[HIGH COURT OF AUSTRALIA.]

BARNARD . . . . . APPELLANT;

AND

GORLIN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 11.

McTiernan, Williams, Webb, Kitto and Taylor JJ.

Landlord and Tenant—Notice to quit—Premises—Use by tenant—As residence and for sub-letting—Not "used solely as a dwelling house"—Notice—Prohibition order—Applicability—Landlord and Tenant (Amendment) Act 1948-1952 (*N.S.W.*), *s.* 62A.*

High Court—Appeal—Competency.

An application made under s. 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) for an order preventing the lessor from giving notice to quit certain premises used by the applicant, Barnard, was granted by a District Court judge he having found as a fact that the applicant carried on a business of letting the rooms other than the room in which he himself lived and thus the premises were "not premises used solely as a dwelling house". An appeal to the Full Court of the Supreme Court of New South Wales was allowed. Upon an appeal to the High Court,

* Section 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) provides as follows:—"(1) A judge of the District Court for the district in which prescribed premises not being premises used solely as a dwelling-house are situated may—(a) on application in that behalf made by the lessee who has become the lessee of the premises by virtue of a transfer or assignment, order that a notice to quit upon the ground specified in paragraph (b), or paragraph (n) of subsection five of section sixty-two of this Act shall not be given in relation to the transfer or assignment; (b) on application in that behalf made by the lessee of the premises, who has sublet the premises, order that a notice to quit on the ground specified in paragraph (b) or paragraph (o) of the said subsection shall not be given in relation to the sub-lease; (c) on application in that behalf made by the lessee of the premises who proposes to sublet the premises or to transfer or assign the lease of the premises, order that a notice to quit on the ground specified in paragraph (b), paragraph (n) or paragraph (o) of the said subsection shall not, if the proposed sub-lease, transfer or assignment is subsequently made or effected, be given in relation to the sub-lease, transfer or assignment,

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Held, (1) that the material before the Court did not show that the appeal lay as of right; (2) that s. 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952 was concerned only with the physical acts done on the premises; and (3) that the sole use to which the premises were put by the persons who occupied and used them was that of a "dwelling house", therefore s. 62A did not apply.

Observations by *Roper* C.J. in Eq. in *In re Appeal by Effie Smith* (1954) 72 W.N. (N.S.W.) 84, at p. 85, approved.

Decision of the Supreme Court of New South Wales (Full Court), subject to a variation, affirmed.

APPEAL from the Supreme Court of New South Wales.

An application to a judge of the District Court of the Metropolitan District was made under s. 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952, by Kenneth Barnard as lessee of No. 140 Palmer Street, East Sydney, which he described as prescribed premises not used solely as a dwelling house and the lease of which he proposed to transfer to one Michael Bennett, for an order that a notice to quit on the ground specified in par. (b) or par. (n) of s. 62 (5) of the Act should not, if the proposed transfer were subsequently made or effected, be given in relation to the transfer or any other order as to the judge seemed fit upon the grounds that the lessor, Solomon Gorlin, having been requested to consent to or approve that proposed transfer of the lease unreasonably refused or unreasonably withheld that consent or approval and that Gorlin had not offered to pay to Barnard a fair and reasonable price for the lease (including the goodwill of any business carried on by the lessee upon the premises).

In an affidavit in support of the application Barnard deposed that he was a public servant and residential proprietor; that he held the subject premises as tenant from week to week of Gorlin; that the premises consisted of a building divided into forty-two

if the judge is satisfied—(i) that the lessor, having been requested to consent to or approve that transfer or assignment or sub-lease or proposed sub-lease or proposed transfer or assignment of the lease, unreasonably refused or unreasonably withheld that consent or approval; and (ii) that the lessor has not offered to pay to the lessee making the application a fair and reasonable price for the lease (including the goodwill of any business carried on by the lessee upon the premises).

(2) (a) Any party to any proceedings in a District Court under subsection one of this section may appeal to the Supreme Court against the decision of the judge of the District Court given in those proceedings granting or refusing an order of the nature referred to in that subsection. (b) The appeal shall be by way of rehearing and shall be made in accordance with rules of court.

(3) (a) A notice to quit given in contravention of an order made under this section and subsisting at the date upon which the notice to quit is given shall be void and of no effect."

separate residential units forty-one of which were sub-let by him, Barnard, in the course of a business of sub-letting the same which he had conducted since about January 1948; that during that time he had supplied cleaning and other services to the sub-tenants and had continued to conduct that business as it was conducted by his predecessor; that on 27th October 1953 he entered into a contract of sale of the lease and business to Michael Bennett for the sum of £5,000 being the sum of (a) £1,600 for the furniture, utensils and effects; (b) £1,000 for a covenant in restraint of trade within a radius of one mile for a period of three years; and (c) £2,400 for the goodwill of the business, on completion all electricity, gas, telephone and similar charges to be adjusted between the parties; and that although requested to give his approval to the transfer Gorlin had not done so.

In an affidavit Gorlin deposed, *inter alia*, that an inspection of the premises disclosed that they were in an extremely bad state of repair despite the fact that this had been brought to the notice of Barnard from time to time for remedial action by him in the terms of his covenants; that he, Gorlin, was not prepared to consider any application by Barnard for the transfer of the weekly tenancy in respect of the premises until he placed the property in a proper state of repair in accordance with his obligations under his covenants in the lease; and that it was his, Gorlin's, intention to serve a notice to quit upon Barnard upon the grounds: (a) that Barnard had failed to take reasonable care of the premises and of goods leased therewith and had committed waste; and (b) that Barnard by sub-letting or parting with possession of the premises or any part thereof or by permitting use of the premises or any part thereof by any other person for reward receiving rents or profits equal to or in excess of an amount equivalent to one hundred and twenty per cent of the rent paid by him.

The facts established to the satisfaction of the District Court judge so far as they were relevant to the applicability of s. 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952 were: (a) the subject premises were "prescribed premises"; (b) the relationship of landlord and tenant existed; (c) the applicant, Barnard, was a weekly tenant of Gorlin under the terms of an expired lease dated 19th March 1948, between Gorlin's predecessor in title and himself; (d) the lease provided, *inter alia*, "that the lessee covenants with the lessor . . . that the lessee will not use or permit to be used the premises or any part thereof for any purpose other than a well-conducted residential hotel . . . And will not assign or sub-let without leave. This covenant shall not apply to such underletting as is usual in the ordinary course of the business carried on

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in the demised premises " ; (e) the premises consisted of a building comprising forty-two rooms forty-one of which were sub-let by the applicant to various persons for residence as separate residential units in the course of a business of sub-letting them being the business referred to above ; (f) that business was conducted by the applicant as it was conducted by his predecessor, and cleaning and other services were supplied by him to the sub-tenants ; (g) the applicant himself occupied one unit ; (h) there were not any shops or offices in the premises ; and (i) on 27th October 1953, the applicant entered into a contract of sale of the said business to one Bennett and in that behalf proposed to assign the lease to Bennett.

The District Court judge came to the conclusion that the subject premises were not occupied within the meaning of s. 62A solely as a dwelling house. Having reached that conclusion his Honour held that he had jurisdiction to make an order as asked, and, having considered the other aspects of the application, he came to the conclusion that Barnard had established a case, and he made the order as asked.

An appeal by Gorlin was allowed by the Full Court of the Supreme Court of New South Wales.

From that decision Barnard appealed " as of right " to the High Court.

E. C. C. Lewis, for the appellant. The Full Court of the Supreme Court of New South Wales interpreted the word " used " in s. 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) as if it were the word " occupied " : *In re Appeal by Effie Smith* (1) ; *Allen* v. *Connelly* (2). The word " used " means " employed for a purpose " whereas the word " occupied " means " be in " or " take possession of ".

[TAYLOR J. How do you get a right of appeal from the Supreme Court to this Court ?]

From the fact that the appellant is seeking to sell his goodwill in the business. The head lessee is seeking leave to assign.

[TAYLOR J. Even if he were granted an order the purchaser would still be entitled to refuse to proceed with the purchase under the agreement. This appeal does not necessarily involve any money at all.

KITTO J. You will have to find £300 represented not by the value in the lease, but by the difference in value between a lease with that right of assignment and a lease without it.]

(1) (1954) 72 W.N. (N.S.W.) 84.

(2) (1954) 54 S.R. (N.S.W.) 229 ; 71 W.N. (N.S.W.) 199.

Section 62A links with s. 36 of the Act. The order which was made in 1950 exempting portion of certain premises from s. 36 is in the same terms as s. 62A, namely "other than premises not being premises used solely as a dwelling house". So, if these premises come within s. 62A they are exempted from s. 36 and are readily saleable. If they are not within s. 62A they are within s. 36 and there is that limitation on assignment provided. Evidence could be produced to show that a lease which may be assigned under s. 62A would be worth considerably more that the appealable amount whereas a lease without that right of assignment would be worth virtually nothing.

[McTIERNAN J. It seems, Mr. *Lewis*, that the requisite evidence of value to support an appeal as of right is not before us, therefore the appeal cannot proceed unless the Court gives special leave. The Court will hear the argument that you wish to put forward, as if you had the right of appeal. The Court is not granting you special leave to appeal nor is the Court deciding that you have an appeal as of right, but the Court would like to hear your argument.]

E. C. C. Lewis. The head lessee "employed" the premises to carry on a business of sub-letting. "User" refers to physical acts. The physical act is the carrying on of a business of sub-letting which involves creating a sub-lease. The whole question is whether the letting of premises is "using" premises; to what use are the premises being put: see *Tendler* v. *Sproule* (1).

[KITTO J. The question is not: How is the building used by the lessee? but is: How is it used?]

The building is being used by the appellant for the carrying on of a business. In the circumstances the subject premises are not used solely as a dwelling house. It is not a simple matter of sub-letting, but services were supplied by the appellant as an incident in the business of sub-letting. There is not any warrant in the wording of the section to exclude the user of the premises by the head lessee. The effect of s. 36 so far as is relevant for this purpose is that it prevents a payment in consideration of the transfer of a tenancy of any prescribed premises unless certain consents are obtained. The order made in March 1950 had for its purpose the exclusion of certain business and commercial premises from the operation of s. 36 and so prevent the trafficking in goodwills of tenancies of those premises. Section 62A was designed for a similar purpose. The proper interpretation of the order is similar to the interpretation adopted in *Thompson* v. *Easterbrook* (2). In effect,

(1) (1947) 1 All E.R. 193, at p. 194. (2) (1951) 83 C.L.R. 467.

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in that case the words " *inter alia* " were inserted to associate with the word " lease " in the definition of " dwelling house ", and in like fashion the words " *inter alia* " should be inserted before the words " for business or commercial purposes " in the above-mentioned order. The question is whether the user of the head lessee may be taken into consideration; that question arises equally under s. 62A and also under the exclusion order from s. 36. In *In re Appeal by Effie Smith* (1) the court followed the decision of that court in *Allen* v. *Connelly* (2) but that was a decision on a different provision entirely, namely s. 62 (9) (b) (iii). In interpreting s. 62A one cannot have regard to the wording of another and entirely different section in a different context. If s. 62 (9) (b) (iii) should be looked at in regard to the interpretation of those words, then, in any event, the decision in *Allen* v. *Connelly* (3) is not a necessary decision from the words. If the decision can be looked at in interpreting s. 62A then the decision is incorrect and does not follow from a necessary interpretation of the section. If the use by the head lessee may be looked at in determining whether premises are used solely as a dwelling house, then it is not necessary to restrict the interpretation of the words in s. 62 (9) (b) (iii) in the way in which the court did in *Allen* v. *Connelly* (2). " Lodging-house " and " boarding-house " are specifically included in the definition of dwelling house, but there is not any specific inclusion of a residential in that definition. The appellant takes in sub-tenants and provides them with accommodation and furniture. He cleans and provides linen and attends to the common areas. It is not disputed that the premises are a dwelling house, but they were not used solely as a dwelling house inasmuch as the appellant there carried on the business of sub-letting. Sub-section (9) (b) (iii) of s. 62 applies to cases where the second leg of s. 62 (5) (q) would be applicable, namely in the case of a lodging-house or a boarding-house, but it has no application where there is a business of sub-letting, or where there is sub-letting in effect; its purpose is not to cover the sub-letting aspect of ground (q) in s. 62 (5). In the case of premises which might originally have been said to be a dwelling house where parts of them have been sub-let and the tenant has retained part for himself, a notice to quit could be given under ground (q). " Exclusively " and " solely " merely mean that regard is had to another use, and if there is not any other use then " exclusively " or " solely " apply. A business of sub-letting is

(1) (1954) 72 W.N. (N.S.W.) 84.
(2) (1954) 54 S.R. (N.S.W.) 229; 71 W.N. (N.S.W.) 199.
(3) (1954) 54 S.R. (N.S.W.), at pp. 230, 231; 71 W.N. (N.S.W.) 199.

recognized as such by the legislature (*Spartalis* v. *Tidswell* (1)). The words can only have one meaning, that is the use of the premises. The fact that the premises are used by the lessee for the business of sub-letting concludes the matter. "Sub-letting" is a business (*Barton* v. *Reed* (2)). The subject premises are used not solely for the purpose of a dwelling house, but are used also for the purpose of a business, the business of sub-letting. That business entails the rendering of various services by the head lessee to the sub-lessees.

D. S. Hicks, for the respondent, was not called upon.

THE following oral judgment of the COURT was delivered by:

McTIERNAN J.: The material at present before the Court does not show that this appeal lies as of right. Counsel for the appellant has suggested that, if given an opportunity, he might be able to obtain evidence which would establish a right of appeal; but we have heard his submissions on the substance of the matter, and as we have formed a clear opinion that the appeal, if competent, must fail we shall dispose of the case at once.

The appellant is the lessee and the respondent is the lessor of a building known as 140 Palmer Street, East Sydney, comprising forty-two rooms. The appellant lives in one room and sub-lets the remainder as separate residential units. Every occupant of a unit uses it exclusively for the purpose of residence. The appellant contracted to sell to a purchaser what he described as the residential business carried on by him at 140 Palmer Street, East Sydney. Being desirous of assigning his lease of the premises to the purchaser of the business, he applied to a District Court judge under s. 62A of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) for an order that a notice to quit, on the grounds mentioned in par. (c) of that section, should not be given if the proposed assignment should subsequently be made. The section gives power to make such an order in respect only of "prescribed premises not being premises used solely as a dwelling house"; and before the District Court judge an objection was taken by the lessor that the premises in question, which admittedly were prescribed premises, were used solely as a dwelling house. "Dwelling house" is defined by s. 8 (1A) to mean, unless the contrary intention appears, any prescribed premises (including shared accommodation) leased for the purposes of residence; and it includes, *inter alia*, the premises of any lodging-house or boarding-house.

(1) (1950) 68 W.N. (N.S.W.) 229. (2) (1932) 1 Ch. 362, at p. 373.

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The District Court judge overruled the objection because he found as a fact that the appellant carried on a business of letting the rooms other than that in which he himself lived. The carrying on of this business appeared to his Honour to be a user of the premises otherwise than as a dwelling house.

An appeal to the Full Court of the Supreme Court was upheld. The Full Court followed an earlier decision of its own in a case which appears not to have been brought to the attention of the District Court judge : *In re Appeal by Effie Smith* (1). That decision placed upon the relevant words of s. 62A the meaning which had been ascribed in *Allen* v. *Connelly* (2) to the words, in s. 62 (9) (b) (iii), " a dwelling house used exclusively as such ". In *In re Appeal by Effie Smith* (1) the view of the Full Court was summed up by *Roper* C.J. in Eq. by saying : " The purpose to be looked at must be the purpose for which the premises are used by the persons who occupy and use them " (3). In our opinion this is plainly correct. A person may lease premises as premises in which people may dwell, and the number of lettings and other attendant circumstances may suffice to indicate that he is engaged in a business of letting premises for that purpose. But the premises are nevertheless used solely as a " dwelling house " where that is the sole use to which they are put by their occupants.

The section is concerned only with the character of the physical acts done on the premises. Use " as " a dwelling house is the criterion selected, and the question whether a person in the position of the appellant is sub-letting portions of the premises by way of carrying on a business of sub-letting is irrelevant.

The appeal will be dismissed with costs.

Rule of the Supreme Court varied by inserting therein, after the order that the appeal to that court be allowed, on order discharging the order of the District Court judge referred to in the notice of appeal to that court. Otherwise rule affirmed and appeal to this Court dismissed with costs.

Solicitors for the appellant, *Ellitt & Law.*
Solicitors for the respondent, *John T. Norris & Co.*

J. B.

(1) (1954) 72 W.N. (N.S.W.) 84.
(2) (1954) 54 S.R. (N.S.W.) 229 ; 71 W.N. 199.
(3) (1954) 72 W.N. (N.S.W.), at p. 85.