[HIGH COURT OF AUSTRALIA.]

MORRIS . . . . . APPELLANT;

AND

THE ENGLISH, SCOTTISH AND AUSTRALIAN BANK LIMITED . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 6, 9, 19.

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

Landlord and Tenant (N.S.W.)—Prescribed premises—Recovery of possession—Notice to quit—Ground—Premises reasonably required by lessor for own occupation—Intention to demolish or reconstruct—Landlord and Tenant (Amendment) Act 1948-1954 (*N.S.W.*), *s.* 62 (5) (*g*) (*ii*), (*m*).*

Where a lessor requires prescribed premises, not being a dwelling house, for his own occupation intending to demolish or reconstruct them for that purpose, the appropriate ground to be stated in the notice to quit is that contained in par. (g) (ii) of s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1954 (N.S.W.). The ground prescribed by par. (m) of s. 62 (5) is limited to cases where the lessor requires the premises for reconstruction or demolition with a view to letting or selling them or using them otherwise than for his own occupation.

McKenna v. *Porter Motors Ltd.* (1956) A.C. 688, applied.

Remarks of *Williams* J. in *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (1948) 76 C.L.R. 485, at p. 490, discussed; see also (1953) 27 A.L.J. 116, at pp. 116, 117.

APPEAL from the Supreme Court of New South Wales.

This was an appeal by way of stated case from the decision of a stipendiary magistrate who on 20th November 1956 dismissed an information laid by John Pirie Davidson, agent of the landlord,

* Section 62 (5) (g) (ii) and (m) provides:—

"(5) The prescribed grounds shall be— . . . (g) that the premises— . . . (ii) not being a dwelling-house— are reasonably required for occupation by the lessor or by a person associated or connected with the lessor in his trade, profession, calling or occupation; . . . (m) that the premises are reasonably required by the lessor for reconstruction or demolition."

the English, Scottish and Australian Bank Ltd., under the *Landlord and Tenant (Amendment) Act* 1948-1954, for the recovery of possession of certain business premises situate in Oxford Street, Sydney.

A notice to quit was served by the landlord upon the tenant, John Boyd Morris, pursuant (a) to s. 62 (5) (g) (ii) of that Act on the ground that the premises were reasonably required for occupation by the landlord, and (b) s. 62 (5) (m) on the ground that the premises were reasonably required by the landlord for reconstruction or demolition.

The magistrate found the following facts (*inter alia*) established to his satisfaction : (1) that the premises were reasonably required by the landlord for its own occupation ; (2) that the premises were reasonably required by the landlord for demolition ; (3) that the landlord required the premises, that is the land and buildings thereon, for its own personal occupation after demolition of the buildings ; (4) that the tenant was a protected person ; (5) that no reasonably suitable alternative accommodation had been provided for the tenant as required by the Act ; (6) that the landlord would suffer hardship if an order were not made ; and (7) that the tenant would suffer hardship if an order were made.

The magistrate dismissed the information upon the following grounds :—(1) that although ground (g) (ii) of the notice was established an order could not be made as the tenant was a protected person and no reasonably suitable alternative accommodation was available for him ; and (2) that although ground (m) was established an order could not be made against the tenant by reason of the decision in *McKenna* v. *Porter Motors Ltd.* (1).

The landlord being dissatisfied with this decision obtained a stated case pursuant to s. 101 of the *Justices Act* 1902-1955 upon the following grounds :—that the magistrate erred in holding (1) that contrary to the evidence the second ground in the notice to quit had not been established ; (2) that because the evidence disclosed that the landlord required the subject premises for its own personal occupation after reconstruction it could not obtain an order for possession of the premises upon the ground set forth in s. 62 (5) (m) of the *Landlord and Tenant (Amendment) Act* 1948-1954 ; and (3) that he was bound by the decision of the Privy Council in *McKenna* v. *Porter Motors Ltd.* (1) and that in consequence of that decision he should not follow decisions of the Supreme Court of New South Wales to the contrary and in particular the decision in *Felser* v. *Walker* (2).

(1) (1956) A.C. 688.

(2) (1953) 53 S.R. (N.S.W.) 155 ; 70 W.N. 97.

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In *McKenna* v. *Porter Motors Ltd.* (1) the Privy Council had under consideration, *inter alia*, the *Tenancy Act* 1948 of New Zealand. Section 24 of that Act provides, so far as material: "(1) An order for the recovery of any . . . urban property . . . may . . . be made on one or more of the grounds following . . . (h) that the premises are reasonably required by the landlord . . . for his . . . own occupation . . . (m) that the premises are reasonably required by the landlord for demolition or reconstruction. (2) On the hearing . . . the Court shall take into consideration the hardship that would be caused to the tenant . . . by the grant of the application and the hardship that would be caused to the landlord . . . by the refusal of the application . . . and may in its discretion refuse the application notwithstanding that any one or more of the grounds mentioned in sub-s. (1) may have been established." Section 25 (1) of that Act provides that an order shall not be made on the ground specified in par. (h) of s. 24 (1) unless the Court is satisfied either:—(a) that suitable alternative accommodation is available, or (b) that the hardship caused to the landlord would exceed the hardship caused to the tenant; and sub-s. (2) provides that an order shall not be made on the ground specified in par. (m) of s. 24 (1) unless the Court is satisfied that suitable alternative accommodation is available.

Section 62 of the *Landlord and Tenant (Amendment) Act* 1948-1954 provides, by sub-s. (5), as follows:—"The prescribed grounds shall be . . . (g) that the premises . . . (ii) not being a dwelling-house—are reasonably required for occupation by the lessor or by a person associated or connected with the lessor in his trade, profession, calling or occupation . . . (m) that the premises are reasonably required by the lessor for reconstruction or demolition."

Richardson J. before whom the special case came on for hearing reached the conclusion that the *Landlord and Tenant (Amendment) Act* 1948-1954 (N.S.W.) and the *Tenancy Act* 1948 (N.Z.) as they related to the recovery of possession of premises were so dissimilar in terms that there was not any basis for applying the decision in *McKenna* v. *Porter Motors Ltd.* (1) and said he was persuaded by the further consideration that knowledge of the law as interpreted in *Felser* v. *Walker* (2) must be attributed to the Parliament of New South Wales, and when the amending Act of 1948 was further amended by the *Landlord and Tenant (Amendment) Act* 1954, Parliament allowed this interpretation to be continued and it had been acted upon in this State now for the past four years.

(1) (1956) A.C. 688.

(2) (1953) 53 S.R. (N.S.W.) 155; 70 W.N. 97.

The appeal was allowed.

From that decision the tenant appealed, by special leave, to the High Court.

Further statutory provisions appear in the judgments hereunder.

B. Seletto, for the appellant. The question is: What construction should be put upon par. (g) (ii) and par. (m) in s. 62 (5) of the *Landlord and Tenant (Amendment) Act* 1948-1954 (N.S.W.), in the light of the decision of the Privy Council in *McKenna* v. *Porter Motors Ltd.* (1).

[WILLIAMS J. referred to *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (2).]

Before that matter reached the Privy Council the Supreme Court in Victoria had adopted what *Williams* J. had said as being the correct interpretation of the law (*Peak* v. *Van Der Kolk* (3)). Similarly, before that decision had been made known, the matter was dealt with by the Full Court of Queensland in *Black* v. *Hopley*; *Ex parte Hopley* (4); see also *Felser* v. *Walker* (5). The *dictum* of *Williams* J. in *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (2) was applied by the Privy Council in *McKenna* v. *Porter Motors Ltd.* (1). The distinction in this case is that the lessee, being a protected person, gets protection under ground (g) (ii), but not under ground (m). The New South Wales statute and the New Zealand statute are not dissimilar in any respect at all although they are not identical in verbiage. There is no dissimilarity between the paragraphs under consideration. The Privy Council should be followed. The Acts are for precisely the same purpose although the language may not be precisely the same. [He referred to *Grocery & General Merchants Ltd.* v. *Longwear Industries Pty. Ltd.* (6).] Having regard to the general tendency of the Act the only distinctions drawn by the judge below are minor. The Court should not be astute to try to differentiate where there is, in fact, no real difference either in the purpose of the legislation—which is admittedly the same—or the means by which that purpose is given effect. The principles which should be applied were recently laid down in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (7). There should be uniformity of interpretation as far as possible.

J. D. Holmes Q.C. (with him *D. A. Yeldham*), for the respondent. On its true construction the New South Wales Act, in ground (m),

(1) (1956) A.C. 688.
(2) (1948) 76 C.L.R. 485, at p. 490.
(3) (1954) V.L.R. 276, at p. 279.
(4) (1956) 50 Q.J.P.R. 133.
(5) (1953) 53 S.R. (N.S.W.), at pp. 156, 157; 70 W.N., at p. 98.
(6) (1952) 69 W.N. (N.S.W.) 277, at p. 279.
(7) (1956) 95 C.L.R. 494.

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gives a ground for which there is no reason to imply any limitation at all. That being so, some reason must be found elsewhere in the statute for reading those words as meaning something less than what, prima facie, they say. *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (1) was not a case in which the Court was concerning itself, even indirectly, with a question of the construction of the regulation that corresponded with s. 62. It was thought in that case that possibly the wrong ground had been taken (2). When *Williams* J. dealt with the matter he was indicating that he was not agreeing with what was there suggested as the possible view of the ground taken in the notice to quit, as against the facts, but only that he thought the right ground had been taken. In this case there was no discussion as to whether ground (g) or ground (m) was the proper ground to have taken. The Full Court in *Felser* v. *Walker* (3) approved of *Grocery & General Merchants Ltd.* v. *Longwear Industries Pty. Ltd.* (4) and gave ground (m) its full scope as applying both to cases where the premises were to be demolished and re-let and where they were to be demolished, rebuilt and occupied by the lessor. In a passage reported (5), *Williams* J. indicated a view which, in substance, was the view held by the Full Court, that ground (m) would cover all demolition cases, but ground (g) (ii) would cover particular demolition cases, if the lessor chose to proceed on that ground. But his Honour indicated a view that ground (m) should be given its ordinary meaning and that that was the correct view.

The correct view is that ground (m) will cover all demolition cases, including the case where the lessor seeks to demolish and reconstruct as part of his occupation (*Burnham* v. *Carroll Musgrove Theatres Ltd. and Victoria Arcade Ltd.* (6); affirmed (7)). It is nothing to the point that the landlord can, if he chooses, go under ground (g). It is a very long way away to say that the State legislation and the New Zealand legislation are statutes *in pari materia*: at most they are statutes dealing with the same subject matter. The legislation, more particularly the New Zealand legislation, proceeds from different political entities, different legislatures. The respective policies may be different: see *Grand Trunk Railway Co. of Canada* v. *Washington* (8) and *Andrew Knowles & Sons Ltd.* v. *Lancashire and Yorkshire Railway Co.* (9).

(1) (1948) 76 C.L.R. 485.
(2) (1948) 76 C.L.R., at p. 489.
(3) (1953) 53 S.R. (N.S.W.) 155; 70 W.N. 97.
(4) (1952) 69 W.N. (N.S.W.) 277.
(5) (1953) 27 A.L.J. 116.
(6) (1927) 28 S.R. (N.S.W.) 169, at pp. 180, 181; 45 W.N. 23, at p. 26.
(7) (1928) 41 C.L.R. 540.
(8) (1899) A.C. 275, at p. 280.
(9) (1889) 14 App. Cas. 248, at p. 253.

[TAYLOR J. referred to *McKenna* v. *Porter Motors Ltd.* (1).]

The full volume of the *National Security* (*Landlord and Tenant*) *Regulations* was not before the Privy Council. There are many significant differences between the grounds in the New Zealand Act and the grounds in the New South Wales Act: see grounds (g) and (h) in the first-mentioned Act and ground (g) in the other Act. The decision of the Privy Council was really a decision on ground (h), not on ground (m). There is no point of comity involved in a decision of this type of question and on legislation of this character. This Act has been substantially amended since *Felser* v. *Walker* (2), and this matter was not touched. That case has been followed in this State consistently in several cases. *Black* v. *Hopley*; *Ex parte Hopley* (3) bears out the same view which *Williams* J. has taken consistently about the section, because it is a decision on ground (g) and not on ground (m). [He referred to *Felser* v. *Walker* (4); *Grocery & General Merchants Ltd.* v. *Longwear Industries Pty. Ltd.* (5) and *Burnham* v. *Carroll Musgrove Theatres Ltd. and Victoria Arcade Ltd.* (6); affirmed (7).] If the view submitted on behalf of the respondent as to the construction of this statute be the correct one then there is no reason why this Court should regard itself as bound by the decision of the Privy Council. That decision is not a binding precedent on this Court.

B. Seletto, in reply.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered:—

DIXON C.J., MCTIERNAN, WEBB AND TAYLOR JJ. In this case *Richardson* J. rejected the second ground upon which the magistrate dismissed the information. In terms that ground is that although the prescribed ground contained in s. 62 (5) (m) was established, an order cannot be made against the lessee by reason of the decision of the Privy Council in the matter of *McKenna* v. *Porter Motors Ltd.* (8).

Richardson J. rejected the ground for the reason that he considered the terms of the New Zealand statute on which their Lordships pronounced were distinguishable from the legislation of New South Wales and the respondent's argument rested in great measure upon the same view. But unfortunately for the argument, their Lordships so interpreted the New Zealand statute upon the assumption

(1) (1956) A.C., at p. 695.
(2) (1953) 53 S.R. (N.S.W.) 155; 70 W.N. 97.
(3) (1956) 50 Q.J.P.R. 133.
(4) (1953) 53 S.R. (N.S.W.), at pp. 157-159; 70 W.N., at pp. 98-99.
(5) (1952) 69 W.N. (N.S.W.) 277.
(6) (1927) 28 S.R. (N.S.W.) 169; 45 W.N. 23.
(7) (1928) 41 C.L.R. 540.
(8) (1956) A.C. 688.

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that the statute closely resembled the *National Security* (*Landlord and Tenant*) *Regulations*, which are the parent of the New South Wales Act, an offspring carrying its paternity on its face. Their Lordships appear to have been influenced by a provisional dictum of *Williams* J. as to the meaning of those regulations in *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (1), which the Board adopted. Whether their Lordships carried the meaning of the dictum of *Williams* J. further than he intended is a matter upon which respectful doubt may be allowable. Compare his Honour's statement in refusing special leave in *Felser* v. *Walker* (2). But their Lordship's authority is supreme on such a matter and it remains only for this Court to comply with their pronouncement. The appeal should therefore be allowed.

WILLIAMS J. In my opinion the interpretation placed by Lord *Somervell of Harrow*, delivering the judgment of the Privy Council in *McKenna* v. *Porter Motors Ltd.* (3) upon grounds (h) and (m) contained in sub-s. (1) of s. 24 of the *Tenancy Act* 1948 (N.Z.) must be applied to grounds (g) (ii) and (m) contained in sub-s. (5) of s. 62 of the *Landlord and Tenant Act* 1948-1954 (N.S.W.). In the course of the judgment his Lordship referred to certain remarks of mine in *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (1) made in reference to grounds (g) (ii) and (l) contained in sub-reg. (5) of reg. 58 of the *National Security* (*Landlord and Tenant*) *Regulations*. At the time these remarks were made the *National Security* (*War Service Moratorium*) *Regulations* were in force and it was provided by reg. 30 (2) of those regulations that an application should not be made for an order for the recovery of possession of any premises from a protected person on any ground specified in pars. (f), (k) or (l) of sub-reg. (5) of reg. 58 of the *National Security* (*Landlord and Tenant*) *Regulations*. It was provided by reg. 30 (5) that notwithstanding the provisions of the *National Security* (*Landlord and Tenant*) *Regulations*, an order should not be made for the recovery of possession of any premises from a protected person on the grounds specified in pars. (g) or (i) of sub-reg. (5) of reg. 58 of the *National Security* (*Landlord and Tenant*) *Regulations* unless the court making the order was satisfied—(a) that reasonably suitable alternative accommodation was, or had been since the date upon which notice to quit was given, available for the occupation of the protected person or (b) that the protected person had sub-let the premises in respect of which the order was sought and was permanently

(1) (1948) 76 C.L.R. 485, at p. 490.
(2) (1953) 27 A.L.J. 116, at pp. 116, 117.
(3) (1956) A.C. 688.

residing elsewhere. When, therefore, the lessee was a protected person, it was impossible for a lessor who required the demised premises for reconstruction or demolition to obtain an order for possession but it was possible for him to do so if he required them for occupation by himself &c. Accordingly a lessor who could prove that he reasonably required premises in order to occupy them by himself etc. and as incidental thereto to reconstruct or demolish the existing building, whether it was replaced or not, was in a more favourable position when the lessee was a protected person than a lessor who could not prove that he reasonably required the premises for occupation by himself etc. By a strange inversion, under the *Landlord and Tenant (Amendment) Act* (N.S.W.), a lessor who seeks to recover premises from a lessee who is a protected person in order to reconstruct or demolish the premises is in a more favourable position if he proceeds under ground (m) than if he proceeds under ground (g) (ii) because s. 100 of that Act provides that " except in the case of an order made upon any one or more of the grounds set out in pars. (a), (b), (c), (d), (e), (f), (k), (m), (n), (o), (p), (q) or (r) of sub-s. (5) of s. 62 of this Act, an order for the recovery of possession of any prescribed premises shall not be made against a protected person unless the court, in addition to being satisfied upon any other ground upon which the court is required to be satisfied, is further satisfied—(a) that reasonably suitable alternative accommodation is, or has been since the date upon which the notice to quit was given, available for the occupation of the protected person . . . or (b) that the protected person (being the lessee) has sub-let the prescribed premises in respect of which the making of an order is sought and is permanently residing elsewhere ". A lessor therefore who seeks to recover possession of premises from a protected person for occupation by himself &c. under ground (g) (ii) is still in the same position as he was under the *National Security (War Service Moratorium) Regulations*, whereas a lessor who seeks to recover possession of premises from such a person in order to reconstruct or demolish them can now take proceedings to do so and the court can make an order after taking into consideration, in accordance with s. 70 (1) in addition to all other relevant matters, " (a) any hardship which would be caused to the lessee or any other person by the making of the order; (b) any hardship which would be caused to the lessor or any other person by the refusal of the court making the order; and (c) . . . whether reasonably suitable alternative accommodation in lieu of the prescribed premises is, or has been since the date upon which notice to quit was given, available for the occupation of the person occupying the prescribed premises or for the occupation of

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the lessor or other person by whom the prescribed premises would be occupied if the order were made". As stated in the remarks that appear in (1), I did not intend to suggest in *Burling's Case* (2) that the two grounds in question were mutually exclusive but that if the lessor could prove that he reasonably required the premises for occupation by himself &c., although he also intended to reconstruct or demolish them, he could proceed under ground (g) (ii), but that if all that he wished to prove was that he reasonably required them for reconstruction or demolition so as to leave himself free to put the premises to some use other than occupation by himself &c., ground (l) was the appropriate ground. I did not intend to suggest that a landlord who wanted to reconstruct or demolish the premises for occupation by himself &c. could not rely on ground (l) as well as on ground (g) (ii), but that if he relied on ground (l) he might be met by a defence not open to the lessee under ground (g) (ii). Where, therefore, the lessor could prove that he reasonably required the premises for reconstruction or demolition for occupation by himself &c., (g) (ii) was the correct ground. The definition of a protected person in the *National Security* (*War Service Moratorium*) *Regulations* was so wide that a lessor might often have found that ground (l) was not available.

Their Lordships however have given a more limited meaning than this to ground (m) in the New Zealand Act corresponding to ground (l) in the *National Security* (*Landlord and Tenant*) *Regulations* (and now ground (m) in the *Landlord and Tenant* (*Amendment*) *Act*) and this limitation is of course binding upon us. In my opinion the appeal should be allowed.

Appeal allowed with costs including the costs of the objection to competency. Discharge the order of Richardson J. In lieu thereof order that the question in the stated case of the magistrate be answered that the determination dismissing the information is not erroneous in point of law and the appeal from the Court of Petty Sessions at Paddington be dismissed.

Solicitors for the appellant, *Brierley, Hodge & Co.*

Solicitors for the respondent, *Fisher and Macansh with J. T. Ralston & Son.*

J. B.

(1) (1953) 27 A.L.J., at pp. 116, 117.

(2) (1948) 76 C.L.R. 485.