[HIGH COURT OF AUSTRALIA.]

NAVAL LODGE HOTEL LIMITED . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY.

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1953, SYDNEY, *Dec.* 16, 17;

1954, *April* 23.

Dixon C.J., Williams and Webb JJ.

Lease—Land owned by Commonwealth—Lessee—Company—Term—Four periods—Rent—Payable monthly in advance—Amount increased for each of second and third periods—Last period—Rent to be determined by Minister—"But not less than £700 per annum"—Determination considerable time after commencement of last period—Large increase in amount—Effect of determination—Power of Minister—Leases Ordinance 1918-1937, *ss.* 3, 3AA.

A lease granted to N. by the Commonwealth pursuant to the *Leases Ordinance* 1918-1937, and regulations thereunder, was for a term which commenced on 16th January 1940, and was to end on 15th November 1961, of land and premises in the Australian Capital Territory to be used for residential purposes only. The term was divided into four parts. The rent was at the rate of £326 per annum and of £442 per annum during the first and second periods respectively. In the third period which commenced on 16th November 1946, and ended on 15th November 1951, the rent was at the rate of £672 per annum. The lease then provided that for the remainder of the term after 15th November 1951, the rent was to be at a rate determined by the Minister but not less than £700. Rent was payable monthly in advance. On 30th July 1952, the Minister purported to determine the rental for the balance of the term of the lease at the rate of £2,080 per annum payable monthly in advance as from 16th August 1952. N. claimed that in the circumstances which then existed, the rent for the fourth period was at the rate of £700 per annum.

Held, by *Dixon* C.J. and *Williams* J. (*Webb* J. dissenting), that the words "not less than £700 per annum" were not apt to fix a rate for the fourth period in default of a determination of a rate for that period by the Minister, and s. 3AA of the *Leases Ordinance* 1918-1937, which governed the matter,

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did not by express words require that the determination by the Minister should be made prior to the commencement of the relevant period.

Held, by *Dixon* C.J. and *Williams* J., that s. 3AA of the *Leases Ordinance* 1918-1937 can operate otherwise than where the lease is granted subject to an unqualified power on the part of the Minister to determine the rent.

Decision of the Supreme Court of the Australian Capital Territory (*Simpson* J.), affirmed.

APPEAL from the Supreme Court of the Australian Capital Territory.

An originating summons was filed by Naval Lodge Hotel Ltd. in the Supreme Court of the Australian Capital Territory for the construction of a lease made under the *Leases Ordinance* 1918-1937, on 27th October 1941, between the defendant, the Commonwealth of Australia as lessor, and the plaintiff as lessee.

The lease provided, *inter alia*, that the lessee should hold the subject property, being certain land situate at Jervis Bay together with the buildings erected thereon and the articles of furniture and equipment in the premises, for the term commencing on 16th January 1940 and ending on 15th November 1961, to be used by the lessee for residential hotel purposes only "yielding and paying therefor for the period commencing on the Sixteenth day of January 1940 and ending on the fifteenth day of November 1941 rent at the rate of . . . £326 per annum and for the period commencing on the Sixteenth day of November 1941 and ending on the fifteenth day of November 1946 rent at the rate of . . . £442 per annum and for the period commencing on the sixteenth day of November 1946 and ending on the fifteenth day of November 1951 rent at the rate of . . . £672 per annum and for the remainder of the said term after the fifteenth day of November 1951 rent at a rate to be determined by the Minister but not less than . . . £700 per annum payable monthly in advance (and proportionately for any part of a month) on the sixteenth day of each month in each year during the tenancy hereby created."

The plaintiff submitted the following question for determination by the court :—

Whether upon the true construction of the said lease and in the events which have happened, the true rental rightfully payable thereunder by the plaintiff to the defendant was and is—(i) at the rate of £700 per annum from 15th November 1951 for the remainder of the lease's term ; or (ii) at the rate of £672 per annum from 15th November 1951 up to and including 15th August 1952, and thereafter at the rate of £2,080 per annum for the remainder of the lease's term ?

On 7th March 1952, the Commonwealth, acting through the Assistant Secretary, Department of the Interior, wrote to the plaintiff a letter in which it was stated that the department was considering the question of the rent payable for the lease for the period 16th November 1951 until 15th November 1961, and that the plaintiff would be further advised in that regard at an early date.

On 30th July 1952, the secretary of the Department of the Interior wrote to the plaintiff a letter in which after referring to the previous correspondence and to the terms of the lease, he said that the Minister had determined the rental for the balance of the term of the lease at the rate of £2,080 per annum, and that the new rental would be payable as from 16th August 1952, and that rental at the rate then being paid—£672 per annum—would be accepted for the period ending 15th August 1952.

On 20th August 1952, the plaintiff's solicitors wrote to the secretary of the Department of the Interior a letter in which they stated that they were advised that the rent for the unexpired term was clearly at the rate of £700 per annum and that monthly payments at the rate of £700 per annum would be made by the company henceforth.

Simpson J. answered par. (i) of the question in the negative, and par. (ii) in the affirmative, and declared that the true rental rightly payable by the plaintiff to the defendant under the lease was at the rate of £672 per annum from 15th November 1951 up to and including 16th August 1952, and thereafter at the rate of £2,080 per annum for the balance of the term of the lease.

From that decision the plaintiff, by virtue of s. 51 (1) (*a*) of the *Seat of Government Supreme Court Act* 1933-1945, appealed to the High Court.

Relevant provisions of the *Leases Ordinance* 1918-1937 and clauses of the lease appear in the judgments hereunder.

Sir *Garfield Barwick* Q.C. (with him *A. H. Conlon* and *R. G. Henderson*), for the appellant. The clause in the lease by which the period of the lease is divided into four parts determines the rent for the final period of ten years at a single rate, and prescribes that, in default of a determination by the Minister before the commencement of that period of ten years of some greater rate, the rental for the period is to be £700 per annum payable in advance. The power to determine the rent may only be exercised once by the Minister and only with respect to the whole of the balance of the term, the ten years, and it must be exercised before the commencement of that period of the term to which the power is referable.

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It was necessary for the lessee to know in November 1951 what rental it was required to pay in view of improvements effected by it, and recovering the costs thereof during the ensuing ten years. The Minister did not make any determination before the commencement of the remainder of the term, and it is not clear that he ever made a determination of the rental for the whole of the remainder of the term. He only purported to determine rental for the period which commenced on 16th August 1952. Section 3AA of the *Leases Ordinance* 1918-1937 grants a faculty to the Minister. It is a condition that he, if he likes, can incorporate into the lease, but it must be subject to the terms of the lease, which otherwise are paramount. The Minister determined the rental provisions of the lease in such a way as to make it impossible to treat s. 3AA of the ordinance as regulating the rental or the determination of it for the period from 15th November 1951 to 15th November 1961. " Rent at a rate to be determined by the Minister " is a rate for the entire period. The rental would need to be fixed before or on the commencement of the period because (a) it is payable in advance on the 16th day of each month. Section 3AA contemplates an insertion in the lease of a power, which is unfettered on the part of the Minister, to determine the rent. The introduction of the fetter £700, takes it outside the section. The words " not less than " could not have been inserted for the benefit of the lessee ; they are against the lessee and the only way in which they are against the lessee is to fix a minimum for his rental ; it was to be £700 unless the Minister in due time and for the right period validly determines some other sum. The whole scheme of the division into four periods is against any other view. The right answer should have been : £700 per annum.

Dr. *F. Louat* Q.C. (with him *C. M. Collins*), for the respondent. It is incorrect to treat s. 3AA as a pure grant of power to the Minister to make a lease in this form if he so chooses. The purpose of the first part of s. 3AA is declaratory and its real function is not to grant power but to provide that, if the Minister is to introduce this particular kind of term or condition, which he would be entitled to introduce under s. 3, he must only do it *sub modo* ; he must only do it subject to the qualifications in the interests of fair dealing which the proviso insists upon. The whole importance of s. 3AA is the proviso. The words " when notice of the determination is given " are equivalent to saying " up to the time when he does effectively determine it "—" the rental shall continue to be what it was at the beginning of the period ". There is nothing in the

ordinance which would require that the determination should be made prior to the commencement of the period. The words and figures " not less than £700 " are attached as a qualification of the Minister's determining power. They should be construed as meaning " at a rate to be determined by the Minister but not at less than £700 ". The phrase has no operation at all until the Minister is determining the rent. Reliance is placed, first, on s. 3 of the ordinance, and, secondly, on the opening words of s. 3AA. A rent must be certain (*Milnes* v. *Gery* (1); *Rees* v. *Johnson* (2)). The words " not less than " cannot be regarded as certain. The words and figures " not less than £700 " are otiose in this lease unless they have the significance, which grammatically they have, of being a qualification of the Minister's determination. If they do not specify a rent, then the appellant cannot have the question answered in the way he desires. The language at the beginning and end of the lease indicate that it is intended to be subject to and read in relation to the ordinance. The ordinance in relation to leases by which its terms are invoked is in the nature of a superior law which applies to the lease. The same kind of result is to be seen in *Clarke* v. *Tyler* (3) and in *In re Mair*; *Richards* v. *Doxat* (4). The appellant's claim involves establishing each of two independent propositions: (i) that a determination after the commencement of the period is void, and (ii) that " not less than £700 ", as well as being a limit on the determining power, has the added function of supplying a fixed and certain rent where there is not any valid determination. Each of those propositions is wrong. Proposition (ii) is clearly wrong because " not less than " cannot be a specification: *ex parte Voisey*; *In re Knight* (5); *Foa* on *Landlord and Tenant*, 7th ed. (1947), p. 99.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

April 23, 1954.

The following written judgments were delivered:—

DIXON C.J. AND WILLIAMS J. This is an appeal from a judgment of the Supreme Court of the Australian Capital Territory (*Simpson* J.) declaring that the true rental rightly payable by the plaintiff (the present appellant) to the defendant (the present respondent) under a lease granted to the appellant by the respondent pursuant to the *Leases Ordinance* 1918-1937 and the regulations thereunder

(1) (1807) 14 Ves. 400, at p. 406 [33 E.R. 574, at pp. 576, 577].
(2) (1885) 3 N.Z.L.R. 1.
(3) (1949) 78 C.L.R. 646, at p. 655.
(4) (1935) Ch. 562, at p. 565.
(5) (1882) 21 Ch. D. 442, at p. 458.

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on 27th October 1941 is at the rate of £672 per annum from 15th November 1951 up to and including 15th August 1952, and thereafter at the rate of £2,080 per annum for the balance of the term of the lease. The appellant who is the lessee contends that this declaration is wrong and seeks in lieu thereof a declaration that on the true construction of the lease and in the events which have happened, the true rental rightly payable thereunder is at the rate of £700 per annum from 15th November 1951 for the remainder of the term of the lease.

The lease in question is for a term commencing on 16th January 1940 and ending on 15th November 1961 of land and premises at Jervis Bay in the Australian Capital Territory to be used for residential purposes only. The lease does not provide for a uniform rent over the whole term but is divided into four periods. In the first period commencing on 16th January 1940 and ending on 15th November 1941 the rent is at the rate of £326 per annum. In the second period commencing on 16th November 1941 and ending on 15th November 1946 the rent is at the rate of £442 per annum. In the third period commencing on 16th November 1946 and ending on 15th November 1951 the rent is at the rate of £672 per annum. The lease then provides that for the remainder of the term after 15th November 1951 the rent is to be at a rate to be determined by the Minister but not less than £700 per annum. The lease makes the rent payable monthly in advance (and proportionately for any part of a month) on the 16th day of each month in each year during its continuance.

The dispute between the parties relates to the amount of rent payable in the fourth period commencing on 16th November 1951. The lessee paid the agreed rent during the first three periods including rent at the rate of £672 during the third period ending on 15th November 1951. Prior to this date the Minister had not determined any rate for the fourth period and did not purport to do so until about 30th July 1952. On 31st July 1952, after some preliminary correspondence, the appellant received a letter from the Secretary of the Department of the Interior dated 30th July 1952 stating that: "The lease granted to the Company provides that for the remainder of the term of the lease after the 15th November, 1951 rental shall be payable at a rate to be determined by the Minister. I now have to inform you that the Minister has determined the rental for the balance of the term of the lease at a rate of Two Thousand and Eighty Pounds (£2,080 0s. 0d.) per annum. The new rental will be payable as from the 16th August 1952 and as provided for in the lease is payable monthly in advance.

Rental at the rate now being paid—£672 per annum—will be accepted for the period ending 15th August 1952 ". The appellant in reply claimed that in the circumstances which then existed the rent for the fourth period was at the rate of £700 per annum.

The present proceedings were then brought in the Supreme Court to determine the amount of rent rightly payable under the lease after 15th November 1951. The submission made on behalf of the lessee before *Simpson* J. and before us is that the power of the Minister to determine a rate for the fourth period contained in the lease is a power to determine a single rate for the whole period, that the Minister must exercise this power prior to its commencement, and that in default of his doing so, the rental for the period is fixed by the lease at the rate of £700 per annum. We were referred to several provisions of the lease, including the provision for payment of the rent monthly in advance on the 16th day of each month, the operation of which, it is submitted, depends upon the lessee knowing in advance the amount of rent it should pay from time to time. The following are instances of such provisions : (1) The covenant by the lessee to pay the rent thereby reserved without any deduction to the Commonwealth on the days and in the manner aforesaid. (2) The agreement that if any rent should be fourteen days in arrears the Commonwealth might by notice in writing to the lessee determine the lease. (3) The provision that if the premises should at any time during the tenancy be destroyed, damaged or rendered uninhabitable by fire, storm, tempest, lightning, flood or earthquake then the rent reserved or a proportionate part thereof should be suspended until the premises should be reinstated. (4) The provision that if at any time during the continuance of the tenancy the whole or any portion or portions of the land thereby leased should be required by the Commonwealth for any Commonwealth or government purpose or for any other public purpose whatsoever the Commonwealth might by notice in writing to the lessee withdraw the whole or any such portion or portions of the land from the lease provided that the rent to be paid for the portion or portions that were not withdrawn should be reduced proportionately.

We agree that these provisions, and in particular the provision making the rent payable in advance, do appear to contemplate that the lessee should know in advance what rent it is required to pay from time to time. If the rights of the parties depended entirely on the lease it might be proper to attribute to the instrument considered as a whole an intention that the Minister should fix the rate for the fourth period, if it was to be at more than £700 per

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annum, prior to the commencement of that period, so that the rate would operate for the whole period and the lessee would know in advance what rent it would have to pay on 16th November 1951 and on the subsequent dates for payment of rent. Difficult also as the conception may be, it might be necessary, in order to give business efficacy to the lease (for it is clear that it was intended that some rent should be payable in the fourth period), to imply a provision that in default of the Minister doing so the rent for that period should be at the rate of £700 per annum. But counsel for the lessor relies upon the provisions of s. 3AA of the *Leases Ordinance* 1918-1937 and points out that the lease commences by stating that it is granted pursuant to this ordinance and concludes by stating that it has been executed by the Minister pursuant to the powers thereby conferred upon him. If the section is applicable the requirement that the lessee should know in advance what rent it has to pay from time to time would not be inconsistent with a determination of a new rate for the fourth period after 15th November 1951 because, as will be seen, the section provides that until notice of the new rate is communicated to the lessee it is to continue to pay rent at the previously existing rate.

The text of s. 3AA is as follows: "(1) Any lease may, without prejudice to the period for which the lease is granted or to any covenant or condition of the lease, be granted subject to the condition or agreement that the rate at which the rent shall be payable for any period of the lease may be determined by the Minister or otherwise, and the rate may be determined accordingly, and, subject to any variation made in pursuance of the *Land Valuation Ordinance* 1936, the rate as so determined shall be the rate at which the lessee shall pay rent for that period. Provided that if notice of the determination is not, in pursuance of the next succeeding sub-section, delivered to or served on the lessee before the commencement of the period in respect of which the rate is determined, the rate at which the lessee shall pay rent for that period up to the date on which the notice is delivered to or served on him, shall be the rate at which the rent for the lease was payable immediately prior to the commencement of the period. (2) The Minister shall cause to be delivered to, or served by post on, the lessee, notice in writing of any determination made under or by virtue of the last preceding sub-section."

This section expressly provides that a lease may be granted subject to an agreement that the rate at which rent shall be payable for any period of the lease may be determined by the Minister or otherwise and that the rate may be determined accordingly. The

present lease provides that for the remainder of the term after 15th November 1951 the rent payable shall be at a rate to be determined by the Minister. But it also provides that the rate shall be not less than £700 per annum. Counsel for the lessee submits that the section is inapplicable to the present lease or alternatively to the determination of the Minister made in July 1952 on several grounds. He submits that the section cannot apply to the present lease because the lease provides that the rent for the whole of the fourth period is to be not less than £700 per annum whereas the proviso, if operative, would fix the rent prior to 16th August 1952 at the rate of £672 per annum. He also submits that the section only applies where the lease gives the Minister an unqualified power to determine the rate for any period of the lease and here the power is qualified because the rate is to be " not less than £700 per annum ". He also submits that if the section is applicable the power to make a determination must be exercised prior to the commencement of the relevant period and that the proviso only operates where for some reason a determination made in due time is not communicated prior to the commencement of that period.

We are unable to accept any of these submissions. We do not think that the words " not less than £700 per annum " are at all apt to fix a rate for the fourth period in default of a determination of a rate for that period by the Minister. The amount of rent should always be fixed with certainty and a provision that the rent shall not be less than a certain amount does not fix any amount at all. It only limits the amount that can be fixed by the Minister. The words are apt and apt only to fetter the power of the Minister in determining the rate and to prevent him fixing a rent less than £700 per annum. The reference in s. 3AA to the *Land Valuation Ordinance* 1936 is a reference to the rights conferred by the latter ordinance on lessees who are dissatisfied with a determination of rent by the Minister. That ordinance enables a dissatisfied lessee to apply to the Minister to vary the rent as so determined and it prescribes a series of steps which may be taken. By taking the appropriate steps the lessee may finally appeal to the Land Court of the Australian Capital Territory. In any proceedings under that ordinance the agreement of the parties that the rent for the remaining period should be not less than £700 per annum would prevent the lessee complaining if the Minister determined a rent not exceeding that amount. The lessee or an assignee would at least know that the new rate when determined by the Minister would be, at least to that extent, at a higher rate than that prevailing in the third period. The words have no operation except as a

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qualification upon what would otherwise be an unqualified power provided it was exercised bona fide, subject only to revision under the *Land Valuation Ordinance*, to determine a new rate of any amount either above or below the previously existing rate. We are also of opinion that the words do not make the provisions of s. 3AA inapplicable to the present lease. They do not of their own force fix any rent at all. Accordingly there is nothing to prevent the proviso operating to maintain the rent payable in the fourth period prior to the communication to the lessee of the determination of the Minister of the new rate at the same rate as that operating in the third period.

Nor do we think that the section operates only where the lease is granted subject to an unqualified power on the part of the Minister to determine the rent. The section in the first instance authorizes the Minister to grant a lease subject to the condition or agreement that the rate at which rent shall be payable for any period of the lease may be determined by the Minister or otherwise. The lease when granted must contain the condition or agreement. It will only do so if the parties agree to its insertion. The section then provides that the rate may be determined accordingly—that is, determined by the Minister or otherwise in accordance with the condition or agreement in the lease. The section then attaches certain statutory consequences to the determination. In our opinion the provision in a lease that the Minister may determine a rate for a period at not more or less than a certain amount would still be an agreement that he should determine the rate for that period. Such a provision would still require a determination before any rent was fixed for the period. It was submitted that in the present lease it was part of the agreement of the parties that the rate should be determined prior to the expiration of the third period. If the lease did expressly so provide the question would arise whether the parties could contract out of the statutory effect of sub-s. (2) and the proviso to sub-s. (1) of s. 3AA. But the lease does not so provide. It does not expressly fix any time within which the determination must be made. As we have said, apart from s. 3AA, it might be proper to imply such a limitation. But in face of the provisions of the section it would not be proper to make such an implication. Nothing appears in the lease to indicate that the parties are attempting to contract out of the section. On the contrary the lease states that it is granted pursuant to the ordinance. If they were so attempting the question would arise whether they could lawfully do so. The word " shall " in sub-s. (2)

appears to make compliance with its provisions mandatory. The same word occurs in the proviso so that its provisions also appear to be mandatory. Moreover the submission overlooks the words " or otherwise ". These words, if it is necessary to invoke them, are wide enough not only to authorize a provision in the lease that some person other than the Minister should make the determination but also to authorize the inclusion of provisions relating to the manner in which the determination should be made including provisions fixing upper or lower limits for the rate.

Lastly, we do not think that the section requires the determination to be made prior to the commencement of the relevant period. There are no express words in the section requiring the Minister to do so. If the section consisted solely of the first paragraph it might have this meaning. But sub-s. (2) provides that the Minister shall cause to be delivered to or served by post on the lessee notice of any determination made under or by virtue of the last preceding sub-section and the proviso to sub-s. (1) enacts that, if notice of the determination is not so delivered or served before the commencement of the period in respect of which the rate is determined, the rate at which the lessee shall pay rent for that period in the meantime shall be the rate at which the rent for the lease was payable immediately prior to the commencement of the period. In our opinion it would not be right to construe the proviso as intended to apply only to cases where the Minister, having made a determination prior to the commencement of the period, fails to communicate the determination to the lessee until after such commencement. The word " shall " indicates that compliance with sub-s. (2) is required to make the determination by the Minister effective. Until then the determination is inchoate. If delivery or service of notice of the determination is required to make it effective, and this can take place after the commencement of the period, there does not seem to be any reason to be derived from the wording of the section why the determination should not also be made after such commencement. The proviso fills the intervening gap because it provides that until the determination is communicated to the lessee the rate at which he shall pay rent shall be the rate at which rent was payable immediately prior to the commencement of the period. The real function of the provision in the lease that the rate to be determined by the Minister shall not be less than £700 per annum is, as we have said, to place a fetter on the power of the Minister to determine a rate and require him not to fix a lower rate than £700 per annum. This provision has no effect

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upon the operation of the proviso in the section pending the determination by the Minister of the new rate and the communication of that determination to the lessee.

For these reasons we are of opinion that the appeal should be dismissed with costs.

WEBB J. The lease contemplated that the rent for the fourth and last period of the term would be determined before the period began, i.e., before 15th November 1951, as it required the rent to be paid in advance. That conclusion is rendered necessary, not merely by the requirement of payment of rent in advance, but also by the necessity to have known from time to time just what the rent was for the purposes of the abatement clause and the clause providing payment for improvements made by the lessee, who should have been put in a position to know whether the rent warranted the making of improvements without compensation. Other covenants in cll. 1, 2 and 3 are consistent with the rent being paid in advance, if they do not require it; and there is no clause that indicates the contrary. But the determination of the rent for the last period was not made until some time after 7th March 1952, and so I think was invalidly made. If so, s. 3AA of the *Leases Ordinance* does not remedy the situation. The proviso which makes the rent payable as from the date of notice does not extend beyond the enacting part, which assumes a valid determination. But if there was no valid determination by the Minister, what is the rent, if any, for the last period? That depends on the meaning and effect of the words "not less than £700" in the rent provision of the lease. That provision reads: "for the remainder of the said term after the fifteenth day of November 1951 rent at a rate to be determined by the Minister but not less than Seven hundred pounds (£700) per annum payable monthly in advance".

If the words "but not less than £700 per annum" qualify "rate", then they have no operation except when the Minister makes a determination. But if they qualify "rent", they can have an operation in the absence of such a determination, as an alternative to such determination; although it is unusual to fix a rent in such terms as "not less than £700", which do suggest an instruction to the individual determining the rent, and not an independent alternative specification of the rent. The choice between the two meanings is not easily made, but I prefer the latter. In so deciding, I am influenced by the fact that, if the former meaning is given to the words "not less than £700", then it is a provision having no

legal effect, no binding effect, on either lessor or lessee, and amounts to nothing more than an intimation of the intention of the lessor. The words do not bind the lessee to refuse to pay less than £700 per annum; and they do not bind the Minister or the lessor to fix not less than £700. There is no statutory provision to the contrary. But the words are, I think, meant to have a legal effect, a binding effect, on the lessee, and that can be the case only if they qualify " rent " and specify a rent in the absence of a determination by the Minister.

I proceed to consider the effect of s. 3AA of the *Leases Ordinance* 1918-1937, which reads:—"(1). Any lease may, without prejudice to the period for which the lease is granted or to any covenant or condition of the lease, be granted subject to the condition or agreement that the rate at which the rent shall be payable for any period of the lease may be determined by the Minister or otherwise, and the rate may be determined accordingly, and, subject to any variation made in pursuance of the *Land Valuation Ordinance* 1936, the rate as so determined shall be the rate at which the lessee shall pay rent for that period: Provided that if notice of the determination is not, in pursuance of the next succeeding sub-section, delivered to or served on the lessee before the commencement of the period in respect of which the rate is determined, the rate at which the lessee shall pay rent for that period up to the date on which the notice is delivered to or served on him, shall be the rate at which the rent for the lease was payable immediately prior to the commencement of the period. (2). The Minister shall cause to be delivered to, or served by post on, the lessee, notice in writing of any determination made under or by virtue of the last preceding sub-section."

It will be noted that this section treats the determination of the rent and the notice of such determination as quite separate matters: it does not identify the notice with the determination and so provide that the determination may be made during and not necessarily before the announcement of the period in respect of which it is made.

It is true, as Dr. *Louat* for the respondent pointed out, that if s. 3AA is not applied to this lease, then the choice is between the somewhat extreme finding that no rent has been or can now be fixed for the last period of the term, and the finding that it has been fixed by the operation of the lease without more " at not less than £700 per annum ", which admittedly, is somewhat indefinite language for a rental determination. Further the phrase " but not

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Webb J.

less than £700 per annum " cannot qualify both " rent " and " rate ", But if it does not qualify " rate " the Minister is at liberty to fix less than £700 per annum. These are no doubt serious difficulties in the way of the construction of the lease which I am driven to prefer. However, for two reasons which seem to me to be conclusive I can see no ground for applying s. 3AA to this lease. The first reason is that s. 3AA has not been incorporated in or adopted by the lease. The mere provision in the lease that the rent is to be determined by the Minister does not amount to its incorporation or adoption. That is because s. 3AA expressly provides that it is " without prejudice to . . . any covenant or condition " of the lease. But to apply s. 3AA to this lease would not merely create a difficulty but would be an impossibility, as it would amount to an amendment of the lease by completely ignoring and making wholly futile the provision for payment in advance of the rent for the last period of the term, and the other provisions of the lease that I have referred to as indicating that payment in advance was not only intended by the parties to the lease but was a practical necessity. The proviso to s. 3AA is obviously quite inconsistent with and prejudicial to payment in advance, i.e. to a covenant or condition of the lease, if it permits not merely notification of the determination of the rent but the determination itself to be made after the period commences. The second reason is that, as I have already pointed out, s. 3AA is not a validating provision. Indeed Dr. *Louat* did not claim that it was. Then the choice, as it appears to me, is between what is difficult and what is impossible, and naturally I prefer the former.

I have given consideration to the question of treating the provision in the lease for payment of rent in advance merely as something for the sole benefit of the lessor and which the lessor might waive without prejudice to the other provisions of the lease. But, as appears plainly enough from the terms of the lease with respect to abatement and non-payment for improvements, the provision for payment of rent in advance cannot be said to be for the sole benefit of the lessor. Moreover, in a period of rising costs it might prove to be to the considerable benefit of the lessee. Further, it is in any event a safeguard to the lessee that the Minister should not be able to select his own time for fixing the rent and postpone his determination to a time when the rent would be so much greater than that which he would have fixed if he had made his determination before the commencement of the period, that the increase would not merely compensate for the temporary loss of rent during

the delay, but also leave a substantial margin in favour of the lessor. It is, I think, no answer to say that only during a period of rising prosperity would the Minister be induced so to postpone his determination, and that the lessee also would enjoy that prosperity. The provision for payment of rent in advance might well have been designed to prevent that by putting both lessor and lessee on an equal footing for the future. After all, payment in advance requires determination in advance.

I would allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Parish, Patience & McIntyre.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.