[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LIMITED
APPLICANT, } APPELLANT;

AND

RODDY AND ANOTHER . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 22, 23;

MELBOURNE, *June* 26.

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

Landlord and Tenant—Justices—Statutory prohibition—Rule nisi—Fair rent—Excess payment—Conviction—Landlord and Tenant (Amendment) Act 1948-1952 (*N.S.W.*), *ss.* 8, 15, 35—*Justices Act* 1902-1951 (*N.S.W.*), *s.* 112.

Section 15 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) provides:—Except in the case of premises which were not in existence or were not leased on the first day of March, one thousand nine hundred and forty-nine, the rent payable by the lessee of any prescribed premises (or of prescribed premises together with goods) shall not, in respect of any period after the commencement of the *Landlord and Tenant (Amendment) Act* 1951, and notwithstanding any term or covenant in any lease in force at any time after such commencement, exceed the rent payable in respect of the prescribed premises at the first day of March, one thousand nine hundred and forty-nine (including the rent of any goods then leased therewith and the charge for any service then provided in connection with the lease), or where that rent has been increased or decreased by a determination made before such commencement and in force immediately before such commencement the rent as so increased or decreased.

When the rent of premises was expressed as a percentage of the gross receipts of the business occupying the premises;

Held: that the phrase "the rent payable on 1st March 1949" connoted a sum expressed as a money figure and as such fixed, and not a sum expressed solely as a formula and as such variable; and that it denoted the sum which became payable in respect of the period of tenancy in which 1st March 1949 occurred.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Australian Provincial Assurance Association Ltd., Re Roddy* (1956) S.R. (N.S.W.) 69; 73 W.N. 78, affirmed.

APPEAL from the Supreme Court of New South Wales.

By a memorandum of lease under the *Real Property Act* 1900 (N.S.W.), dated 28th February 1944, Australian Provincial Assurance Association Ltd. leased to Cahills Sea Products Pty. Ltd. the sub-ground floor, together with an area in the basement, of a building known as A.P.A. Chambers, 53 Martin Place, Sydney, for the purposes of a high-class restaurant for a term of ten years commenced on 1st May 1940.

Clauses 7 (b), 8-12 of that lease were substantially as follows :—

" 7 (b) Should the lessee continue to occupy the premises beyond the expiration of the said term with the consent of the lessor he shall do so hereunder as a weekly tenant only at a weekly rent equal to one week's proportion of the rent hereby reserved payable weekly such tenancy being determinable at the will of either the lessor or lessee by one week's notice in writing expiring at any time.

8. The lessee shall pay in manner hereinafter provided to the lessor a rental equal to a percentage of the gross receipts of the business carried on on the premises by the lessee including all moneys received for all goods supplied by or procured for or services rendered to the lessee's customers and patrons of such business. Such rental shall be paid by the lessee to the lessor weekly on or before the Friday of each and every week following the week in respect of which the payment is to be made the first of such payments of rent to be made on or before the Friday of the second week after the day of the commencement of the term hereby granted in respect of the period from the said day of commencement to the then ensuing Saturday. The percentage of the gross receipts referred to in this clause and payable as rental by the lessee to the lessor shall be ten per cent in the case of ordinary restaurant business and eight and one-half per cent in the case of wedding receptions, card parties and other special functions.

9. For the purpose of calculating the amount of rent payable hereunder the lessee shall keep proper records of the receipts by it from the business conducted by it on the premises and shall furnish to the lessor on the Wednesday of each and every week a statement of the total receipts for the then immediately preceding week showing the total daily receipts to and including the immediately preceding Saturday and shall also furnish in January of each year a statement certified by the auditors of the lessee for the time being of the total receipts made up to the " 31st " December in each year. The lessee shall also furnish to the lessor with the said statement of receipts (a) a statement of moneys due for goods sold or services rendered or otherwise during the immediately preceding week in

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respect of which payment has not been received by the lessee and (b) a statement of the dates and particulars of wedding receptions or other special functions arranged to be held on the demised premises and of the amounts of the payments to be received in respect thereof and when such payments are due to be made.

11. Subject as hereinafter provided the lessee except with the written consent of the lessor will continue to use the premises for the purpose of carrying on the business of a high-class restaurant and the said premises shall be open for business between the hours and at the times usual to a business of a similar class in the City of Sydney. Except as herein provided the lessee will not without the written consent of the lessor first had and obtained use or occupy the premises for any purpose other than for the purpose of conducting thereon a high-class restaurant.

12. If for any period of fifty-two consecutive weeks commencing on or after the first day of January one thousand nine hundred and forty-three the rental payable hereunder shall total less than £1,000 either the lessee or the lessor shall have the right to terminate this lease by giving to the other party hereto one month's notice in writing of its intention so to do and this lease shall be deemed to be terminated one month after the receipt by the lessor or lessee of such written notice Provided however that the lessee may at the lessee's option make up the rental payable for such period hereunder so that it shall total the sum of £1,000 and if the sum of £1,000 be received by the lessor for any such period of fifty-two consecutive weeks the lessor shall not be entitled to exercise its option under this clause."

When that lease expired Cahills Sea Products Pty. Ltd. held over under the terms of the lease until a new lease was executed.

On 10th December 1950 the parties executed another lease of the premises, for the term of five years commenced on 1st August 1950, " at the rent of £7,280 per annum (and at the same rate for any portion of such period) payable by equal monthly payments of £606 13s. 4d.", equal to £140 per week, the first of such monthly payments of rent to be made on 1st August 1950 subject to certain covenants and conditions. Apart from the term, the amount of the rent, the omission of the clauses relating to takings and the inclusion of an option in favour of Cahills Sea Products Pty. Ltd. of a further ten years at the same rent, the new lease contained the same covenants and conditions as were contained in the 1944 lease except that there were included in the new lease a further clause which it is not material to set forth.

By the application of the formula contained in cll. 8-10 of the 1944 lease the rental payable in respect of the week which commenced on 28th February 1949 and terminated on 5th March 1949 (which included Tuesday, 1st March 1949) was £109 13s. 1d. and that sum was actually paid by Cahills Sea Products Pty. Ltd. to Australian Provincial Assurance Association Ltd. in respect of that week.

One Michael Roddy, a respondent to this appeal, exhibited an information dated 20th November 1953, against the Australian Provincial Assurance Association Ltd. alleging that it received on 4th June 1953, as rent for the premises the sum of £606 13s. 4d. for a period of one month at the rate of £140 per week which exceeded the fair rent of the premises, namely £109 13s. 1d.

On 19th March 1954, the Australian Provincial Assurance Association Ltd. was convicted of the offence alleged in the information.

There was not any evidence before the magistrate (i) as to whether or not the premises were let on 1st September 1939; nor (ii) concerning what covenants, conditions and provisions were usually entered into by a lessee, or concerning the value to the lessor of any of the covenants, conditions and provisions entered into by the lessee in respect of either of the leases.

The Australian Provincial Assurance Association Ltd., on 6th April 1954, obtained, from a judge of the Supreme Court, a rule nisi for prohibition on the grounds, substantially, " . . . (4) that the magistrate was in error in holding:—(a) that the fair rent of the subject premises within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1952, was £109 13s. 1d.; (b) that the rent payable in respect of the subject premises at 1st March 1949, was £109 13s. 1d. per week; (c) that the rent payable in respect of the subject premises at 1st March 1949 was a weekly rental calculated on a percentage basis of the gross receipts of the lessee's business; (d) that the rent payable in respect of the subject premises at 1st March 1949 was a weekly rent; (e) that the rent payable in respect of the subject premises at 1st March 1949 was the amount received by the lessor from the lessee in respect of the subject premises for the week ended 5th March 1949 pursuant to the terms of the then current lease, and (f) that the information and the evidence disclosed an offence under the said *Landlord and Tenant (Amendment) Act*."

The Full Court of the Supreme Court of New South Wales (*Street*, C.J., *Herron* and *McLelland* JJ.) dismissed the appeal and discharged the rule nisi (1).

(1) (1956) S.R. (N.S.W.) 69; 73 W.N. 78.

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From that decision the Australian Provincial Assurance Association Ltd. appealed, by special leave, to the High Court.

The relevant statutory provisions sufficiently appear in the headnote and in the judgments hereunder.

B. P. Macfarlan Q.C. (with him *A. F. Rath*), for the appellant. Clause 8 is the important clause. The first lease provides for a rental to be determined by the application of a formula which is set out in cll. 8 and 9. Although otherwise similar the second lease differs radically in the rental provisions, providing as it does for a fixed rent payable at fixed times, that is for the computation of the rent on a fixed annual sum payable monthly in the sum of £606 13s. 4d. The determination of this appeal depends upon sub-s. (1) of s. 15 as inserted by the 1951 Act. Section 15 requires that a comparision shall be made between the two factors. In this case there cannot be any comparison between the first factor, namely, the rent at 1st March 1949, and the second factor, the rent at the date of the alleged offence, namely 4th June 1953. That argument goes really to a point of substance on the construction of s. 15, but, as a second argument, where s. 15 (1) speaks of the rent payable in respect of the prescribed premises on 1st March 1949 it refers to the rent lawfully payable on 1st March 1949. There is not any evidence to show what the lawful rent was on that date. It must be shown that the rent as at that date was the lawful rent according to the provisions of the Act and not the de facto rent—the money actually paid on that date as held by the court below. " Rent " includes by definition the value to the lessor of covenants and conditions relating to the lease to be performed by the lessee other than usual covenants. Evidence was not given by the respondent as to what were usual covenants, nor as to the value of the covenants in the two leases. The respondent has not proved the two factors which must be proved, namely the rent at each particular date. The words of s. 15 (1) require a comparison between two factors, firstly, rent in respect of any period after 1951 and the rent payable at 1st March 1949. If the comparison cannot be made, then the section does not operate to fix a fair rent. " Payable " in the phrase " rent payable at 1st March 1949 " meant due at 1st March 1949 (*City of Geelong* v. *Tait* [*No.* 2] (1)). The true nature of rent does not always require the payment of money. One cannot compare a rate of ten per cent of the gross receipts with a rental of £7,280 per year payable by monthly payments of £606 13s. 4d. In this case it is not really possible to make

(1) (1950) V.L.R. 504.

the comparison required by s. 15 but in *City of Geelong* v. *Tait* [*No.* 2] (1) it was possible to make a comparison. The rent of these premises was not fixed by s. 15. The phrase " rent payable shall not exceed the rent payable in respect to the prescribed premises as at 1st March 1949 " in sub-s. (1) of s. 15 means the lawful rent or the rent lawfully payable. The court below applied a wrong test. That court took a completely wrong view of s. 15 (1) in so far as the members thereof had not made the comparison of comparables which s. 15 (1) requires. It is not the intention of s. 15 to fix all rents. These premises, because all rents are not comparable, are premises in respect of which the rent is not fixed by s. 15. To make a comparison the requirement of the section is to go to the obligation itself and not to the working-out of the obligation. There is insufficient evidence adduced by the respondent in this case to justify a conviction. The phrase " rent payable " in sub-s. (1) of s. 15 means the rent which under the Act could be lawfully charged. If the true meaning be " rent lawfully payable " then it would be necessary for the respondent to show whether or not these premises were in existence or leased at 31st August 1939. If they were, it may well have been that the fair rent was a sum greater than the rent which was payable pursuant to the 1944 lease. " Rent payable " was discussed in *Ex parte Alcock* ; *Re McConnell* (2) and *Haugaard* v. *Rowlands* (3). It would be permissible for persons contractually to agree upon a rent which was lower than the fair rent, but still for the purposes of the Act in determining what is the fair rent, or for the purposes of the penal provisions, as in s. 35, the fair rent is the lawful fair rent. There is not any evidence before the Court as to what are or what are not usual covenants in a lease of this kind : see definition of rent in s. 8.

[WILLIAMS J. referred to *Foa's General Law of Landlord and Tenant*, 7th ed. (1947), p. 378.]

These covenants clearly have some value for the lessor in this case, and because they in sum total are different in words they clearly have a different value for the lessor. By s. 8 that value is part of the rent. If the value of covenants is to be a factor in determining rent, and therefore the fair rent the respondent must in proving what is the fair rent give evidence of the value of those covenants which by definition are required to be computed in determining what is rent.

(1) (1950) V.L.R. 504.
(2) (1955) 55 S.R. (N.S.W.) 259, at pp. 260, 262, 263, 266, 267 ; 72 W.N. 309, at pp. 310, 312, 313, 314.
(3) (1955) 72 W.N. (N.S.W.) 460, at pp. 461, 462.

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H. A. Snelling Q.C. (Solicitor-General) (with him *W. H. Wilson*), for the respondents. The Act defines rent as meaning actual rent payable under the lease. It is well recognised that periodic rents without a specification of amount, but of a calculable amount, are to be found in various kinds of leases. Rents that are not defined by an amount mentioned in money but are ascertainable by calculation or measurement are a type of periodic rent which have long been recognised and are familiar in various types of tenancies. There are several cases where the impact of common law notions or of statutory provisions upon that type of rent, which is the type of rent in this case, have been considered: see *Daniel* v. *Gracie* (1); *Reg.* v. *Westbrook* (2). The rent when ascertained in this case at the end of the relevant week could have been distrained for. The cases referred to are periodic rents and the only feature in which they differ from a specified rent is that in one case the amount is immediately before one, and in any other case some amount of calculation or measurement is necessary in order to arrive at the amount: see also *Ex parte Voisey: In re Knight* (3) and *Coal Commission* v. *Earl Fitzwilliam's Royalties Co.* (4). The words "in respect of any period" mean and were intended to have the meaning that the whole basis of this comparison with the pegged rent is on a period basis. The Act intends that any subsequent period after the pegged period cannot be the subject of a greater amount of rent paid or received than was paid or received in respect of the pegged period: see *Syme* v. *Commissioner of Stamps* (5). The words "at the 1st March" should be read as meaning "for the period in which the 1st March occurred". The whole Act must be based on the fundamental assumption that rents are paid periodically. The word "payable" and the word "rent" in the light of the definition and these factual situations that are required to be recorded and made the subject of statutory declarations, all point to fact, amounts in fact paid and not to the formula. "Payable" was discussed in *Perpetual Trustee Co. (Ltd.)* v. *Pacific Coal Co. Pty. Ltd.* (6). In that case the Privy Council held that the reference was not to the amount named in the document but to the amount as produced by the legislation. Reliance is placed upon *City of Geelong* v. *Tait* [*No.* 2] (7) because it recognises that this type of legislation provides for the comparison of current periods. The words to be read into s. 15 are "the actual rent payable under a lease by definition of rent". The words "actual rent

(1) (1844) 6 Q.B. 145, at p. 152 [115 E.R. 56, at p. 59].
(2) (1847) 10 Q.B. 178, at pp. 204, 205 [116 E.R. 69, at p. 79].
(3) (1882) 21 Ch. D. 442, at pp. 455, 456, 458.
(4) (1942) Ch. 365, at p. 373; 111 L.J. Ch. 244, at p. 247.
(5) (1910) 29 N.Z.L.R. 975.
(6) (1955) 93 C.L.R. 479, at p. 491.
(7) (1950) V.L.R. 504.

payable under a lease" are of considerable significance. They mean the eventual ascertained rent, the final money figure which ultimately becomes payable in respect of the current period. "Actually" was considered in *Pacific Coal Co. Pty. Ltd.* v. *Perpetual Trustee Co. (Ltd.)* (1), this Court being there of opinion that that word had the significance of what would be really legally payable and take into account statutory reduction of rates contracted. It is conceded that there are some cases in which there would not be fair rent until a determination were made.

Regard should be had to the situation as it was on 1st March 1949, even if the premises were in existence and leased on 1st March 1945. The second point raised by the appellant was really concluded by the concession made on its behalf in the court below that the lease of 1940 was the first and it was argued on its behalf that the proper date was 1st March 1945. The court below rightly held that 1st March 1949 now supplants all previous dates. The appellant should not be allowed to raise the third point argued on its behalf. It was not raised before the magistrate and had it been so raised it could have been easily cured by evidence.

A. F. Rath, in reply.

Cur. adv. vult.

June 26.

The following written judgments were delivered by :—

DIXON C.J., MCTIERNAN, WILLIAMS AND WEBB JJ. Special leave to appeal was granted in this case because it appeared to raise a question of some possible importance concerning the operation of s. 15 of the *Landlord and Tenant (Amendment) Act* 1948-1952. That question is, how does s. 15 (1) apply in the case of prescribed premises which at 1st March 1949 were governed by a lease reserving a rent consisting of a percentage of the receipts of a business carried on by the tenant upon the demised premises ?

The premises to which the appeal relates were in existence and were subject to a lease on 1st March 1949. They therefore do not fall within sub-s. (2) of s. 15 or within the excepting words with which sub-s. (1) opens and it is upon the operation of the general words of sub-s. (1) that the matter depends. Those words provide that the rent payable by the lessee shall not, in respect of any period after the commencement of the *Landlord and Tenant (Amendment) Act* 1951, that is to say after 28th December 1951, and notwithstanding any term or covenant in any lease in force at any time after such commencement, exceed the rent payable in respect of the prescribed

(1) (1954) 91 C.L.R. 486, at p. 507.

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premises at 1st March 1949. There is a qualification that does not affect this appeal with reference to cases where the rent has been altered by a determination made before 28th December 1951; indeed sub-s. (3) provides that nothing in the section shall affect the operation of a determination. By sub-s. (4) the rent "fixed by sub-s. (1)" is made the "fair rent", that is until it is increased or decreased by a determination. The "rent fixed by sub-s. (1)" is a phrase obviously referring to the rent which sub-s. (1) says must not be exceeded. Section 35 (1) (b) provides, among other things, that a person shall not receive any sum as rent exceeding the fair rent of the premises. The appellant was convicted of an offence against this provision. The offence consisted in receiving on or about 4th June 1953 as rent for certain premises at the corner of Martin Place and Elizabeth Street, Sydney, the sum of £606 13s. 4d. for a period of one month at the rate of £140 per week which exceeded the fair rent of the premises, namely £109 13s. 1d.

On or about 4th June 1953 rent was in fact received by the appellant from its tenant amounting to £606 13s. 4d. It was in fact due on 1st June 1953 and represented a payment of rent for that month. The sum was due under a lease made on 10th December 1950 between the appellant as lessor and Cahills Sea Products Pty. Ltd. as lessee. The premises are a sub-ground floor and basement occupied by the lessee for the purpose of a restaurant. The lease was for a term of five years commencing on 1st August 1950 and the rent reserved was £7,280 per annum payable by equal monthly payments of £606 13s. 4d., the first of which was to be made on 1st August 1950. Thus in effect, although not in form, the rent was payable monthly in advance. When he came to frame a charge against the appellant based upon the receipt of the payment for June 1953, the informant appears to have considered that he must reduce the expression of the rent to a weekly basis. He reduced it to a weekly basis because he relied upon what he took to be a weekly rent as the fair rent payable at 1st March 1949 which had been exceeded by the payment received on 4th June 1953. Accordingly the information alleged that the appellant received £606 13s. 4d. for a period of one month at the rate of £140 per week, a description which is not altogether accurate in point of either law or arithmetic. The inaccuracy, however, is of no importance. For it is upon the previous lease that the appeal turns, or rather upon the application to it of s. 15 (1).

That lease was made between the same parties with respect to the same premises on 28th February 1944. It was for a term of ten years commencing on 1st May 1940 and was current on 1st March

1949. The reddendum, part of the printed form, was expressed in the words " at the yearly rent as hereinafter provided ". The effect of the provisions relating to rent occurring later in the lease was to require the lessee to pay to the lessor a rental equal to a percentage of the gross receipts of the restaurant business carried on by the lessee upon the demised premises. The percentage was calculated at different rates for two separate parts of the takings, viz. ten per cent in the case of the ordinary restaurant business and eight and one-half per cent in the case of wedding receptions and special functions. The lessee was required to furnish on every Wednesday a statement of the receipts for the preceding week ending on Saturday. The rent was made payable " weekly on or before the Friday of each and every week following the week in respect of which the payment is to be made ". In January of every year the lessee was required to furnish a statement, certified by the auditors, of the total receipts made up to 31st December of the prior year.

The decision of the Supreme Court of New South Wales may perhaps be reduced to the simple statement that, for the purpose of ascertaining what under these covenants was " the rent payable in respect of the prescribed premises at 1st March 1949 ", you applied the percentage to the gross receipts for the week in which 1st March occurred, namely the week ended Saturday 5th March, a process producing the sum of £109 13s. 1d. as the fair rent. *McLelland* J. expressed the conclusion in a sentence—" . . . there was a rent payable for the relevant period current at 1st March 1949 and, in my opinion, the fact that the amount was calculated on ten per cent of the gross takings of the lessee does not alter the fact that the amount so calculated was the rent payable ".

The amount of £109 13s. 1d. which was the percentage due to the lessor in respect of the receipts for the week ended Saturday, 5th March 1949, was in fact paid by the lessee on Thursday, 17th March. The last payment before that was made on Monday, 7th March 1949. It was an amount of £109 18s. 9d. calculated upon the receipts for the week ended Saturday, 26th February 1949. The difference between the amounts of the two payments (5s. 8d.) is of no importance in the case, but there is a significance in the choice of the payment calculated upon the receipts for the week in which 1st March 1949 occurred rather than the payment which had accrued in respect of the period ended Saturday, 26th February, for which returns had been due on Wednesday, 2nd March. It is the amount that became payable on Friday, 4th March, and was actually paid on Monday, 7th March. The significance is that to choose the former implies

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that the expression in s. 15 (1) "payable in respect of the prescribed premises at 1st March 1949" does not refer to that date as a point of time as at which the rent forming the standard of fair rent must become due and payable, but is seeking to take a point of time for the purpose of identifying the periodical rent then representing the consideration for the enjoyment of the land, so that it might provide the criterion of the fair rent.

This indeed seems the better view of the provision. The statute is dealing with rent as the consideration to the lessor for the lessee's enjoyment of his tenancy of the demised premises and, in selecting a date for the purpose of establishing the consideration then payable as a standard for the future, it is more reasonable to suppose that the legislature was concerned with the measure by which the enjoyment of that land was valued at that time than with adopting, as a standard, whatever rent fell due for payment on the specified date regardless of the period of enjoyment in respect of which the rent was payable. No doubt the distinction would not present itself to the draftsman with great clearness or as a problem of great practical importance. For prepayment of rent for any considerable period or deferred payment of rent is not a common case. But s. 15 (1) has a wide operation over multitudinous transactions and the very general words in question must cover cases in which it is essential to understand and apply the distinction. Both the policy and the language of the provision point to the conclusion that what is to be taken is the rent payable in respect of the enjoyment at 1st March 1949 of the tenancy by the lessee. But that conclusion answers only a subsidiary question arising upon s. 15 (1) and it contributes very little towards solving the difficulty in applying that sub-section to the facts of the present case.

It is reasonably certain that s. 15 was drawn upon the assumption that rents reserved would be expressed in money sums. Even if leases might, as in the case of *City of Geelong* v. *Tait* [*No.* 2] (1), reserve progressive rents, the rate applicable as at 1st March 1949, so apparently it was assumed, would be ascertained by reference to a figure fixed by agreement of the parties or otherwise pursuant to law. But when a rent consists of a percentage of gross or net profits, there is no sum certain fixed by agreement of parties or otherwise. It is dependent upon uncertain events. The guidance as to the value of the use or occupation of the premises which a rent named by the parties or determined by authority may give is lacking. The accidents of trading or of external events may determine the figure. This consideration is used by the appellant in support of

(1) (1950) V.L.R. 504.

an argument that the comparison which s. 15 (1) seeks to institute simply cannot be made. It may also be used to support an argument, in a case such as the present, that the earlier limb of the comparison is supplied by answering the question, what is the rent payable at 1st March 1949, simply by saying that it is the specified percentage of gross receipts. The result of such an answer would be that the " fair rent " would be nothing but a named percentage of the gross proceeds, a formula not a figure. It would, of course produce an ever-fluctuating money sum as rent.

Of these two views the first would simply mean that there was no fair rent. Yet if sub-ss. (1), (2), (3) and (4) of s. 15 be considered together the one thing clear about them is that they were designed to ensure that always there would be a fair rent for prescribed premises. Section 35 forbids the letting of premises at a rent exceeding a fair rent or the demanding, receiving or paying of such a rent. If there be no fair rent, could any rent be reserved, demanded, received or paid until a fair rent was fixed ?

The second of the two views deprives s. 15 of its capacity to fulfil its obvious purpose. For it seems obvious enough that its purpose was to establish a fixed standard of rent which might not be exceeded in subsequent tenancies of the prescribed premises or otherwise after 28th December 1951. If you adopt it, how do you find whether the percentage of receipts has been exceeded in a subsequent letting ? As this case illustrates the later lease may reserve a fixed rent. Further, it may not be the same business, or indeed any business, that is carried on at the demised premises.

The truth is that s. 15 (1) and (2) look to the rent actually payable by the lessee to the lessor at 1st March 1949. That means the money figure. There is no reason why the money figure should, in order to fit the description, appear on the face of the lease. Indeed the very definition of " rent " in s. 8 shows that, to the " actual rent payable under the lease ", there must be added the value of certain covenants and the amounts of certain taxes. The value of the covenants doubtless must be estimated but the estimate is expressed in money.

To say that such a case as this was not present to the mind of the draftsman of s. 15 (1) is one thing. But it is quite another thing to say that he has expressed no intention which will cover it. He has adopted wide general words designed to cover all rents payable in respect of prescribed premises at the date he has selected. In the present case there was such a rent. It was ascertained from external facts in accordance with the covenant in the lease but that made it no less the rent payable at 1st March 1949.

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An additional but independent argument was advanced for the appellant. It is an argument one step of which depended upon an interpretation of s. 15 (1). It was contended that s. 15 (1) refers not to the rent which the tenant was liable to pay but to the rent which might lawfully be paid on 1st March 1949. That means the maximum rent which might at that date have been exacted from a tenant without infringement of the law. The next step in the argument was to maintain that what rent might lawfully have been paid upon that date depended upon the application of the prior legislation and regulations to the history of the premises. It was then said that no proof of the requisite facts on this head was adduced by the informant and that for this reason the prosecution must of necessity fail.

The argument necessarily gives to the words in s. 15 (1) " the rent payable in respect of the prescribed premises at 1st March 1949 " a meaning which looks not at the rent actually payable on that date by the then tenant to the then landlord but at the rent which as at that date a landlord might exact or a tenant might concede without any contravention of the law. This is not the natural meaning to place the words. In *Ex parte Alcock* ; *Re McConnell* (1), *Roper* C.J. in Eq. expressed the view that the phrase " the rent payable in respect of the prescribed premises at 1st March 1949 " means the rent then lawfully payable and does not mean the amount then actually being paid as rent, whether it was the amount then lawfully payable or not. In *Haugaard* v. *Rowlands*, (2), however, the Full Court of the Supreme Court (*Street* C.J., *Roper* C.J. in Eq. and *Herron* J.) decided that these words mean the actual rent paid on 1st March 1949 in respect of the premises and not the rent which was then lawfully payable. *Roper* C.J. in Eq. did not adhere to his earlier view and remarked (3) that the amendment in s. 15 made by Act No. 46 of 1954, among other things, showed that it was a more open question than his Honour had previously thought it to be.

It is not necessary in the present case to express any opinion upon the question so decided by the Full Court. For the point raised on behalf of the appellant rests on still another construction of the words in question. It is a construction which goes away from the meaning which *Roper* C.J. in Eq. adopted in *Ex parte Alcock* ; *Re McConnell* (1). In effect that meaning was that " payable " connoted that the lessee was liable for the rent and that this involved legality.

(1) (1955) 55 S.R. (N.S.W.) 259, at p. 261 ; 72 W.N. 309, at p. 310.
(2) (1955) 72 W.N. (N.S.W.) 460.
(3) (1955) 72 W.N. (N.S.W.), at p. 462.

It goes away too from the construction adopted in *Haugaard* v. *Rowlands* (1). Instead it supposes that "rent payable" means simply the rent which the law would allow to be paid, whether the tenant at the time had incurred any liability to pay such a rent or not. This construction, it seems clear enough, s. 15 (1) does not bear.

A still further contention was advanced in support of the appeal depending upon what was said to be a want of evidence to support the information. The contention took four steps, viz. :—(1) that there was no evidence to show that all the covenants in the earlier lease were "covenants, conditions and provisions usually entered into by a lessee" within the meaning of those words in the definition of "rent" in s. 8; (2) that in fact some appeared not to be so, notably the covenant restricting the use of the premises to a high-class restaurant; (3) that there was no evidence of the value of such covenants; and (4) that therefore it was consistent with the evidence that, if the value of these covenants were added to the rent to make the fair rent, the total might be equal to or greater than the payment of rent received on or about 4th June 1953. An offence was therefore not proved.

To this it was replied, first, that although the covenants in the second or later lease were not the same, they were so similar to those of the earlier, that the values must turn out to be approximately the same, that is if the covenants possessed any value capable of expression in money, and, second, that the disparity between the £109 13s. 1d and the £140 was too great to be bridged by any value that could reasonably be added for the difference in the covenants.

A comparison of the two leases is enough to establish the first of these arguments. Indeed it must prevail unless an entirely artificial estimate of the facts is substituted for the reasonable inferences to be drawn from the practical considerations an inspection of the two leases discloses. It is impossible to sustain this last contention on behalf of the appellant.

The application of s. 15 (1) to the present transaction may be unfortunate. It is said that both parties to the lease are content that the rent reserved by the lease should be paid. Further, it may be true that the operation which, according to the foregoing view of the matter, s. 15 (1) has upon the transaction, is rather a fortuitous result of the nature of the earlier lease and of the amount of business done upon the premises than a consequence of any real attempt to increase (without lawful authority) the economic rent of the premises. But these are not considerations that can affect the construction of such a provision as s. 15. It is a provision restricting the right of

(1) (1955) 72 W.N. (N.S.W.) 460.

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landlords to reserve rents which tenants might be prepared to pay and it restricts that right in terms evidently intended to apply generally and subject only to the qualifications actually expressed in the legislation.

For these reasons the appeal should be dismissed.

FULLAGAR J. I agree with the conclusion reached by my brethren, and with the reasons which they have given for that conclusion. I wish to add only a few words.

The construction put upon s. 15 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1952 by the magistrate and by the learned judges of the Supreme Court is, as I understand it, this. The " rent payable at the 1st March 1949 " is the amount of rent which actually became payable in respect of the period in which 1st March 1949 occurred. The " period ", of course, is fixed by the relevant lease. It may be a week or a fortnight or a month or a quarter or a half-year or a year. When the question arises whether rent payable under a later lease exceeds the rent payable under the lease current at 1st March 1949, we may find that the period, in respect of which rent is payable under the later instrument, is different from the period in respect of which it is payable under the earlier instrument. The period may be, as in the present case, a week under the one lease and a calendar month under the other lease. But this creates no problem. Rent accrues due from day to day, and there is no difficulty in reducing the two rents to a common denominator and then comparing them in order to see whether the later " exceeds " the earlier. This is what the informant tried to do in the present case. His arithmetic was not quite correct, but the evidence clearly established that the rent payable under the current lease, reduced to a weekly basis, exceeded the amount of rent which became payable in respect of the week in which 1st March 1949 occurred.

This construction of s. 15 (1) is, in my opinion, correct. It produces, as *Street* C.J. and *Herron* J. observed, " a serious result for the lessor ", and it is tempting to say that the " rent payable at 1st March 1949 " cannot in this case be expressed otherwise than as a percentage of the gross receipts of the business carried on by the lessee on the premises. If this view were accepted, it is perhaps arguable that it would not be impossible to make the comparison required in order to establish the commission of an offence against s. 35 (1) of the Act. For it might be said that the comparison could be made by ascertaining the gross receipts of the business for the period in respect of which rent was paid under the current lease, and seeing whether the amount paid did or did not exceed ten per cent

or eight and one-half per cent (as the case might be) of the gross receipts of the business in that period. On this view, of course, no offence was proved to have been committed in the present case. Such a comparison, however, could only be made in a case where the rental period was the same under each of the two leases to be compared. Where, as here, the period is in the one case a week and in the other case a month, it cannot be made. Nor could it be made in a case where the lease current at 1st March 1949 based the rental on a percentage of the receipts of a business, and the premises had, when the later lease was executed, ceased to be used for the carrying on of a business.

These considerations alone make it very difficult to say that in such a case as the present the " rent payable at 1st March 1949 " is not a sum certain but a percentage of a fluctuating amount. And, when we look at the whole of s. 15 and at the whole of the Act, it becomes very clear that what is contemplated is that there shall be a " fair rent " for all " prescribed premises ", and that that fair rent shall be a fixed amount per week or per month or as the case may be. Sub-sections (1) and (2) of s. 15 purport to deal exhaustively between them with all prescribed premises, and sub-s. (4) speaks of " the *rent fixed* by sub-s. (1) or sub-s. (2) of this section ". The only construction of the words " rent payable at 1st March 1949 " which will give effect to the obvious intention of the legislation is the construction accepted by the magistrate and by the Supreme Court. It is a natural enough construction. I can see no real inherent difficulty in it, and, whatever may be thought of its consequences, I feel no doubt that it is correct. I would only add that the case of *City of Geelong* v. *Tait* [*No.* 2] (1) was, in my opinion, correctly decided.

The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Allen, Allen & Hemsley.*

Solicitor for the respondents, *F. P. McRae,* Crown Solicitor for New South Wales.

J. B.

(1) (1950) V.L.R. 504.