question involves the ascertainment of the scope of the covenant by a process of interpretation. The first thing to be noticed in the covenant is that it relates to interest on a sum of money definitely ascertained. It is a sum measured by the expenditure of the lessor upon the improvements of the demised premises for the benefit of both parties. It is that sum, the £18,131 3s. 9d., and no more that is to bear the interest payable by the lessee as additional rent. It is that sum which is to be borrowed on the security of the land, and I think it is implied that it must be borrowed on first mortgage of the land and not upon second or third mortgage.

The second thing to notice is that the covenant relates only to a contract of a lessor, that is, the original lessor, some one constituted as his personal representative, or some one who fully answers the description "transferee." In the present case we are concerned only with the last of these. It may be conceded that when the respondent handed over the mortgage and thus completed the contract to pay 4½ per cent it had become "transferee," because at the same time a transfer was handed to it by or on behalf of the vendors of the reversion. But the fact that the covenant requires that the contract for the rate of interest should be made by a transferee appears to me to show that the covenant assumes that the party so contracting has complete ownership of the reversion. The lessee does not bind himself to pay any rate of interest except that which a full owner of the reversion has contracted to pay on the definite sum of £18,131 3s. 9d., and no more, secured by first mortgage of the land. The respondent in fact has included other moneys in the mortgage

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and those other moneys were so included because only thus could the respondent become the transferee. It is true that it cannot be said that the inclusion of these other moneys in the mortgage raised the rate that the particular mortgagee would otherwise have exacted upon the £18,131 3s. 9d. But the necessity or desirability of including them in a mortgage over the land led to the rejection of the mortgage offered at 4¼ per cent. It appears to me that it is an assumption at the basis of the covenant that the reasonableness of the contract should be judged on the hypothesis that no greater sum would be considered than that ascertained at £18,131 3s. 9d., that the rate would not be affected by further borrowing, and that the "lessor" would not be a person called upon to encumber the land with unpaid purchase money.

For these reasons I think that the considerations which led the "lessor" to reject the offer of 4¼ per cent are not admissible as grounds upon which his action in contracting to pay the higher rate may be held reasonable.

This conclusion raises another question. It means that the respondent did not reasonably contract to pay a rate of 4½ per cent per annum on the £18,131 3s. 9d. Is the appellant, the lessee, therefore absolved altogether from paying additional rent? On the exact words of the covenant it might appear so. But I think the sense of the covenant is to put a limitation upon the amount payable by way of additional rent in respect of interest contracted for by the lessor. The higher rate which it was unreasonable to contract to pay contains whatever lower rate might have been reasonably contracted for. On the whole, I think that an intention is sufficiently disclosed by the covenant to render the lessee liable in respect of so much of the interest as the lessor reasonably contracted to pay.

For these reasons I think the decision of *Martin* J. was right and should be restored.

EVATT J. The only question on this appeal is whether the rate of interest of 4½ per cent which the respondent agreed to pay to a mortgagee answers the description of the rate of interest referred to in the following covenant of the appellant: "and after the expiration of the said mortgage to be at *such higher or lower rate of interest as the lessor may reasonably contract to pay on the said*

moneys." In other words, did the respondent, as lessor, "reasonably" contract to pay interest at the rate of 4½ per cent for the term of five years ending on 1st July 1939 ?

The "said moneys" referred to in the covenant had been borrowed originally at a much earlier date, the sum amounting to £18,131. When the loan became due, the respondent borrowed not only the £18,131 for the security covered an additional sum making the total amount of the loan £35,000. But the appellant did not contend that the mere fact that the lessor agreed to pay interest on a sum of money greatly in excess of that referred to in the covenant, prevented the application of the latter. The only question really in contest on the appeal was whether the action of respondent as lessor in agreeing to pay interest at the rate of 4½ per cent was "reasonable."

In the Supreme Court *Martin* J. held that the lessor acted unreasonably in refusing an offer of a loan of £18,131 at 4¼ per cent. This offer, however, seems to have been made at a time when negotiations were in train to borrow the larger sum of £35,000 at 4½ per cent.

On appeal to the Full Court a contrary view was adopted by *Mann* C.J., who held that "the question of what is a reasonable contract for the lessor to make does not, on the proper interpretation of this clause exclude from consideration the owner's own financial necessities, or considerations of prudence generally as a mortgagor."

An appeal was brought to this Court although the amount in dispute was only the sum of £45 per annum. The appellant brought the judgment within the appealable amount by the contention that, if the lessor acted unreasonably in paying the higher rate of interest, he would be disentitled from recovering any interest under the covenant. As it happened, this contention was not elaborated before us on the hearing of the appeal.

In my opinion the judgment of *Mann* C.J. was correct. It finds support from the case of *Viscount Tredegar* v. *Harwood* (1) where Lord *Phillimore* said, in relation to a dispute between landlord and tenant as to whether the landlord had acted reasonably: "If it be a question whether a man is acting reasonably, as distinguished

(1) (1929) A.C. 72.

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from justly, fairly, or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect someone else" (1). A somewhat similar view was expressed by Lord *Shaw* (2).

If, as I hold, the circumstances did not preclude the landlord from consulting his own convenience and advantage, the proper conclusion is that in contracting to pay the rate of $4\frac{1}{2}$ per cent, he acted reasonably.

The appeal should be dismissed.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant, *Blake & Riggall.*

Solicitors for the respondent, *Green, Dobson & Middleton.*

(1) (1929) A.C., at p. 82.

(2) (1929) A.C., at p. 81.

H. D. W.