[HIGH COURT OF AUSTRALIA.]

BELMORE PROPERTY COMPANY (PROPRIETARY) LIMITED AND ANOTHER } Applicants;
Respondents,

AND

ALLEN AND ANOTHER . . . . . Respondents.
Applicants,

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY. *April* 13, 26.

Latham C.J., Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Landlord and Tenant—Building lease—Covenant by lessee to demolish old building and erect new building—Covenant complied with—New building—Fair rent—Relationship of parties—Decision by Fair Rents Board—"Determination"—Prohibition—Rent—Increase—Jurisdiction of Board—Landlord and Tenant (Amendment) Act 1948-1949 (*N.S.W.*) (*No.* 25 *of* 1948—*No.* 21 *of* 1949), *s.* 41.

Section 41 of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.) provides that "every determination of a Fair Rents Board or of the Controller shall . . . be final and without appeal."

Held that under s. 41 proceedings by way of prohibition will lie before but not after a determination has been made.

A building erected in 1918 by a lessee in pursuance of a covenant in a building lease made in 1912 to demolish the then existing buildings and to erect a new building, is within the operation of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.).

A Fair Rents Board constituted under the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W.) may increase as well as decrease rents.

Application for special leave to appeal from the decision of the Supreme Court of New South Wales (Full Court): *Ex parte Belmore Property Pty. Ltd.*; *Re Allen*, (1949) 67 W.N. (N.S.W.) 39, refused.

APPLICATION for special leave to appeal from the Supreme Court of New South Wales.

By an indenture of lease made on 7th October 1912, certain land was leased to the Belmore Property Co. Ltd. for a term of fifty years from 1st August 1912 at the annual rental of £1,066.

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The land, which had a frontage of one hundred and thirteen feet six inches, was situate at and known as Nos. 393-397 Pitt Street, Sydney, and was leased " together with the messuages and buildings erected on the said land and now let to " two named persons.

The lessee for itself and assigns covenanted with the lessors their heirs and assigns, *inter alia* : (i) that it would pay or cause to be paid the yearly rent of £1,066 and would from time to time and at all times during the term bear, pay and discharge all rates, taxes, charges, assessments, outgoings and impositions of every kind payable in respect of, or assessed, charged or imposed upon the demised premises or any erections therein or additions thereto ; (ii) that it and its assigns would at its own cost and expense pull down and altogether demolish the buildings then presently erected on the demised land and at its own cost and expense before 13th August 1918 build, construct and completely finish fit for habitation and use on the demised land and in the stead and place of the messuages then thereon erected in a good and substantial and workmanlike manner of brick or stone in accordance with plans and specifications to be approved by the lessors their heirs and assigns a good and substantial building together with such erections, buildings, outhouses, offices, boundary walls, sewers, drains and other works and conveniences as should be necessary at a cost of at least £10,000 ; (iii) that it would at all times during the term well and substantially uphold, repair, cleanse, maintain and keep " the said messuages erected upon " the demised land and all additions thereto in good and substantial repair ; and (iv) that it would during the whole term at its own cost insure and keep insured " the messuages and all buildings, fixtures and things of an insurable nature which now are or may at any time during the term be erected upon " the demised land.

The lessee company duly observed and complied with the covenants contained in the indenture of lease.

The building so erected or caused to be erected by the lessee company prior to 13th August 1918, occupied the whole of the demised land and also occupied adjacent land owned by the lessee company. It was called " The Hub " and, pursuant to a power contained in the indenture of lease, was sub-leased by the lessee company to The Hub Ltd.

In September 1949, Herbert Daniel Allen and Arthur Forbes Mudie Pratt, trustees of the will of James Watson, deceased, being the lessors of the premises situate at and known as Nos. 393-397 Pitt Street, Sydney, applied under the *Landlord and Tenant (Amend-*

ment) *Act* 1948-1949 (N.S.W.) to the Fair Rents Board for a determination of the fair rent of those premises.

Particulars shown in the application included the following: values regarding the premises on 31st August 1939—improved capital value: £110,000; unimproved capital value: £66,600; assessed annual value: £9,766; rent, on 31st August 1939 and at date of application: £1,066; building constructed of brick and cement; building occupied 41,000 square feet; premises and fixtures in sound condition.

Upon the hearing of the application counsel for the lessee company and the sub-lessee took the objection that the Fair Rents Board had no jurisdiction to determine the application for the following reasons: (*a*) that the subject premises were not prescribed premises within the meaning of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949, in that there was not any lease of prescribed premises; (*b*) that on the true construction of that Act it was not intended to apply and did not apply to a case where a determination would result in interference with existing contractual rights, that is to say, in a case where the lessor's application was to increase rent. It was not intended that in a building lease over a long term the contractual rights of the parties should be altered by determining the so-called fair rent higher than that to which the parties agreed; and (*c*) that having regard to the nature and conditions of the subject lease, the Act contained no sufficient provisions whereby existing contractual rights could be properly altered. The formula set forth in s. 21 was inappropriate to the case, and that point would confirm the points raised in (*a*) and (*b*).

It was admitted that in pursuance of clause 2 of the indenture of lease the lessee demolished the buildings erected on the subject land at the date of the lease, and that prior to 13th August 1918, the lessee erected a new building upon the land, which building occupied the whole of the land under lease and also land not owned by the lessor.

The magistrate who constituted the Fair Rents Board, Mr. R. A. Pollard, S.M., reserved his decision and on 18th October 1949, said that he was of opinion that he had jurisdiction to entertain the application, and he proposed, after having regard to the provisions of s. 21 of the Act, particularly pars. (i) and (j), to proceed to the determination of the fair rent of the subject premises.

The Full Court of the Supreme Court of New South Wales held that s. 41 of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949, prevented the grant of a prerogative writ of prohibition to restrain the magistrate and the lessors from further proceeding in the matter

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of the application for a determination of the fair rent of the subject premises (*Ex parte Belmore Property Pty. Ltd.*; *Re Allen* (1)).

The lessee company and the sub-lessee applied by way of notice of motion to the High Court for special leave to appeal from that decision.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

G. Wallace K.C. (with him *E. J. Hooke*), for the applicants. The covenant was merely a covenant to erect a building. The words of demise were " to have and to hold the building now let to " the former lessees. The applicant lessee caused the building so demised to be demolished in accordance with the terms of the lease, and pursuant to the covenant that applicant caused a new building, of a value much greater than the value of the demolished building, to be erected. Although the applicant lessee continued to be the lessee of the land, the new building was not included within the demise, therefore there were not any " prescribed premises " within the meaning of the *Landlord and Tenant (Amendment) Act*; (*McNamara* v. *Quinn* (2)). The respondents were not qualified under s. 18 of the Act to make an application to have the fair rent determined. There has not been any " determination " in this matter. The Fair Rents Board has only given a ruling on a preliminary point. The condition precedent not having been complied with, s. 41 does not operate to prevent the Court or the appropriate superior court from restraining further proceedings (*Boulos* v. *Broken Hill Theatres Pty. Ltd.* (3)). The Fair Rents Board has no jurisdiction to increase the rent in the case of a current lease.

C. M. Collins, for the respondents. The object of the *Landlord and Tenant (Amendment) Act* was the determination of a fair rent as between landlord and tenant. The Act contemplates that under its provisions the Fair Rents Board may increase as well as decrease rents. The Act applies to all leases which were in existence at the date the Act came into force and irrespective of the commencing date of the leases. If there has not been a " determination " by the Fair Rents Board the matter should be referred back to the Board for its decision. The fixing or determining of fair rent includes the ascertaining of whether any particular premises are prescribed premises and all matters which lead up to it. The decision of the Board that the premises were " prescribed premises " was a determination.

(1) (1949) 67 W.N. (N.S.W.) 39.
(2) (1947) V.L.R. 123.
(3) (1949) 78 C.L.R. 177.

[DIXON J. referred to *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1).]

The Board had before it the lessors, the lessee, the lease and the fact that the rent had been paid, which "showed on the face of" the proceedings that they had relation to the subject matter over which the Act had given it jurisdiction. In those circumstances the decision or determination of the Board was, pursuant to s. 41, final and without appeal (*Baxter* v. *New South Wales Clickers' Association* (2)). Section 41 is not limited to an appeal against *quantum* but precludes prohibition or *certiorari* on any finding by the Board which leads to its determination. The repair and maintenance provisions in the indenture of lease support the view that the "new" building was intended to form part of the demised premises.

Cur. adv. vult.

April 26.

THE COURT delivered the following written judgment:—

This is an application for special leave to appeal against an order of the Full Court of the Supreme Court of New South Wales discharging a rule nisi for prohibition directed to a stipendiary magistrate sitting as a Fair Rents Board under the provisions of the *Landlord and Tenant (Amendment) Act* 1948-1949. The applicant company is in occupation of property in Pitt Street, Sydney, which is subject to an indenture made on 7th October 1912 between the then owner of the premises and the company. This was a building lease under which the lessee covenanted to pull down the buildings then on the land and to erect a new building to cost at least £10,000. The old buildings were pulled down and the new building was erected. The present landlord made an application to a Fair Rents Board for a determination of the fair rent of the premises. The tenant contended that there was no lease of the buildings now on the land, so that the buildings were not "prescribed premises" within the meaning of the Act, and that the Fair Rents Board had no jurisdiction to increase the existing rent fixed by the contract between the parties. These objections were heard by the stipendiary magistrate who constituted the Fair Rents Board and he ruled against the tenant, the applicant in this Court. The tenant then obtained a rule nisi for prohibition in the Supreme Court on the ground that the owners of the property were not lessors, that there was no lease of the premises and that the premises were not prescribed premises within the meaning of the Act, that the Act did

(1) (1924) 34 C.L.R. 482, at pp. 520-526.

(2) (1909) 10 C.L.R. 114, at pp. 148, 149.

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not authorize interference with existing contractual rights in order to increase rent, and that for these reasons the Fair Rents Board had no jurisdiction to entertain the application.

Upon the return of the rule nisi it was held by the Supreme Court that the rule must be discharged by reason of the provisions of s. 41 of the *Landlord and Tenant (Amendment) Act* 1948-1949. Section 41 is in the following terms :—" Every determination of a Fair Rents Board or of the Controller shall, except as provided by this Part, be final and without appeal, and no writ of prohibition or *certiorari* shall lie in respect thereof." In the present case no determination had been made, but the Supreme Court held that the section showed that it was the intention of the legislature that no proceedings before a Fair Rents Board should be subject to prohibition. In our opinion this is not the effect of s. 41. The words of the section in our opinion are clear. They provide, and provide only, that no writ of prohibition or *certiorari* shall lie in respect of a determination of the Board. They do not prevent or purport to prevent proceedings by way of prohibition before a determination has been made. Once the determination has been made s. 41 operates in the manner explained in *R.* v. *Connell* (1); *R.* v. *Hickman* (2); and *Boulus* v. *Broken Hill Theatres Pty. Ltd.* (3). But until a determination has been made the section has no operation (cf. *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4)). Accordingly, in our opinion, the Supreme Court should not have held that s. 41 was fatal to the prohibition proceedings.

But in our opinion special leave to appeal should not be granted. The lease is a building lease and it cannot reasonably be contended that the premises which were erected in pursuance of the covenant in the lease and are now on the land are not premises which were leased on the prescribed dates mentioned in the Act: see ss. 12, 15 and the definitions of " lease " and " prescribed premises " in s. 8. To hold that the lease was not a lease of the existing buildings would be contrary to the intention of the parties as shown by the indenture of lease. There are several places in the Act where the word " premises " is used in the colloquial but incorrect sense of a building. We think, however, that it by no means follows that a building erected under a covenant in a building lease is outside the Act. But holding, as we do, that such a building may fall under the Act, it becomes a question for the Controller or the Fair Rents Board whether, when the tenant has built the building in perfor-

(1) (1944) 69 C.L.R. 407.
(2) (1945) 70 C.L.R. 598.
(3) (1949) 78 C.L.R. 177.
(4) (1924) 34 C.L.R. 482, at p. 526.

mance of an obligation under the lease, it is fair and just to increase the rent because the existence of the building has increased the letting value of the land.

There are several provisions in the Act which show that the Fair Rents Board may increase as well as decrease rents. Section 20 authorizes the determination of fair rent by the Controller appointed under the Act subject to an appeal to a Fair Rents Board—s. 30. Section 31 provides that the Board shall hear the appeal and may confirm the determination of the Controller and dismiss the appeal or may determine the fair rent " at such amount as, in the opinion of the Board, is the correct rent of the prescribed premises." Section 15 contains provisions dealing with a case where the rent has been increased or decreased by a determination made before the commencement of the Act: s. 15 (1) and (2). Section 15 (4) provides that until any rent so fixed " is increased or decreased by a determination, the rent so fixed shall be the fair rent of the prescribed premises." Thus the general provision specifying the power of the Fair Rents Board is sufficient to authorize an increase as well as a decrease of rent, and specific provisions of the Act show that the Act contemplates the possible increase of rent by a determination. Accordingly, in our opinion, it is not shown that, if the Fair Rents Board proceeds with the hearing of the application of the landlord, the Board will be acting beyond its jurisdiction. The application for special leave to appeal should be refused.

Application refused. Applicants to pay the costs of the respondents.

Solicitors for the applicants, *Sly & Russell.*
Solicitors for the respondents, *Walter Dickson & Co.*

J. B.