[HIGH COURT OF AUSTRALIA.]

GRAHAM AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE MARKETS HOTEL PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 5, 6, 7.

MELBOURNE, *May* 24.

Latham C.J., Rich, Starke and Williams JJ.

Landlord and Tenant—Sub-lease—Covenant to repair, maintain and keep all buildings and to yield up in repair—Licensed premises—Inherent structural defect—Lavatory—Removal during term of sub-lease—Non-restoration at expiration of term—Breach of covenant—Measure of damages—Construction of lavatory—Statutory requirements—Consequential alterations—Remodelling of premises—Cost—Liability of sub-lessee—Value of reversion—Diminution—Conveyancing Act 1919-1939 (*N.S.W.*) (*No.* 6 *of* 1919—*No.* 18 *of* 1939), *s.* 133A (1).

The plaintiffs were the lessees of a licensed hotel in Sydney. They granted a sub-lease which was assigned to the defendant. When the sub-lease was granted there was in the basement of the hotel a lavatory which could be approached only by steep and dangerous steps and was badly lighted and poorly ventilated. The sub-lease contained a covenant that the sub-lessee would repair, maintain and keep all buildings and all internal and external walls, sewers, drains and appurtenances and would yield up in repair at the end of the term. During the term the lavatory was dismantled and closed by the sub-lessee and another lavatory was installed in adjoining premises which were leased by the defendant and to which the plaintiffs had no title. At the end of the term the demised premises were yielded up without any lavatory whatever. In order to continue the demised premises as a hotel and to obtain a new licence therefor it was necessary under the *Liquor Act* 1912 (N.S.W.) for the plaintiffs to instal sanitary accommodation. This they did in the course of an extensive remodelling of the premises, at a cost of £3,078, in accordance with plans prepared in conformity with statutory and departmental requirements and approved by the Licensing Court. The plaintiffs claimed that the

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defendant had broken the covenant to yield up in repair and sued for damages. The trial judge held that the above-mentioned facts did not constitute a breach of covenant and gave judgment for £100 in respect of other matters. This judgment was confirmed by the Full Court of the Supreme Court. On appeal,

Held:—

(1) That the dismantling of the lavatory and the failure to yield up the demised premises with a lavatory was a breach of the covenant to maintain, *inter alia*, the lavatory and to yield up the demised premises in repair.

(2) That the measure of damages for this breach of covenant was the cost of providing sanitary accommodation of the capacity and quality as demised, including the cost of consequential alterations and applications but did not include the cost of improvements unconnected with the re-establishment of sanitary accommodation of that capacity and quality.

(3) That the relevant structural alterations were rendered necessary by the defendant's breach of covenant and, therefore, did not come within the scope of s. 133A of the *Conveyancing Act* 1919-1939 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court), *Graham* v. *The Markets Hotel Pty. Ltd.*, (1943) 43 S.R. (N.S.W.) 98; 60 W.N. 59, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales Florence Graham and Frank Graham her husband, claimed from The Markets Hotel Pty. Ltd., damages in the sum of £3,500 for the breach of certain covenants in an indenture of sub-lease of the Markets Hotel situated at the corner of Ultimo Street and Quay Street, Sydney, the substantial ground being the failure on the part of the defendant to yield up to the plaintiffs the licensed premises with a usable lavatory.

The plaintiff Florence Graham, then Florence Moran, by an indenture dated 29th June 1910 leased from the Sydney Municipal Council a piece of land situated at the corner of Ultimo Street and Quay Street, Sydney, for a term of thirty years from 1st May 1910, with an option of renewal for a period of twenty years from 1st May 1940. It was a building lease, the lessee covenanting to erect on the land a building which was to be used only as a hotel so long as the necessary licences could be obtained, and the lessor was to have the licences at the termination of the term.

A new hotel building was erected on the land; and upon the marriage of the lessor the lease was on 10th June 1913 assigned by her to herself and her husband.

On 26th July 1926 the plaintiffs by indenture sublet the premises to one Costin from 24th February 1926 for the residue of the term

of thirty years from 1st May 1910 granted by the head lease, less the last three days thereof, with an option of renewal.

The sub-lease contained a covenant by the sub-lessee to repair in the following terms: "And also will from time to time and at all times during the said term or any extension well and sufficiently repair cleanse maintain amend and keep all buildings and messuages at any time erected on the land hereby demised and all fixtures therein and all internal and external walls sewers drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever and the same so well and substantially repaired cleansed maintained and amended will and shall at the end expiration or sooner determination of the term hereby granted or any extension thereof peaceably and quietly yield and deliver up to the lessors." The sub-lessee also covenanted to use the premises only as a hotel so long as the necessary licence could be obtained, and upon the termination of the term to deliver up the current licences for the sale of liquor on the demised premises and cause the residue of the existing licences to be transferred as the sub-lessors should direct. The sub-lease provided that Costin might assign it to a company nominated by him, and that he should thereupon be discharged from liability under it.

When the hotel was erected pursuant to the building covenant in the head lease, the lavatories for use in connection with the bars were constructed in the basement, and the ventilating shaft from the privies led out into the open air over immediately adjoining, and then vacant, land belonging to the head lessor the Sydney Municipal Council. At some subsequent date, and before the sub-lease to Costin, markets for the sale of foodstuffs were erected on this adjoining land, so that the ventilating shaft discharged into the market building. When the sub-lease was executed on 26th July 1926 the construction of the privies in the demised premises was such that they could be approached only by steep and dangerous steps leading down into the basement.

When Costin was arranging to take the sub-lease and to obtain a transfer of the licence, the licensing sergeant drew his attention to the unsatisfactory condition of the lavatories, and obtained from him a promise that this would be remedied.

A by-law made pursuant to the *Metropolitan Water, Sewerage and Drainage Act* 1924 (N.S.W.) provides that every water closet constructed wholly or partly within a building shall be constructed in such a position that one of its sides at least shall be an external wall, which wall shall abut immediately upon a street or upon an open space of not less than one hundred square feet of superficial area.

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In 1927 Costin, without the knowledge or consent of the sub-lessors, extended the licensed premises to an adjoining building of which he had obtained a lease. A doorway was cut through the wall into the annexe. The whole of the original ground floor, which had been occupied by a public bar, a private bar, and two bar parlours, was devoted to a large public bar, and the portion of the annexe on the same level, to a private bar. Lavatories were provided on the ground-floor level in the annexe; and when they were ready for use, the pedestals and pans were removed from the privies in the basement and the pipes sealed off. On the first floor, a doorway was cut through the wall into the first floor of the annexe and an additional bedroom and bathroom provided in the annexe. The licence was varied accordingly.

On 14th March 1927, Costin assigned to the defendant company the unexpired residue of the term of the sub-lease; and on 2nd January 1939 the defendant company sublet the hotel to Costin upon a weekly tenancy.

When it became known that the defendant did not intend to exercise its option to renew the sub-lease, which ran out on 28th April 1940, and the Sydney Municipal Council, which was the owner of the annexe, having refused to grant the plaintiffs a lease of it, the plaintiffs, on 7th March 1940, informed the defendant that they required the hotel premises to be put back into their original condition and the liquor licence varied accordingly. The defendant refused to do so.

The plaintiffs exercised their option to renew the head lease, and on 14th April 1940 they entered into an agreement with one Leon Sharp to grant him a sub-lease of the hotel premises, excluding the annexe, for five years from 29th April 1940. On 19th March a lease was executed pursuant to the agreement. The agreement and sub-lease contained provisions for bricking off the annexe, that the basement should be used only for cellar, basement or storage purposes, that the plaintiffs should carry out such structural alterations to the premises as they might deem necessary for the proper and efficient conduct of the premises as a hotel, and that Sharp should allow full access to the premises for carrying out this work.

The plaintiffs applied to the Licensing Court and were granted authority to make extensive alterations to the demised premises.

The remodelling, which was ultimately completed at a cost of £3,078 8s. 3d., was carried out in the following way:—On the ground floor the public bar was retained in the same state as the defendant had handed it over. In order to comply with the regulations of the Metropolitan Water, Sewerage and Drainage Board with respect to the ventilation of the lavatories, the position of the staircase was

changed and what had been the staircase well was used as a ventilation shaft. A lavatory for the public bar was provided on the ground floor. The first floor was completely remodelled. A private bar was installed there, with a lavatory of its own on the same floor, and the kitchen was transferred from the third floor down to the first floor. Sitting-rooms were substituted for some of the bedrooms on the second floor. On the third floor, two bedrooms took the place of the former kitchen.

The declaration, as amended, contained two counts. By the first count the plaintiffs alleged a breach by the defendant company of a covenant to yield up in repair alleged to be contained in the indenture of sub-lease. The count set out the covenant as actually contained in the sub-lease and then went on to add as part of the covenant matter which in the sub-lease was not associated with it. The second count is not material to this report. The defences were *non est factum*, and a denial of breaches.

The action was, by consent, tried by a judge without a jury. At the trial the defendant did not insist on its right to succeed on the plea of *non est factum*, and the case proceeded on the footing that if the plaintiffs could prove a breach of the actual covenant to yield up in repair they should be entitled to recover the appropriate damages. The trial judge gave a verdict for the plaintiffs on the first count in the sum of £100.

The Full Court of the Supreme Court, by majority (*Jordan* C.J. and *Davidson* J., *Halse Rogers* J. dissenting), dismissed an appeal brought by the plaintiffs on the ground that the damages awarded were inadequate: *Graham* v. *The Markets Hotel Pty. Ltd.* (1).

From the decision of the Full Court the plaintiffs appealed to the High Court.

Further facts and the relevant statutory provisions and regulations appear in the judgments hereunder.

Barwick K.C. (with him *Kerrigan* and *Holmes* for *Stuckey* on military service), for the appellant. The removal of the lavatory was an act of voluntary waste. It was in fact removed for the tenant's own purpose. Its removal, therefore, was a breach of the covenant to repair. The yielding up of the premises without a lavatory and a saloon bar was a failure to yield up in repair. This constituted a breach of the covenant. The matter thus becomes merely a question of what damages flow from that breach. Those damages are such as may be fairly and reasonably considered as arising naturally from that breach having regard to the fact that

(1) (1942) 43 S.R. (N.S.W.) 98.; 60 W.N. 59.

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the premises are licensed premises. The natural consequences are that by reason of the provisions of the *Liquor Act* 1912 (N.S.W.) (*a*) lavatory accommodation must be provided, (*b*) an application in respect thereof must be made to the Licensing Court, and (*c*) the minimum requirements of that Court must be complied with. The question whether the lavatory on the premises when demised would have required to be repaired is irrelevant; the important point is that the respondent yielded up the demised licensed premises without lavatory accommodation. The only question, therefore, is either (*a*) as to so much as directly affected repair, or (*b*) as to the balance which was imposed by way of condition to consent, the amount necessarily spent to repair having regard to the necessity for the making of an application to the Licensing Court and complying with its demands. A tenant who is in breach of his covenant to repair is liable for such amount as may be necessary to put the demised premises into a proper state of repair even though this may necessitate renewals and replacements (*Howe* v. *Botwood* (1)). Repair includes replacement (*Lurcott* v. *Wakely & Wheeler* (2)). On the facts, the renewal of the lavatory entailed substantial alterations except, possibly, to the saloon bar. The covenant to repair required the tenant to repair and maintain the lavatory. There was not any exception from this obligation even if the lavatory constituted an inherent defect. The lavatory was not inherently defective, therefore *Lister* v. *Lane & Nesham* (3) is not applicable to this case. At most the lavatory was only faulty in design. The damages claimed by the appellant come within the scope of the rule enunciated in *Hadley* v. *Baxendale* (4). The general way in which the measure of damages has been applied to the relevant facts is shown in various cases, of which *Joyner* v. *Weeks* (5) is typical. There is not any evidence of nuisance. The extent of the covenant must be determined having regard, *inter alia*, to the user of the premises (*Lurcott* v. *Wakely & Wheeler* (6)). The extent of the repair therefore must be such as will enable the maintenance of the licence. The cases of *Wright* v. *Lawson* (7) and *Pembery* v. *Lamdin* (8) do not establish any principle; each case was decided on the basis of its own facts. Even assuming, but not admitting, that the lavatory was inherently defective the tenant was not for that reason entitled to demolish or remove it. Its demolition or removal by the tenant would nevertheless constitute a breach of the

(1) (1913) 2 K.B. 387, at p. 391.
(2) (1911) 1 K.B. 905, at p. 919.
(3) (1893) 2 Q.B. 212.
(4) (1854) 9 Ex. 341 [156 E.R. 145].
(5) (1891) 2 Q.B. 31.
(6) (1911) 1 K.B. 905.
(7) (1903) 19 T.L.R. 203, 510.
(8) (1940) 2 All E.R. 434.

covenant. So long as the lavatory existed in the position and structural condition it was in at the time of the demise it would not be affected by the regulations of the Metropolitan Water, Sewerage and Drainage Board, but any alteration to or renewal or replacement of that lavatory would necessitate compliance with those regulations. The tenant removed the lavatory for his own purposes and not to abate a nuisance. Section 133A (1) of the *Conveyancing Act* 1919-1939 (N.S.W.) was devised to place an upward limit on damages and to meet the decision in *Joyner* v. *Weeks* (1). The matter does not come within the concluding words of that sub-section, because it was not shown that the premises, in whatever state of repair they might be, would be subject to such structural alterations as would render valueless the repairs. The obligation to repair was not in any way cut down by the nature of the premises. There is no doctrine that repairs rendered necessary by inherent defects need not be done (*Lurcott* v. *Wakely & Wheeler* (2)). The Court below took no account whatever of the fundamental facts (*a*) that the tenant removed the lavatory for his own purposes, and (*b*) that the premises were yielded up without any lavatory.

Clancy K.C. (with him *Walsh*), for the respondent. In the circumstances the appellant is limited to the first count in the declaration and to the actual words of the covenant to repair. In order to determine the rights and liabilities of the parties the matter should be considered in the following sequence, firstly, the scope of the covenant on its proper construction; secondly, whether as to the covenant so construed there was any breach and, if there was a breach, the nature and extent of it; and, thirdly, the proper measure of damages flowing from such breach. The full scope or extent of the covenant to repair now under consideration is that the premises were to be "repaired, kept in repair, and yielded up in repair" (*Anstruther-Gough-Calthorpe* v. *McOscar* (3)). What comes within the ambit of the covenant is a question of degree. In determining that question regard must be had to the condition of the premises at the date of the demise. Although in certain circumstances it may well be that renewals and replacements can come within the ambit of a covenant to repair, that rule is subject to the principle that first of all it applies only to such renewals or replacements as become necessary in the ordinary course of taking proper care of a properly constructed building, that is without original or inherent defects, of the age, character and condition in which the building

(1) (1891) 2 Q.B. 31.
(2) (1911) 1 K.B., at pp. 915-923.
(3) (1924) 1 K.B. 716, at pp. 722, 723.

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the subject of the covenant was at the time of the demise. Under the covenant the tenant is not liable to repair anything due to a defect existing in the building at the time of the demise. The respondent was not required and there was not any obligation on it to give either a different thing from or a new thing for that which was demised. In particular, if the premises had in them at the time of the demise some defect or some peculiarity of construction which could be remedied only by the giving of a new or different thing from that form of construction, the tenant is not obliged under the covenant to repair to substitute or give anything better than the standard of the building demised to him. The evidence shows that the continued existence of the lavatory in the condition as demised would not have been permitted by the relevant authorities and that action to terminate that existence had been taken by them. It was not a proper lavatory having regard to the fact that it was required for licensed premises. For that reason and by virtue of the provisions of the *Liquor Act* and the *Public Health Act* the tenant was compelled, under pain of the probable non-renewal of the licence, to provide other lavatory accommodation of the required statutory standard. Nevertheless, the tenant as tenant was under no obligation to give the landlord something different from and better than that which had been demised. The provision of proper lavatory accommodation was rendered necessary by the condition of the premises when demised; therefore the cost thereof, including the incidental matters, should be borne by the landlord. The tenant is liable only for the small cost involved in restoring the lavatory as demised. Under the covenant to repair the landlord is not entitled to a new lavatory at the cost of the tenant. Although it is conceded that there are circumstances in which repair may involve renewals or replacements and those renewals and replacements will come within the ambit of the covenant to repair, that principle has to be qualified to the extent that there is never any obligation on a lessee to give a new or different thing from that which was demised, and, in particular, that if the premises at the time of the demise had some radical or substantial constructional defect there is no obligation on the lessee to remove that defective construction. There is no obligation on the lessee to give in lieu of that defective construction something which is adequate or new. The respondent is not liable under the covenant to repair to give anything different from that which was demised (*Pembery* v. *Lamdin* (1)), or something which was not within the contemplation of the parties (*Lazar* v. *Williamson* (2)).

(1) (1940) 2 All E.R., at pp. 437, 438.
(2) (1886) 7 L.R. (N.S.W.) 98, at pp. 108, 109.

Before and at the time of the demise the lavatory was in such a condition that it must inevitably, unless some remodelling work were done, sooner or later bring about a reconstruction of the vent shaft. The only damage chargeable against the respondent is the restoration of certain fittings and as that work is useless by reason of s. 133A of the *Conveyancing Act* no damage at all flows from what was done by the respondent. The need for the provision of modern lavatory accommodation in the premises was not due to the operation of time nor to any of the matters naturally giving rise to requirements for repair. It was due to an inherent defect in the premises at the time of the demise which was in breach of the statutory requirements and did not comply with the requirements of the Licensing Court (*Lister* v. *Lane & Nesham* (1)). Those requirements, however, do not affect the position as between the appellant and the respondent under the covenant to repair. The respondent is not sued for waste. The only cause of action sued upon is breach of the covenant to repair.

[STARKE J. referred to *Matthey* v. *Curling* (2).]

The principle enunciated in *Wright* v. *Lawson* (3) is the principle applicable to the facts of this case. *Howe* v. *Botwood* (4) is in conflict with other decisions on this matter. The decision in *Lurcott* v. *Wakely & Wheeler* (5) was upon facts peculiar to that case. The matter comes within the terms of s. 133A of the *Conveyancing Act*. In the circumstances the value of the reversion is not diminished by reason of the breach of the covenant or the failure to restore the lavatory to its former condition, therefore damages are not payable by the respondent to the appellants.

Barwick K.C., in reply. The respondent is not excused from the performance of the covenant because incidentally in complying with statutory and departmental requirements it would have to use new material (*Lurcott* v. *Wakely & Wheeler* (5) ; *Howe* v. *Botwood* (4) ; *Hydraulic Engineering Co. Ltd.* v. *McHaffie, Goslett & Co.* (6) ; *Pollock* on *Torts*, 14th ed. (1939), pp. 447, 448), or substitute a new lavatory for the lavatory in existence at the time of the demise (*Morgan* v. *Hardy* (7)). *Lister* v. *Lane & Nesham* (8) has little or no bearing on this case, because it ignores the fundamental fact in this case, namely that the lavatory was taken away by the tenant. *Wright* v. *Lawson* (3) is only an authority for the proposition that where a tenant can repair in a way which is satisfactory he is not bound to

(1) (1893) 2 Q.B., at p. 216.
(2) (1922) 2 A.C. 180, at p. 228.
(3) (1903) 19 T.L.R. 203, 510.
(4) (1913) 2 K.B. 387.
(5) (1911) 1 K.B. 905.
(6) (1878) 4 Q.B.D. 670.
(7) (1886) 17 Q.B.D. 770, at p. 779.
(8) (1893) 2 Q.B. 212.

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repair in the most perfect way if in substance the premises are repaired. In the absence of similar facts *Pembery* v. *Lamdin* (1) has no bearing on this case. *Joyner* v. *Weeks* (2) is a special example of the rule in *Hadley* v. *Baxendale* (3) and was limited to special facts. The measure of damages is the damage which directly flows from the breach of the covenant (*Ebbetts* v. *Conquest* (4); *Conquest* v. *Ebbetts* (5)). The respondent should have returned the demised premises with a lavatory therein in a state of repair.

Cur. adv. vult.

May 24.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales (*Jordan* C.J. and *Davidson* J., *Halse Rogers* J. dissenting) dismissing a motion to set aside a verdict and judgment for the plaintiffs for £100 and to enter judgment for the plaintiffs for £3,500, or, alternatively, for an order for a new trial. The plaintiffs were the lessees of the Markets Hotel in Sydney and they granted a sub-lease to one Costin which was assigned to the defendant company. At the time when the sub-lease was granted there was in the basement of the hotel a lavatory containing sanitary conveniences. The sub-lease contained a covenant to repair and to yield up in repair at the end of the term. During the term the lavatory was closed by the sub-lessee and another lavatory was installed in adjoining premises which were leased by the defendant. At the end of the term the premises were restored without any sanitary conveniences whatever. The plaintiffs claimed that the defendant had broken the covenant to yield up in repair and, upon the defendant refusing to reinstate a lavatory in the hotel, sued for damages. The learned trial judge, *Herron* J., gave judgment for £100 damages in respect of certain minor matters, rejecting the contention of the plaintiffs that the covenant had been broken, that an expenditure of more than £3,000 had been incurred by the plaintiffs as a result of the breach, and that this expenditure was the measure of damages for the breach.

The hotel was erected under a building lease granted in 1910 to the first-named plaintiff by the City Council of Sydney, and assigned by her to herself and the other plaintiff. The hotel was erected in accordance with plans and specifications which were approved by the City Council, and it was a term of the lease that the building

(1) (1940) 2 All E.R. 434.
(2) (1891) 2 Q.B. 31.
(3) (1854) 9 Ex. 341 [156 E.R. 145].
(4) (1895) 2 Ch. 377, at p. 382.
(5) (1896) A.C. 490, at p. 494.

should satisfy the requirements of the *City of Sydney Improvement Act*, and of the *Public Health Act*, and that the lessees would, when required, do anything necessary to comply with any other Act in force relating to buildings or premises in the City of Sydney and the sanitary arrangements thereof, or the *Liquor Acts* in force from time to time. After the hotel was built it was licensed under the *Liquor Acts* and there is no evidence to suggest that it did not then satisfy the requirements of the Acts mentioned or of any regulations made thereunder. The licence was renewed from time to time and neither the owner nor the lessee was required by the Licensing Court or by any health authority to make any alterations in the lavatory.

On 26th July 1926 the sub-lease to Costin was executed, and on 14th March 1927 the sub-lease was assigned to the defendant company with the consent of the City Council. At that time the lavatory was in the basement in its original condition. It was approached by a stairway which a sergeant of police, who dealt with licensing matters, described as dangerous in conversation with Costin. It had an opening for light and ventilation in an external wall. This external wall abutted upon what had been an open space, but which, before the year 1926, had been roofed so as to become part of the city markets. The lavatory in existence at that time complied with the law applying to it. If it had been desired to construct a new lavatory it would have been necessary to comply with the provisions of by-law No. 86 made under the *Metropolitan Water, Sewerage and Drainage Act* 1924. That by-law provided :—" 126 (2) Every water closet constructed wholly or partly within a building shall be constructed in such a position that one of its sides at least shall be an external wall, which wall shall abut immediately upon a street or upon an open space of not less than 100 square feet of superficial area, measured horizontally at the floor level of such closet." The basement which contained the lavatory had an external wall, but that wall did not abut upon either a street or an open space of not less than one hundred square feet. The by-law, however, did not require that all existing water closets, in order to be within the law, should be remodelled so as to comply with the by-law. It applied only to the construction of water closets which should thereafter be constructed.

Costin and the company decided to improve the hotel. A lease of adjoining land was obtained and the hotel was reconstructed so as to occupy both the demised land and what is described as an annexe on the adjoining land. The sanitary conveniences were removed from the basement, which thereafter was used for the purpose of storage. There had been a public and a private bar,

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with two bar parlours, on the ground floor. The ground floor was turned into a public bar, a doorway was made through the wall into the annexe, and a private bar was placed on the ground floor of the annexe. New lavatories were placed on the ground floor in the annexe.

When the term of the sub-lease expired the demised premises were restored to the plaintiffs with the doorway blocked up, but with the whole of the ground floor occupied by a single public bar, with no bar parlours on the ground floor, and with no sanitary accommodation at all. The existing licence of the hotel was at that time a licence, not for the demised premises, but for the demised premises plus the annexe. In order to be able to use the premises as a hotel, it was necessary to instal sanitary accommodation (*Liquor Act* 1912, s. 25) and also to obtain a new licence applying only to the demised premises.

The sub-lease contained a covenant by the lessee in the following terms :—" And also will from time to time and at all times during the said term or any extension well and sufficiently repair cleanse maintain amend and keep all buildings and messuages at any time erected on the land hereby demised and all fixtures therein and all internal and external walls sewers drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever and the same so well and substantially repaired cleansed maintained and amended will and shall at the end expiration or sooner determination of the term hereby granted or any extension thereof peaceably and quietly yield and deliver up to the lessors." The plaintiffs' claim was a claim for breach of this covenant. The plaintiffs contended that the defendant was bound to yield up the hotel with a usable lavatory. The defendant refused to do so, and the plaintiffs accordingly undertook the work of providing the necessary lavatory. The area occupied by the hotel was only forty feet by thirty-nine feet six inches. In order to construct a new lavatory complying with the law, it was necessary to provide a space ten feet square upon which an external wall of the lavatory should abut. This could not be done without radical remodelling of the premises. Under the *Liquor Act*, s. 40 (2), it was necessary to obtain the approval of the Licensing Court for any material alterations to licensed premises. The plaintiffs submitted a plan for alterations, which, with some variation, was approved by the Licensing Court and carried into effect. In order to obtain the open space ten feet square, it was necessary to alter the position of the staircase and of a service lift well. These alterations involved changes in the arrangement of the bar on the ground floor. They

also involved alterations to other rooms on the second and third floors, the arrangement of which was necessarily affected by the change in position of the staircase. The evidence showed that these alterations were necessary in order to provide a new lavatory and that the expense incurred for that purpose was reasonable, though the learned trial judge did not dissect the details of the expenditure actually incurred. As these extensive alterations were being made, the plaintiffs took advantage of the opportunity to make certain improvements in the accommodation of the hotel. The bar accommodation on the ground floor was improved, and the kitchen was removed to another floor. There is no finding of fact as to the extent to which the reconstruction was brought about by the necessity of providing a lavatory as distinct from the decision of the plaintiffs to make improvements in the premises whether in the lavatory or elsewhere. The defendant cannot, upon any view, be held liable for the cost of such improvements.

The learned trial judge and the Full Court of the Supreme Court examined the leading authorities upon the construction of covenants to repair. It is now well established that the repair of a structure may involve renewal or rebuilding of part of it, and that all repairs involve renewal to some extent (*Lurcott* v. *Wakeley & Wheeler* (1)). There is a difference between repairing a house and building a new house in place of an old house. It is a question of degree whether rebuilding part of a house does or does not fall within the category of repairing a house. A covenant to repair does not involve the covenantee in an obligation to make improvements, but if he cannot perform his covenant to repair without making improvements, then the expense of making the improvements falls upon him. This is the case whether the necessity arises from physical causes, or from legal causes. If, owing to the requirements of the law, repairs cannot be made without also making improvements, then he must perform his covenant to repair in the manner which the law requires (*Howe* v. *Botwood* (2), where Lord *Coleridge* stated that he could draw no distinction between what was physically necessary and what was legally necessary to enable the party bound to perform his covenant).

The learned trial judge found that " a very large proportion of the work done was necessarily consequential on the erection of lavatory accommodation on the ground floor." He held, however, that there had been no breach of the covenant. He reached this conclusion by asking the question whether it could be said that it was in the contemplation of the parties that under any circumstances

(1) (1911) 1 K.B., at pp. 914, 923-926. (2) (1913) 2 K.B., at p. 392.

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the lessee had "in contemplation the re-erection of the staircase or the lavatory accommodation in some other portion of the premises." His Honour said that such an inquiry must be answered in favour of the defendant and that, accordingly, upon the true construction of the covenant there had been no breach on the part of the defendant. With all respect to the learned judge, I am of opinion that he asked the wrong question. The question is not whether the lessee contemplated that he might have to put in a new lavatory. The question is one of construction of the words used in the covenant. Extrinsic evidence of intention is admissible only in certain special cases (See *Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 715, 716), and this is not one of those cases.

I call attention to the precise wording of the covenant. It is not only a covenant to repair a structure. It includes an express undertaking to *maintain* and *keep* all buildings, &c., with all necessary reparations, cleansings and amendments whatsoever "and the same so well and substantially . . . *maintained* . . . at the end expiration or sooner determination of the term . . . peaceably and quietly yield and deliver up to the lessors." The defendant took the premises with a lavatory upon them. The defendant was bound to maintain a lavatory upon them. Instead of maintaining the lavatory, the defendant abolished the only lavatory which existed upon the demised land. The defendant was bound to yield and deliver up the building containing a lavatory at the end of the term. Instead of doing so, the defendant yielded and delivered up the building without a lavatory. In my opinion there was clearly a breach of covenant by the defendant, unless certain arguments which commended themselves to the Full Court are to be accepted.

In the Full Court the learned Chief Justice referred to the principles of law which take into account the age, condition, and general state of a building for the purpose of determining the extent of the obligation to keep a building in repair. If it was an old and rather broken-down building, it need not be repaired in the same way as if, when demised, it was a new and up-to-date building. Thus, as his Honour said, if, when the building was taken over, it contained an inherent defect of a substantial kind, the covenant merely to repair does not impose an obligation to remove the defect, but only to maintain the structure subject to the defect so far as this can be effected by repair. His Honour referred to *Lister* v. *Lane & Nesham* (1); *Wright* v. *Lawson* (2); and *Pembery* v. *Lamdin* (3). The learned Chief Justice agreed that altering the internal arrangements of a building was a

(1) (1893) 2 Q.B. 212.
(2) (1903) 19 T.L.R. 203, 510.
(3) (1940) 2 All E.R. 434.

breach of a covenant to repair. But he was of opinion that the lavatory handed over was a nuisance, that is, I take it, a nuisance at common law, and accordingly contained an inherent defect which the defendant was not bound to remedy under the terms of the covenant. *Davidson* J. agreed with the Chief Justice that the lavatory was a nuisance and a danger. He pointed out that a reasonable user of the premises, having regard to their character, did not amount to a breach of a covenant to repair. He shared the opinion of the Chief Justice that what the sub-lessee did in abolishing the lavatory consisted in abating a nuisance, which was a lawful act which could not be the subject of a complaint.

It is true that if a lavatory had been under construction at the time when the sub-lease was granted it would have been necessary to conform to the requirements of the by-law for an external wall abutting upon an open space. The lavatory as existing did not have such an external wall, but, as I have said, the by-law did not operate to make lavatories unlawful which had previously been approved under the by-laws of the Metropolitan Water, Sewerage, and Drainage Board. It prescribed requirements only in the case of construction of new water closets.

There was no defect in the physical structure of the lavatory such as to render it incapable of maintenance by means of ordinary repairs as required from time to time. Accordingly there was no "inherent defect" in the lavatory which can be relied upon as diminishing the extent of what would otherwise have been the obligation to repair and to yield up in repair. This being so, it is irrelevant, so far as the covenant is concerned, to say that the lavatory constituted a nuisance. The act of keeping the lavatory in good repair could not itself amount to creating a nuisance and could not be unlawful. But, in view of the expressed opinion of the Full Court, I think it proper to say that, in my opinion, there is no evidence that the lavatory when the sub-lease was granted was a nuisance, either at common law or under any statutory provision. There is no evidence whatever that it was offensive in any respect, though it was not up-to-date and had an inconvenient approach. Further, the abolition of all sanitary accommodation in the hotel and the transference, for the convenience of the sub-lessee, of such accommodation to the annexe, went much further than abating any nuisance, even if such a nuisance existed. But, as I have already said, the subject of nuisance does not appear to me to be relevant to the determination of the obligations of the sub-lessee in this case.

I am therefore of opinion that the findings of fact of the learned trial judge showed that there was a breach of covenant by the

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defendant and that the defendant is accordingly liable to pay damages to the plaintiffs in respect of that breach. The breach of covenant consisted in failing to yield up the hotel premises with sanitary accommodation thereon. As a direct consequence of that breach it was necessary to instal such accommodation upon the demised land. Certain consequential alterations to the building upon the ground floor and other floors were unavoidable *because of* the necessity of providing an external wall for the lavatory abutting upon a space which was at least ten feet square. The defendant is liable for the cost of all such work, if it is found to have been reasonably necessary for the purpose. The defendant, however, is not liable for the cost of what may be found upon an investigation of the facts to be improvements to the hotel unconnected with the re-establishment of sanitary accommodation of the same capacity and quality as that which originally existed. The general rule for assessing damages for breach of a covenant by a lessee to deliver up the demised premises in repair was settled in *Joyner* v. *Weeks* (1), where it was held that the damages were the cost of putting the premises into the state of repair required by the covenant. In my opinion the covenant in this case required the defendant to yield up the premises with sanitary accommodation of a certain capacity and quality upon them. The cost of providing such accommodation is the measure of damages for this breach of covenant. It should be realized that it is the action of the defendant himself in removing the lavatory from the demised premises that has placed him in the position of being required to pay such damages. If during the term of the sub-lease the lavatory had been condemned by the health authorities, or if the Licensing Court had refused to renew the licence of the hotel unless the lavatory were remodelled, then, as *Halse Rogers* J. said in his dissenting judgment, the matter could have been fought out between the parties concerned upon an application under s. 40A of the *Liquor Act* (inserted by the amending Act of 1923). Under that section the Licensing Court is authorized to order the owner of premises to carry out work which, in the opinion of the Court, is necessary because public convenience requires the renovation, structural alteration or rebuilding of premises. The defendant, however, did not attempt to take advantage of this provision but destroyed the existing sanitary accommodation without providing any other accommodation upon the demised premises. In order to provide any sanitary accommodation upon the premises it was necessary to prepare plans and to obtain the approval of the Licensing Court (*Liquor Act* 1912, s. 40). The necessity for this expenditure

(1) (1891) 2 Q.B. 31.

arose directly from the breach of covenant by the defendant, and it should be taken into account in assessing damages.

The *Conveyancing Act* 1919-1939, s. 133A (1), imposes a limit upon the amount of damages recoverable for breach of a covenant to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease. The section provides that the damages shall in no case exceed the amount by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of covenant. In the present case it is, I think, clear that the value of the reversion in this hotel was diminished by the breach of covenant to an amount equivalent to the cost of providing sanitary accommodation on the premises equal to that originally existing if it had been duly repaired from time to time—accommodation without which the premises could not be licensed as a hotel (*Liquor Act* 1912, s. 25). The section further provides, however, that " no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement." It was held by the learned trial judge and by the majority in the Full Court that in the present case the structural alterations which were in fact made by the plaintiffs after the termination of the sub-lease were such as to render valueless any repairs which might have been made to the old lavatory in the basement; that is, that whatever had been done in the way of repair to the old lavatory, the plaintiffs would still have made the changes in the structure of the hotel which in fact have been made at a cost of £3,000 or more. In my opinion the words in the *Conveyancing Act* " in whatever state of repair they might be " do not have the effect of relieving the covenantee from liability in this case. The section prevents recovery of damages if it is shown " that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been . . . pulled down " &c. These words, in my opinion, are intended to cover a case where, even if the covenant had been fully observed, the premises would have been pulled down or structural alterations would have been made which would have rendered the repairs valueless. That is to say, the words " in whatever state of repair they might be " mean " irrespectively of the state of repair in which the premises might be." In the present case the relevant structural alterations made by the plaintiffs were not made

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irrespectively of the state of repair in which the premises were left by the defendant. They were rendered necessary by the fact that the defendant had broken his covenant by yielding up the premises without any sanitary accommodation upon them. Accordingly, in my opinion, the *Conveyancing Act* does not, in the present case, affect the application of the ordinary rule above cited from *Joyner* v. *Weeks* (1).

In my opinion the order of the Full Court should be set aside. The verdict for £100 should be set aside and the case remitted to the learned trial judge for assessment of damages according to law. The plaintiffs should have the costs of the proceedings already taken in the Supreme Court and in this Court.

RICH J. As I am in substantial agreement with the judgments of my colleagues, I concur in the conclusion arrived at by them and agree with the order proposed by the Chief Justice.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales in Full Court which dismissed a motion to set aside a verdict of £100 in favour of the appellants here and to enter judgment for the appellants for the sum of £3,500. In 1910 a lease of certain premises in Sydney for a term of thirty years from 1st May 1910 with an option of renewal for a period of twenty years from 1st May 1940 was granted to the appellant Florence Graham, and in 1913 was assigned to her and her husband, the other appellant. Hotel buildings were erected upon these premises pursuant to stipulations contained in the lease. In July 1926 the appellants sublet the premises for the residue of the term of thirty years less three days from 24th February 1926 with an option of renewal. In 1927 the respondent obtained an assignment of this sub-lease. A covenant to repair on the part of the sub-lessee and its assigns was contained in the sub-lease as follows :—" And also will from time to time and at all times during the said term or any extension well and sufficiently repair cleanse maintain amend and keep all buildings and messuages at any time erected on the land hereby demised and all fixtures therein and all internal and external walls sewers drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever and the same so well and substantially repaired cleansed maintained and amended will and shall at the end expiration or sooner determination of the term hereby granted or any extension thereof peaceably and quietly yield and deliver up to the lessors."

(1) (1891) 2 Q.B. 31.

The term of the sub-lease expired, and the option to renew it was not exercised. The appellants alleged a breach of this covenant in that the premises were not yielded and delivered up at the expiration of the term in accordance with its terms.

The state of repair required by a covenant to yield and deliver up premises well and substantially repaired depends primarily upon the words used. It involves, in the present case, an obligation to yield and deliver up the premises in such a state of repair as that in which they would be found if managed by a reasonably minded owner having regard to their age, their character, their ordinary use and the requirements of the tenants likely to take them at the time of the demise or subletting (*Lurcott* v. *Wakely & Wheeler* (1); *Anstruther-Gough-Calthorpe* v. *McOscar* (2)). *Atkin* L.J., as he then was, said in the latter case that such a covenant connotes the idea of making good damage so as to leave the subject matter as far as possible as though it had not been damaged (3). It involves renewal of subsidiary parts : it does not involve renewal of the whole.

Shortly, the facts are that when the sub-lease was made there was a public bar and private bar and two lounge parlours on the ground floor of the demised premises and there were also lavatories, urinals and closets in the basement, which could only be approached down a steep and somewhat dangerous staircase. During the term extensive alterations were made. Premises adjoining the demised premises and in different ownership were obtained, upon which was erected an annexe. The public and private bars and the lounges on the ground floor were made into a large public bar, a door was cut through the wall of the demised premises into the annexe, part of which was made into a private bar. The lavatories, urinals and closets on the demised premises were dismantled, and new lavatories, urinals and closets were erected on the ground-floor level of the annexe. A doorway was also cut through a wall of the demised premises into the first floor of the annexe, and additional bedroom and bathroom accommodation was provided in the annexe. But the sub-lessors had not assented to any of these alterations. The sub-lease ran out in April 1940. The option to renew it was not exercised. And it was ascertained that the owner of the premises upon which the annexe was erected would not grant a lease thereof to the appellants. On 7th March 1940 the appellants required the respondent to put back the hotel premises into their original condition, but the respondent in April 1940 refused so to do.

(1) (1911) 1 K.B. 905. (2) (1924) 1 K.B. 716.
(3) (1924) 1 K.B., at p. 734.

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Therefore a breach of the covenant to yield and deliver up the premises well and substantially repaired was proved. And, as the covenant ran with the land, it is binding upon the respondent as assignee of the sub-lease. But, though the damages for the breach appear to be substantial, the appellant obtained judgment for the small sum of £100 in the Supreme Court: hence this appeal.

It was not argued that the performance of the covenant to yield and deliver up in repair became impossible by reason of any legislation or any regulation on the part of any municipal or local authority (*Baily* v. *De Crespigny* (1)). Local regulations may have made repair more expensive, but the performance of the covenant was not impossible.

It was held, however, in the Supreme Court that the structure on the demised premises was subject to an inherent defect of a substantial kind, and consequently that the agreement to repair did not impose any obligation to remove the defect but only to maintain the structure subject to the defect so far as this could be effected by repair.

It is true enough that the position and design of the old lavatories, urinals and closets was bad and might and perhaps did in use become a nuisance. But that has nothing to do with the stability of the structure itself, which was not such a kind that by its own inherent nature it was liable in the course of time to fall or did fall into disrepair.

The provisions of the *Liquor Act* 1912 and the regulations of the *Metropolitan Water, Sewerage, and Drainage Act* 1924 which were referred to during the argument contain various provisions in relation to conveniences and sewerage service. They are relevant to the question whether repair of the structure has been made impossible by law, but they have no bearing upon the question whether the structure is of such a kind that it was liable to and did fall by reason of its own inherent nature and defect into disrepair.

The measure of damages for breach of a covenant to yield and deliver up in good and substantial repair is authoritatively stated in *Joyner* v. *Weeks* (2): "Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them." If the law requires that repairs shall be effected in a particular manner, then the repairs must be effected in that manner, but it does not follow, because premises must be properly repaired, that the nature and character of the structure in whole or in part must be altered and a totally different

(1) (1869) L.R. 4 Q.B. 180.

(2) (1891) 2 Q.B., at p. 46.

structure erected. The question is one of degree and of fact (*Lurcott* v. *Wakely & Wheeler* (1); *Howe* v. *Botwood* (2)).

But the *Conveyancing Act* 1919-1939, s. 133A, was relied upon and was acted upon in the Supreme Court. It provides, so far as material:—"(1) Damages for a breach of a covenant or agreement . . . to leave or put premises in repair at the termination of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion . . . in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

In some cases the cost of repairs may measure the damage to the reversion, but that is not true in all cases (*Conquest* v. *Ebbetts* (3)). The true inquiry is the extent to which the marketable value of the reversion is injured by the breach of covenant (*Henderson* v. *Thorn* (4)). In the present case no such inquiry has been made.

The provision that no damage shall be recovered if it is shown that at or shortly after the termination of the term structural alterations had been or would be made in the premises as would render valueless the repairs covered by the covenant has not, I think, any application to the facts of the present case. The structural alterations within the section cannot relate, I think, to such as are made or proposed to be made for the purpose of remedying the breach of a covenant to repair. A tenant by pulling down a house or making repairs to demised premises useless by reason of his structural alterations of the premises cannot escape liability for his breach of contract. Consequently, the damages awarded in the Supreme Court have been assessed upon a wrong basis and the case should be remitted to the trial judge for further consideration. Much of the argument in this Court was directed to the measure of damages, and some most extravagant propositions were put forward.

Upon the respondent intimating that it did not intend to exercise its option to renew the sub-lease arrangements were made for another sub-lease to another tenant. Accordingly, in March 1940 an agreement was made with one Sharp to demise to him the hotel premises for a period of five years from 29th April 1940, and on 19th April

(1) (1911) 1 K.B., at pp. 914, 924, 926.
(2) (1913) 2 K.B. 387.
(3) (1896) A.C. 490.
(4) (1893) 2 Q.B. 164.

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1940 the sub-lease was executed. This agreement and sub-lease provided that the appellants should apply to the appropriate Court to have the portion of the hotel premises known as the annexe delicensed so that the licensed premises should consist only of the premises the subject of the new sub-lease; that the appellants should take all necessary steps to sever such portion of the premises as were over the land known as the annexe by erecting a new or completing any existing wall between the premises on which the annexe was erected and the premises the subject of the new sub-lease and carrying out such structural alterations to the premises demised as they might deem necessary for the proper and efficient conduct of the premises as a hotel or such further or other alterations as the appropriate court would approve. Pursuant to this arrangement the appellants remodelled the hotel premises and obtained the approval of the licensing and other necessary authorities to the alterations to the hotel premises. On the ground floor the public bar was retained, the position of the staircase was changed, and what had been the staircase well was used as a ventilation shaft. A lavatory and conveniences for the public bar were provided on the ground floor. A private bar was installed on the first floor with lavatory and conveniences on the same floor. The kitchen was transferred from the third floor to the first. Sitting-rooms were substituted for some of the bedrooms on the second floor, and on the third floor two bedrooms took the place of the former kitchen. The cost exceeded £3,000. It was suggested, on the authority of *Hadley* v. *Baxendale* (1), that the appellants were entitled to recover this sum. The argument was as ill-founded as it was audacious. It would give the appellants practically a new hotel, or a hotel so altered and changed in character that it would be substantially different from the premises demised. The true measure is that stated in *Joyner* v. *Weeks* (2) though, no doubt, the repairs must be effected in manner allowed by law. But, if it be established that lawful authority will not permit the respondent to put the hotel premises into the state of repair in which they ought to have been left according to the terms of the covenant, then the inquiry must be for the sum which it would have taken to put the premises into that state of repair, but so that the damages shall not exceed the amount (if any) by which the value of the reversion in the premises is diminished owing to the breach of the covenant.

Another method, perhaps more simple on the facts of the present case, is to ascertain the extent to which the marketable value of the reversion was injured by the breach of the covenant.

(1) (1854) 9 Ex. 341 [156 E.R. 145]. (2) (1891) 2 Q.B. 31.

The appeal should be allowed, the verdict and judgment for £100 damages and the judgment of the Full Court set aside, and the cause remitted to the trial judge for reassessment of damages with liberty to parties to call further evidence as they may be advised.

WILLIAMS J. In this action the plaintiffs sued the defendant company in the Supreme Court of New South Wales at common law claiming as damages the sum of £3,500 for the breach of certain covenants in an indenture of sub-lease of the Markets Hotel, situated at the corner of Ultimo and Quay Streets in the City of Sydney.

The declaration contained two counts, but it is only necessary to refer to the first count, because the learned trial judge gave a verdict for the defendant on the second count and against that verdict there has been no appeal. The first count alleged that the defendant during the currency of the term created by the indenture of sub-lease caused the premises to be altered and connected with certain adjoining premises of the defendant as one building for occupation as a hotel, inn or public house by abolishing and destroying the existing lavatory serving the public bar of the licensed premises constructing new lavatories and opening doorways through the walls of the licensed premises by removing the existing staircase giving access to the first floor and by erecting a new staircase in place thereof and a wall through to the licensed premises by re-arranging the existing counter of the bar on the ground floor of the licensed premises by erecting a partition wall through one of the bedrooms of the licensed premises and by converting a lumber room on the first floor into a bathroom and lavatory; that the defendant did not at the end and expiration of the term created by the indenture of sub-lease yield and deliver up to the plaintiffs the building and messuages and all fixtures upon the land thereby demised and all internal and external walls, sewers, drains and appurtenances with all necessary reparations, cleansings and amendments duly licensed as a hotel in such a condition that the said premises could be used for the business of a licensed victualler or publican and kept open for the sale of permitted liquors therein during all lawful hours as an inn or public house; and that the defendant omitted and neglected to restore the premises comprised in the indenture of sub-lease separated and enclosed from the adjoining premises duly licensed as a hotel and in such condition that the same might be kept open for the sale of permitted liquors therein during all lawful hours as and for an inn or public house whereby the plaintiffs were put to great trouble and expense in and about converting and enclosing the premises and separating the same from the adjoining premises so that the premises might be

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duly licensed for the sale therein of spirituous liquors and in order that the business of a licensed publican might be carried on therein and in and about obtaining the necessary licence for the carrying on upon the premises of the business of a licensed victualler or publican.

On this count his Honour gave a verdict for the plaintiffs for £100.

The plaintiffs appealed to the Full Court, claiming that the verdict should be set aside and judgment be entered for them for £3,500 or alternatively that a new trial should be granted on the ground that the damages were inadequate. It was contended that his Honour ought to have held that the proper measure of damages was the reasonable cost of placing on the demised premises as at the date of the expiry of the sub-lease a saloon bar and public lavatory or alternatively a public lavatory which might lawfully be used on licensed premises. The Full Court by a majority dismissed the appeal, and the plaintiffs have now appealed to this Court on the same grounds.

The material facts are as follows:—By an indenture made on 29th June 1910 between the Municipal Council of Sydney (hereinafter called the Council) as lessor of the one part and the plaintiff Florence Graham (then Miss Moran) as lessee of the other part the Council leased to Florence Moran the land on which the Markets Hotel now stands upon a building lease for a term of thirty years from 1st May 1910 with an option to renew the lease for a further term of twenty years. The covenants relating to the building of the hotel required that the lessee should within six months from 1st May 1910 expend a sum of not less than £3,000 in erecting a hotel on the demised land; and that the building should be erected, completed and finished in a workmanlike and substantial manner in accordance with plans to be approved by the City Surveyor and the authorities administering the *Liquor Acts* in force for the time being and in accordance with his or their requirements and subject to his inspection or approval and in accordance with the requirements of the *City of Sydney Improvement Act* and any Act amending the same or in lieu thereof in force at the time of such erection completion and finishing, and also would at the time of such erection erect, complete and finish all necessary and suitable outbuildings, yards, drains and other conveniences as might be required by the City Building Surveyor and Inspector of Nuisances of the City of Sydney for the time being and in accordance with the requirements of the *City of Sydney Improvement Act* and any Act amending the same or in lieu thereof and of the *Public Health Act* 1902 and any Act amending the same or in lieu thereof.

The hotel was erected in 1910. The blue prints in evidence have a notation that the plans were approved on 7th July of that year. It had two bars on the ground floor, a public bar and a saloon bar, separated by a wooden partition. The lavatory for these bars was in a basement. It consisted of two pedestals and a urinal stall. It was approached by a steep staircase and ventilated by a vent which opened through the side wall on to adjoining vacant land owned by the City Council, and also, according to the plans, by a small ventilation shaft which opened through the roof. Presumably the staircase to and the position and ventilation of the lavatory were approved by the City Building Surveyor and by the licensing and public health authorities.

By an indenture made on 10th July 1913 between the plaintiff Florence Moran (who had married the plaintiff Frank Graham) of the one part and the plaintiffs of the other part the indenture of lease of 29th June 1910 was assigned by the plaintiff Florence Graham to herself and her husband.

By an indenture made on 26th July 1926 the plaintiffs sub-leased the hotel to Costin for the balance of the term of the head lease less three days, with an option to renew the sub-lease for twenty years less three days.

Costin had obtained a weekly tenancy of an adjoining building known as the annexe.

On 31st January 1927 Costin applied to the Licensing Court for leave to make certain alterations to the demised premises. These alterations included removing the lavatory from the basement to the annexe, converting the two bars on the ground floor into a public bar, and building a saloon bar in the annexe. On 7th February 1927 the Court granted permission to make these alterations.

In order to remove the lavatories into the annexe the fittings consisting of the two pedestals and two cisterns were removed, the water from the cisterns and the junction to the sewer was sealed off, the water was disconnected from the urinal stall, and a doorway was erected in the basement to turn it into a storeroom. The plaintiff Frank Graham swore that these alterations were made without his knowledge or consent, and his evidence was not contradicted by Costin.

By an indenture made on 14th March 1927 the sub-lease was assigned from Costin to the defendant.

On 2nd January 1939 Costin became a tenant from week to week of the defendant.

The defendant did not exercise its option to renew the sub-lease, so that the term expired on 27th April 1940.

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The plaintiffs were unable to obtain a lease of the annexe, so that they found themselves in possession of a hotel without any lavatory to serve the public bar. They had exercised the option to renew the head lease and had entered into a new sub-lease of the hotel to Sharp for five years. They commenced a suit in the Supreme Court of New South Wales in equity against Costin, and filed a notice of motion for a mandatory injunction to compel him to allow them to use the lavatory in the annexe until they were able to provide a lavatory upon the demised premises. Upon this motion a *modus vivendi* was arranged between the parties for the use during this period of the lavatory in the annexe. The plaintiffs then applied to the Licensing Court for leave to make the necessary alterations to the demised premises to instal a lavatory for the public bar and to replace the saloon bar which had previously existed on the ground floor by a new saloon bar on the first floor. The *Liquor Act* 1912 (N.S.W.), s. 25, requires that licensed premises must be provided with at least two decent places of convenience on or near the premises for the use of the customers thereof so as to prevent nuisances and offences against decency, so that it was necessary to replace the lost lavatory in order to preserve the licence. The plaintiffs employed an architect to prepare plans for the remodelling of the hotel so as to instal a new lavatory and to provide a saloon bar in lieu of the saloon bar in the annexe.

After the hotel had been erected in 1910, but prior to the sub-lease to Costin, the Council built a roof over the land adjoining the side wall of the demised premises which contained the vent and proceeded to use the enclosed space for a fruit market.

In 1940 the regulations of the Metropolitan Water, Sewerage and Drainage Board required as a minimum that there should be a light and air well area for lavatories of not less that one hundred square feet stretching from the roof to the ground level. In order to find the necessary space for a light and air well which would comply with this requirement it was necessary to make extensive structural alterations to the hotel. To quote from the judgment of the learned Chief Justice of the Supreme Court :—" The remodelling was carried out in the following way. On the ground floor the public bar was retained in the same state as the defendant company had handed it over. In order to comply with the regulations of the Water and Sewerage Board with respect to the ventilation of lavatories, the position of the staircase was changed and what had been the staircase well was used as a ventilation shaft.

A lavatory for the public bar was provided on the ground floor. The first floor was completely remodelled. A private bar was installed there, with a lavatory of its own on the same floor, and the

kitchen was transferred from the third floor down to the first. Sitting rooms were substituted for some of the bedrooms on the second floor. On the third floor, two bedrooms took the place of the former kitchen.

In the premises as originally sub-demised by the plaintiffs to Costin, the total bar space in running feet, which was then solely on the ground floor, amounted to forty-seven feet six inches lineal, of which about thirty feet was public bar and the rest private bar.

In the building as remodelled as the result of the 1940 alterations, the public bar alone was eighty feet six inches long in running feet, and in addition there was a private bar on the first floor. The architect who prepared the plans of the remodelling for the plaintiffs said that his object (and therefore presumably the object of the plaintiffs) was to give approximately the accommodation that the hotel together with the annexe had formerly provided, thereby enabling the plaintiffs to get the full benefit of the increased trade that had been done in the hotel when the annexe was used in conjunction with it (1).

It is common ground that it was more economical to place the new lavatory on the ground floor than in the basement.

The Licensing Court approved of the plans, which were carried out at a cost of £3,078. The plaintiffs also incurred the costs of the application for the approval of the Licensing Court.

The sub-lease contained the following covenant :—" And also will from time to time and at all times during the said term or any extension well and substantially repair cleanse maintain amend and keep all buildings and messuages at any time erected on the land hereby demised and all fixtures therein and all internal and external walls sewers drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever and the same so well and substantially repaired cleansed maintained and amended will and shall at the end expiration or sooner determination of the term hereby granted or any extension thereof peaceably and quietly yield up unto the lessors its successors or assigns."

It was not and could not be contended that the removal of the lavatory to the annexe and the other alterations made to the hotel premises in order to extend the hotel into the annexe was not a breach of this covenant, so that the only issue between the parties is the extent of the liability of the defendant for the breach in the unusual circumstances of the case. At common law the damages recoverable would be the sum required to restore the lavatory in the basement and the rest of the premises to the condition in

(1) (1942) 43 S.R. (N.S.W.), at pp. 101, 102 ; 60 W.N., at p. 61.

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which they were before the incorporation of the annexe as part of the licensed premises (*Shortridge* v. *Lamplugh* (1); *Hare* v. *Coleman* (2); *Joyner* v. *Weeks* (3); *Anstruther-Gough-Calthorpe* v. *McOscar* (4)), and in addition damages for the loss of the use of the premises during repair (*Woods* v. *Pope* (5); *Birch* v. *Clifford* (6); *Gaham, Law of Damages*, (1936), pp. 62, 63).

Apart from statutory requirements, the replacement of the pedestals and urinal stall in the basement, the conversion of the public bar on the ground floor into a public and saloon bar, and the closing of the openings made in the wall adjacent to the annexe would have been a comparatively cheap job, to pay for which his Honour's award of £100 might have been sufficient. But in 1940 the following complications had arisen:—(1) The Metropolitan Water, Sewerage and Drainage Board's regulations prohibited the restoration of the lavatory in the basement in its original condition because it would not have had a proper light and air well to the roof. (2) The *Conveyancing Act* 1919, as amended in 1930, included s. 133A (1), which reads as follows:—Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

This sub-section is identical in its terms with s. 18 of the Imperial *Landlord and Tenant Act* 1927. The effect of the first limb of the section is to limit the damages recoverable for breach of a covenant to repair to the difference between the value of the reversion if the covenant had been observed and the value of the reversion in the condition into which it had fallen on account of the breach (*Hanson* v. *Newman* (7)).

(1) (1700) 2 Ld. Raym. 798 [92 E.R. 33].
(2) (1846) 6 L.T. (O.S.) 413.
(3) (1891) 2 Q.B. 31.
(4) (1924) 1 K.B. 716.
(5) (1835) 6 C. & P. 782 [172 E.R. 1461].
(6) (1891) 8 T.L.R. 103.
(7) (1934) Ch. 298.

If, therefore, the evidence does not prove that the effect of the breach has been to diminish the value of the reversion the plaintiff must fail (*Moss Empires Ltd.* v. *Olympia (Liverpool) Ltd.* (1)). But in many cases the diminution in the value of the reversion would be the amount required to remedy the breach (*Salisbury* v. *Gilmore* (2)). As the demised premises in the present case are licensed, and a lavatory must be provided to maintain the licence, it would appear that, apart from the question of an inherent defect, the value of the reversion would be diminished by at least the amount required to restore the lavatory. If by reason of supervening legislation the cost of restoration of the lavatory has been increased beyond what it would have been at common law the party in default must bear the increased cost (*Howe* v. *Botwood* (3)).

The main contention of the defendant, which found favour with the majority of the Supreme Court, was therefore that at the date of the sub-lease the hotel was suffering from the inherent defects that the lavatory in the basement was approached by a dangerous staircase, and that the roofing over the adjoining land had caused the lavatory to become poorly ventilated and the odours passing through the vent to constitute a nuisance to the markets next door. On this contention the following facts are material :—(1) There is no evidence that anyone ever fell down the steps while the lavatory was in the basement, however propitious the circumstances. (2) The hotel premises as originally constructed complied with the requirements of the City Building Surveyor and other public authorities. (3) The landlord, the Council, approved of plans which provided for the offending vent opening through the side wall on to adjoining land which it owned. (4) If the opening became a nuisance when the adjoining land was roofed over, it is arguable that it was the act of the Council which created the nuisance and that by so doing the Council derogated from its grant, so that, applying the principles laid down in such cases as *Aldin* v. *Latimer Clark, Muirhead & Co.* (4), *Pollard* v. *Gare* (5), *Browne* v. *Flower* (6), *Harmer* v. *Jumbil (Nigeria) Tin Areas Ltd.* (7), *O'Cedar Ltd.* v. *Slough Trading Co. Ltd.* (8), and *Port* v. *Griffith* (9), it was the duty of the Council to pay for any work required to abate the nuisance. But there is no evidence that any smell was discharged from the vent into the markets or that, if it was discharged, the smell was a nuisance. Any smell that there was from two

(1) (1939) A.C. 544, at p. 557.
(2) (1942) 1 All E.R. 457 ; 166 L.T. 329.
(3) (1913) 2 K.B. 387.
(4) (1894) 2 Ch. 437.
(5) (1901) 1 Ch. 834.
(6) (1911) 1 Ch. 219, at p. 225.
(7) (1921) 1 Ch. 200.
(8) (1927) 2 K.B. 123.
(9) (1938) 1 All E.R. 295.

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pedestal water closets and a properly maintained urinal stall into a large well-ventilated enclosed space would not necessarily be deleterious to the inhabitants of the market or to its fruit or vegetables. (5) Any objection under the *Public Health (Amendment) Act* 1915, s. 8, by a sanitary inspector to the lavatory in the basement as insanitary would have been brought to the notice of the Licensing Court, and would have been considered by that Court in any application for a renewal of the licence as an objection to such renewal, but under the *Public Health Act* 1902, s. 65, where the nuisance arises from any want or defect of a structural character, the notice is served on the owner, so that if the Licensing Court had acted it would probably have required any alterations to be made under s. 40A introduced into the *Liquor Act* 1912 by an amendment made in 1923, the capital cost of which would have had to be borne by the Council.

The crucial point is that the covenant related to a hotel which the plaintiffs were under contract to deliver up to the Council as licensed premises upon the termination of the head-lease or of its renewal, and the defendant was bound to deliver up to the plaintiffs as licensed premises on the termination of the sub-lease. The lavatory in the basement, if it had been maintained in a proper state of repair, would have complied with the covenants in the head-lease and sub-lease and with the requirements of the *Liquor Act*. It was entirely problematical whether any public authority would take any action in respect of the lavatory during the sub-lease, or, if any public authority did so, what alterations would be required and upon whom the burden of paying for the alterations would fall.

It was contended that at the date of the sub-lease the discharge of the smell through the vent on to the enclosed space adjoining constituted a nuisance, that the demised premises at the date of the sub-lease were therefore inherently defective, that all that Costin did was to abate the nuisance by shifting the lavatory into the annexe where it could be properly ventilated and had a safe access, and that a lessee under a covenant to repair is not obliged to remedy an inherent defect by substituting for the defective part something different from that which he took when he entered into the covenant.

A building contains an inherent defect where "it is of such a kind that by its own inherent nature it will in course of time fall into a particular condition. The effects of that result are not within the tenant's covenant to repair" (*Lister* v. *Lane & Nesham* (1); *Wright* v. *Lawson* (2); *Pembery* v. *Lamdin* (3)). In the present

(1) (1893) 2 Q.B., at p. 216. (2) (1903) 19 T.L.R. 203, 510.
(3) (1940) 2 All E.R., at p. 437.

case the hotel is a comparatively modern building constructed in 1910. If Costin had left the lavatory in the basement there would have been no difficulty in keeping the lavatory in repair during the sub-lease or delivering it up in a proper state of repair upon its expiry. But Costin in breach of covenant chose to remove the lavatory off the demised premises on to other land. As a result of this voluntary act the demised premises were delivered up to the plaintiffs on the conclusion of the sub-lease bereft of a lavatory for the public bar. In order to remedy the breach the defendant must therefore pay whatever sum is required to reinstate upon the demised premises a lavatory equivalent to that which was removed, namely, a lavatory in working order consisting of two pedestals and a urinal stall. This will amount merely to the restoration of a subsidiary part of the premises (*Lurcott* v. *Wakely & Wheeler* (1)), and the making good the damage so as to leave the subject as far as possible as though it had not been damaged (*Anstruther-Gough-Calthorpe* v. *McOscar* (2)).

If the plaintiffs were desirous that the ground floor should again be partitioned off into a public and saloon bar, they could also recover the expense of doing this work, but it is evident that the increased trade requires that the whole of the space on the ground floor be used for the public bar, so that the expense of installing a new saloon bar on the first floor is not an expense which flows from the breach of covenant.

There is no evidence that, if the defendant had not removed the lavatory, the demised premises would have been pulled down at or shortly after the termination of the sub-lease, so that no question arises under the second limb of s. 133A of the *Conveyancing Act*.

The alterations which the plaintiffs have made to the hotel consist partly of alterations required to instal the new lavatory on the ground floor and to close up the openings in the walls made to incorporate the annexe with consequential alterations in the internal structure of the hotel, and partly of improvements to meet an increased trade. The defendant is liable to repay to the plaintiffs only so much of the expense of remodelling as was required to remedy the breach of covenant, including a proportion of the costs of obtaining the approval of the Licensing Court to the whole of the plans. There must, therefore, be an apportionment of the amounts paid by the plaintiffs to the builder and architect and of these costs. But it is evident that the damage suffered by the plaintiffs is substantial, that the sum of £100 awarded by the learned judge was assessed on a wrong principle and that it is so unreasonably small that, applying

(1) (1911) 1 K.B., at p. 924. (2) (1924) 1 K.B., at p. 734.

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the principles enunciated in *Lee Transport Co. Ltd.* v. *Watson* (1), it must be reviewed. The evidence is not sufficient to enable this Court to fix the proper sum, so that I agree that there should be a reference back to him to re-assess the damages.

The appeal should be allowed.

Appeal allowed with costs. Order of Full Court set aside. Verdict of Herron J. for £100 set aside. Action remitted to Herron J. for assessment of damages. Liberty to both parties to call further evidence. Respondent to pay costs of appellants in Supreme Court.

Solicitors for the appellants, *McDonell & Moffitt.*

Solicitor for the respondent, *T. J. Purcell.*

J. B.

(1) (1940) 64 C.L.R. 1.