[HIGH COURT OF AUSTRALIA.]

LE BROCQUE . . . . . APPLICANT;
INFORMANT,

AND

MASON . . . . . RESPONDENT.
DEFENDANT,

*Appeal—Landord and tenant—Statute—Alternative construction—State Court—Decision—Quaere, satisfactory—Appeal to High Court—Special leave refused—Decision doubtless acted upon—Similar subsequent matter—High Court—Attitude—Landlord and Tenant (Amendment) Act* 1948-1954, *ss.* 2, 6A (3) (*a*), 81 (1).

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SYDNEY, *Nov.* 19; *Dec.* 14.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

An application for special leave to appeal made for the purpose of impugning the correctness of the interpretation of s. 6A (3) (a) of the *Landlord and Tenant (Amendment) Act* 1948-1954 (N.S.W.) adopted by the Supreme Court of New South Wales in *Rowland* v. *Leslie-Rounding* (1956) S.R. (N.S.W.) 290; 73 W.N. 366, was refused on the ground: (1) that special leave to appeal from the decision in that case had been refused by the Court and the decision had doubtless been acted upon; (2) that the decision, even if open to criticism as giving less than full effect to the language of the provision, ascribed to the enactment a policy which was both definite and reasonable, whereas the wider interpretation contended for would produce consequences which it was unlikely the legislature intended; (3) that in any view the intention of the legislature had been imperfectly expressed and, in all the circumstances including the refusal of special leave to appeal from the decision in *Rowland* v. *Leslie-Rounding* (1956) S.R. (N.S.W.) 290; 73 W.N. 366, the Court ought not to undertake anew the task of choosing between unsatisfactory alternatives in its interpretation.

*Rowland* v. *Leslie-Rounding* (1956) S.R. (N.S.W.) 290; 73 W.N. 366, referred to.

Application for special leave to appeal, refused.

APPLICATION for special leave to appeal.

Upon an information laid by Toddual Le Brocque for an offence under s. 81 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1954, John Henry Mason, of 152 Castlereagh Street, Sydney, was charged that without the consent of the lessee, namely Pamela June Ogilvie, of certain prescribed premises, namely a room at the

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said 152 Castlereagh Street, Sydney, and without reasonable cause did an act whereby the ordinary use or enjoyment by Mrs. Ogilvie as lessee of those prescribed premises was interfered with, contrary to the Act.

The information was dismissed whereupon the informant appealed by way of case stated to the Supreme Court.

The facts, other than formal facts, found by the magistrate to be established were as follow:

On or about 17th September 1955, Pamela June Ogilvie visited premises at 152 Castlereagh Street, Sydney. The premises bore a sign " Private Hotel ". Mrs. Ogilvie had a conversation regarding accommodation with Mrs. Stannell the manageress of the premises referred to. Mrs. Ogilvie agreed to pay £1 10s. 0d. per night or seven pounds per week for the right to occupy room seven permanently. That room was furnished and serviced. Mrs. Ogilvie paid Mrs. Stannell seven pounds every Saturday for the use of the room, and on occasions the defendant, Mason, was present when the money was paid to Mrs. Stannell. Mrs. Ogilvie resided in room seven from 17th September 1955 to 4th January 1956. On 28th December 1955, the defendant Mason requested Mrs. Ogilvie to vacate room seven by 10th January 1956, but she declined to vacate. On 4th January 1956, Mrs. Ogilvie was ejected from room seven by Mason without a prior notice to quit in writing as prescribed by the *Landlord and Tenant (Amendment) Act*. On 2nd January 1956, Mrs. Ogilvie proffered Mason a cheque in payment for her occupancy of room seven. Mason refused to accept the cheque and directed her to pay one pound for each day in respect of her use of the room. The whole premises situate at 152 Castlereagh Street, Sydney, were " prescribed premises " and room seven formed part of such premises. Those premises were and are owned by the Trustees of the Roman Catholic Church. The whole of the prescribed premises had, after 30th June 1949, been the subject of a lease between Mason and those trustees at a rental of £3 15s. 0d. per week, payable monthly. The whole of those premises were used for residential purposes. On 3rd January 1956, the whole of those premises were licensed by the Council of the City of Sydney as a common lodging house.

The grounds upon which the information was dismissed were: (a) that there was not any evidence that Mrs. Ogilvie's licence to occupy room seven had taken the place of an earlier lease which had been terminated, or that the room was occupied by her as a licensee in substitution for a lease; and (b) that room seven was not shown to be " special premises " pursuant to s. 6A (3) (a) of the Act,

and that the relationship of lessor and lessee did not, therefore, exist between the parties. The magistrate referred to *Rowland* v. *Leslie-Rounding* (1).

Upon the appeal coming on for hearing *Myers* J. said the case raised the precise question raised in *Rowland* v. *Leslie-Rounding* (1) by which he was bound. His Honour answered in the negative the question as to whether the magistrate's determination was erroneous in point of law and dismissed the appeal.

The informant applied to the High Court for special leave to appeal from that decision on the grounds: (i) that upon the facts found by the magistrate and upon the true construction of s. 6A (3) (a) of the Act *Myers* J. ought to have upheld the appeal, and (ii) that upon its true construction s. 6A (3) (a) was not restricted in its application to cases where a lease or sub-lease had come to an end and thereafter in place of occupancy under a lease or sub-lease the premises have come to be occupied under a licence, as was decided in *Rowland* v. *Leslie-Rounding* (1).

The relevant statutory provisions are sufficiently stated in the judgment hereunder.

*H. A. Snelling* Q.C. (Solicitor General for New South Wales) (with him *M. E. Warburton*), for the applicant. The purpose of the application is to seek the Court's reconsideration of the question whether the construction put upon sub-s. (3) (a) of s. 6A of the *Landlord and Tenant (Amendment) Act* 1948-1954 by the Full Court of the Supreme Court in *Rowland* v. *Leslie-Rounding* (1), and followed in the instant case by the judge below, is, or is not, the correct construction. Special leave to appeal against the decision in that case was refused by this Court. The question involved is one of general importance. In *Campbell* v. *Stearn* (2) and *Baker* v. *Hall* (3) the decisions of the Supreme Court were on the basis that the section applied to any case where the premises had been the subject of a lease since 1949 irrespective of the question whether the lease had come to an end or was still existing, whether it was a head-lease or a sub-lease. In both of those cases there were leases which were still current at the time of the occupation under an arrangement for leave and licence for purposes of residence for the use thereof. The practice prevailing was in accordance with those decisions. The construction adopted in *Rowland* v. *Leslie-Rounding* (4) is a construction which would very greatly restrict the provisions to cases where a lease had come to an end and had been

(1) (1956) S.R. (N.S.W.) 290; 73 W.N. 366.
(2) (1955) 72 W.N. (N.S.W.) 216.
(3) (1954) 72 W.N. (N.S.W.) 61.
(4) (1956) S.R. (N.S.W.), at p. 291; 73 W.N., at p. 367.

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replaced by a licence. It is submitted that that is a gloss upon the section which is not justified by or required by the ordinary and natural meaning of the words in their grammatical sense and is an implication of a restriction which would go far to restrict the beneficial operation of the Act. There was not any warrant for the Supreme Court's very substantial implication of a restriction of the meaning of the section, particularly as it is contrary to the definitions; it is contrary to what can be gathered from the general indications of the words themselves and it is not the sort of limitation that is suggested by sub-s. (1). That sub-section enabled the Governor to declare any licensed premises.

[DIXON C.J. referred to *Stoyles* v. *Job* (1) and *Butlin* v. *Cox* (2).]

Those cases are not relevant to the question now before the Court. Although there may be some qualifications the section at least covers equally two situations, that is (i) the sub-letting, and (ii) the licensing, by the lessee containing, in each case, a number of rooms, of, in each case, one of such rooms. This is a matter the Court might think is suitable for special leave.

*E. P. Knoblanche*, for the respondent. To grant the application would not only re-open a criminal charge upon which there was an acquittal and which acquittal was confirmed on appeal, but also make the premises the subject of fair rent legislation. The fact that there are a number of prosecutions pending is not a good reason why the special leave sought should be granted. In the circumstances it is the responsibility and obligation of the legislature to express itself in clear and unambiguous terms. If the Crown holds the view put to the Court it would be an extremely simple thing for the State legislature to legislate now, in few words, to that end. In the absence of such amending legislation it cannot be said that the matter is one of public importance. The interpretation placed on the section by the court below is correct. Special leave should be refused.

*Cur. adv. vult.*

Dec. 14.

THE COURT delivered the following written judgment:—

This is an application for special leave to appeal from an order of the Full Court of the Supreme Court of New South Wales by which the court confirmed the determination of a magistrate dismissing an information for an offence. The information charged an offence under s. 81 (1) of the *Landlord and Tenant (Amendment) Act* 1948-1954. That section provides that "a person shall not,

(1) (1954) 73 W.N. (N.S.W.) 41. (2) (1955) 73 W.N. (N.S.W.) 44.

without the consent of the lessee of prescribed premises, or without reasonable cause . . . do, or cause to be done, any act, or omit, or cause to be omitted, any act whereby the ordinary use or enjoyment by the lessee of the premises . . . is interfered with or restricted". It was alleged in support of the information that the defendant, without the consent of one Mrs. Pamela June Ogilvie, described as the lessee of certain prescribed premises, namely a room at 152 Castlereagh Street, Sydney, and without reasonable cause did an act whereby the ordinary use or enjoyment by the said lessee of the said premises was interfered with. In fact Mrs. Ogilvie was not a lessee of the room in question within the ordinary sense of the word "lessee". The premises at 152 Castlereagh Street, Sydney, are prescribed premises. They form what is called a private hotel. Mrs. Ogilvie occupied a room in the private hotel for which she paid seven pounds a week. She was in the sense of the general law a licensee of the room. The offence against s. 81 which the defendant was charged with committing consisted in ejecting her from that room. In order to support the charge it was necessary for the informant to show that Mrs. Ogilvie, although the licensee of the room under the general law, was to be regarded as a lessee for the purposes of the *Landlord and Tenant (Amendment) Act*. For that purpose the informant relied upon s. 6A (3) (a) of that Act. The effect of that provision in its application to the present case was already the subject of a decision of the Supreme Court of New South Wales. It is a decision which the applicant seeks to impugn by this application for special leave.

In *Rowland* v. *Leslie-Rounding* (1) the Full Court of the Supreme Court placed upon sub-s. (3) (a) of s. 6A an interpretation which renders the provision inapplicable to the facts of the present case. It was for that reason that the information was dismissed by the magistrate.

In the present case the proprietors of the private hotel held the premises as lessees in the ordinary sense. Mrs. Ogilvie held her room from the proprietors as licensee. The informant contends that the fact that at the same time the room was included within a lease and included within a licence brings it within sub-s. (3) (a) of s. 6A. The material part of that sub-section provides that: "Where any prescribed premises . . . are after the commencement of the *Landlord and Tenant (Amendment) Act* 1954, occupied by any person for the purposes of residence under an agreement or arrangement whether oral or in writing of leave and license for the use thereof . . . and such premises or any part of such premises

(1) (1956) S.R. (N.S.W.) 290; 73 W.N. 366.

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or the premises of which such premises form a part have, after the thirtieth day of June, one thousand nine hundred and forty-nine, been the subject of a lease (whether the lease was entered into before or after that date), the prescribed premises shall . . . be deemed to be 'special premises' for the purposes of this Act." Sub-section (2) of s. 6A provides in effect that in the case of "special premises" the Act shall apply, subject to certain modifications, as if leave and license were a lease, a licensee a lessee, a licensor a lessor, and the consideration for the leave and licence were rent. The applicant maintains that it follows that for the purpose of s. 81 Mrs. Ogilvie should be treated as a lessee and the defendant, who acted for the proprietors of the private hotel, should be treated as having done an act whereby the enjoyment of "the lessee" of the premises was interfered with.

According to the contention of the applicant, sub-s. (3) (a) operates to make s. 81 applicable by reason of the existence after 30th June 1949, of a lease (i.e. the lease to Mrs. Ogilvie's licensor) of premises of which Mrs. Ogilvie's room forms a part. The construction which the Supreme Court in *Rowland* v. *Leslie-Rounding* (1) placed upon the sub-section would make it applicable only if Mrs. Ogilvie's room had been after 30th June 1949, itself the subject of a lease before it became subject to the licence granted to her.

In support of his application for special leave to appeal the learned Solicitor-General of New South Wales challenged the correctness of this decision, saying that, in effect, it ignored the words "or any part of such premises or the premises of which such premises form a part", which occur in the sub-section. He also said that this interpretation of the section was contrary to that which had been adopted in the administration of the Act, that the decision was relatively recent, and that it had a general operation with some important consequences.

The decision was in fact given on 6th June 1956. On 23rd July 1956 in Brisbane an application to this Court for special leave to appeal was made in that case itself by the lessor, who, as it happened, was the person aggrieved by the actual decision. The Court refused the application for special leave. It is true that not all the matters now urged by the Solicitor-General were then put before the Court. But the refusal of special leave in July has doubtless meant that the decision in *Rowland* v. *Leslie-Rounding* (1) has been acted upon. The statutory provision in question is one which is capable of involving penal consequences, and the fact that special leave to challenge it has been refused on a previous

(1) (1956) S.R. (N.S.W.) 290; 73 W.N. 366.

occasion is a circumstance which, while not, of course, conclusive, tends against the granting of the present application.

The decision in *Rowland* v. *Leslie-Rounding* (1) may be open to criticism, and may be thought not to give full effect to the language of the statute. But it attributes a definite policy to the legislature. In the course of his judgment *Owen* J. said: "Section 6A (3) (a) was introduced into the Act to meet a practice on the part of one-time lessors, including sub-lessors, who had by one means or another been able to determine leases or sub-leases which had been granted over residential premises, thereafter to allow the former lessee or some new occupant to occupy the premises as a licensee, thus avoiding the restrictions on eviction for which the *Landlord and Tenant* (*Amendment*) *Act* provides. Residential premises previously occupied by tenants or sub-tenants were instead being occupied under licence agreements. It was to give a licensee in such cases protection against the right of the licensor to terminate the licence that s. 6A (3) (a) was passed" (2).

The policy thus ascribed to the legislature is not only definite but reasonable. The wider interpretation for which the Solicitor-General contended would produce some very remarkable consequences, and consequences which it does not seem likely that the legislature intended. It would seem indeed to make the position of a licensee in many cases depend on whether his licensor was himself a lessee or an owner in fee. If this were really intended, it would not seem very difficult to make it plain. If something else were intended, that something else could be made plain. On any view the intention of the legislature is imperfectly expressed, and, in all the circumstances, including the fact that special leave was refused in *Rowland* v. *Leslie-Rounding* (1), we do not think that this Court should now undertake anew the task of choosing between unsatisfactory alternatives.

We are of opinion that the application should be refused.

*Application refused.*

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

Solicitor for the respondent, *C. W. Robinson*.

J. B.

(1) (1956) S.R. (N.S.W.) 290; 73 W.N. 366.

(2) (1956) S.R. (N.S.W.), at p. 291; 73 W.N., at p. 367.