M. 76 of 1949 (5

IN THE HIGH COURT OF AUSTRALIA

Palais De Danse Pty Ltd

v.

The Minister of State for the Interior

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday 16th. August 1950

(Reasons published at Sydney 25th. August 1950)

H. E. Daw, Gov. Print., Melb

2280/45

PALAIS DE DANSE PROPRIETARY LIMITED

v.

THE MINISTER OF STATE FOR THE INTERIOR.

ORDER.

Appeal dismissed with costs.

PALAIS DE DANSE PROPRIETARY LIMITED

V.

THE MINISTER OF STATE FOR THE INTERIOR.

REASONS FOR JUDGMENT

LATHAM C.J.

PALAIS DE DANSE PROPRIETARY LIMITED

V.

THE MINISTER OF STATE FOR THE INTERIOR.

REASONS FOR JUDGMENT — LATHAM C.J.

This is an appeal from a judgment of the Supreme Court of Victoria (Gavan Duffy J.) upon a review of an assessment of compensation under the National Security (General) Regulations, reg. 60G. The appellant company conducted a high-class dancing establishment in the Palais De Danse at St. Kilda. On 27th April 1942 the Minister for the Army took possession of the Palais under reg. 54. It was used as an Army Post Office until 19th July 1946. Reg. 60D(1) provides that the owner of property may make an agreement with the Commonwealth authorities as to the compensation to be paid for occupation or for damage done. The appellant company on 5th November 1942 made an agreement with the Commonwealth under which the company, subject to an exception contained in a "without prejudice" clause, agreed to accept as compensation for all damage or loss sustained by the company by reason of the Commonwealth taking possession of the Palais and of doing acts in relation to the land a sum of £294. 6. 8 a month. This compensation, it was agreed, was to be accepted in full, final and complete satisfaction of all claims of whatsoever kind or nature which the company might have against the Commonwealth directly arising out of the said taking possession of the land and doing acts in relation thereto. But such acceptance of compensation, it was agreed, was to be "without prejudice to any claim or claims which the owner may hereafter be legally entitled to make against the Commonwealth in respect of actual physical damage done to the said land by the Commonwealth during the period of possession or use of the said land by the Commonwealth as aforesaid". This latter clause preserves

rights to compensation to which the owner might be "legally entitled" in respect of actual physical damage done. A legal right to compensation in respect of actual physical damage done is created by the proviso to reg. 60D(1), which provides for the making of claims "in respect of any loss or damage suffered by reason of anything done during the period of the interference [that is interference with the land] (except damage resulting from war operations) which has not been made good and is not covered by the periodical payment." This is the legal right which is preserved by the agreement. It is a right not only to have physical damage made good but to recover compensation for loss suffered by reason of such physical damage not having been made good, unless the loss was covered by periodical payment. There is no other legal right upon which the applicant can rely.

The evidence shows that it was not possible for the company to begin business again until some date in 1950, though possession had been surrendered by the Commonwealth to the company in July 1946. This impossibility was due to the fact that it was impossible to obtain timber for a necessary new first-class floor and to the further circumstance that before the premises could be re-opened in proper condition for the class of custom upon which the company depended it was necessary to make various renovations and improvements. State law required permits to be obtained for building operations, and permits were not obtainable for work of the character which it was necessary to do at the Palais.

All the claims for the restoration of physical damage actually done during the Army occupation have been settled. This appeal relates to two matters.

In the first place, the company claims loss of profit for four years at the rate of £5,000 a year. This is not in my opinion a claim in respect of actual physical damage done to the premises. If all the physical damage done by the Commonwealth during its occupation had been made good or paid for when the Commonwealth gave up possession the position would have been exactly the same as it is today. The difficulty as to obtaining timber for a new floor would have been the same and there would have been the same impossibility of obtaining permits to do the work which must be done before the Palais can be

re-opened. The delay in re-opening cannot be held to be due to any physical damage done by the Army. In fact the Commonwealth has agreed to make a payment of £2,000 in respect of loss of profits. This sum has been calculated by the Commonwealth in relation to a period of six months. The company claims that a larger amount should be allowed in respect of the conceded period of six months by reason of the necessity of providing for a renewal of the decorations of the building. In my opinion this question does not arise if, as I consider to be the case, the company has no valid claim at all in respect of any loss of profits. The Commonwealth is prepared, as an act of grace, to pay £2,000 which is described as equivalent to six months' profits. I can see no justification for the court either reducing or extending the amount of this concession.

The second matter raised upon this appeal has been described as loss of goodwill. It is a claim for the cost of an advertising campaign shown to be necessary in order to re-establish the reputation and what might be called the attracting power of the Palais during a period before and after re-opening. The necessity of such an advertising campaign, the cost of which is estimated at about £10,000, is established by the evidence. But in my opinion it cannot be held that this cost is due to anything other than the occupation by the Army during the four years ending in July 1946. It has nothing to do with physical damage caused by the Army. There is no evidence to show that the estimated four years' delay in opening after 1946 has resulted or will result in an increased cost in such advertising. Therefore in my opinion this claim fails.

The appeal should be dismissed.

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REASONS FOR JUDGMENT. WEBB J.

If the appellant company had relied on the provision in S. 51 (xxxi) of the Commonwealth Constitution for just terms on a compulsory acquisition it might well have become entitled to more compensation than its agreement with the Commonwealth secured. But all we have to do now is to ascertain to what the agreement entitles the appellant. If it was made in a belief at the time - April 1942 - that "just terms" ensured less than was subsequently decided by this Court to be the case that does not affect either the validity of the agreement or its construction.

Under Clauses I and II of the agreement the appellant "shall (except as hereinafter provided) accept as compensation for all damages or loss sustained...by reason of the ...taking possession of and/or the carrying out of...acts" the sum of £294.6.8 a month, and this was accepted "in full final and complete satisfaction for all claims...directly arising out of the said taking...and.acts". The exception is of any claim "in respect of actual physical damage done... during the period of possession..." In this context I think the expressions "by reason of" and "in respect of" have the same meaning and effect. The legal right preserved by the agreement is that given by that part of Reg. 60D which speaks of claims for damage "arising out of" acts during occupation. The actual physical damage claimed for is also assumed to have been done lawfully, that is to say, in the carrying out of the acts referred to, I think no difference as to compensation, neither more nor less was intended in respect of those acts causing actual physical damage; so that the appellant was entitled to claim for damage or loss sustained "by reason of" this actual physical damage, and could properly include in the claim something more than the cost of repairing or replacing the damaged property. Loss of profits and of goodwill were, I think, rightly included, but only in respect of the period that

it would ordinarily have taken to repair or replace the dance floor after army occupation ceased. Loss of profits and of goodwill due to the period of that occupation, namely fifty-one months, was compensated for in the monthly payments, as Gavan Duffy J. would have found. I do not think that this period after army occupation can properly be found to include the whole time that elapsed before the grant of a permit to repair or rebuild the dance floor and the obtaining of the requisite timber. Even if the actual physical damage constituted a wrongful act or acts damages by way of recoupment of loss of profits to that extent would have been too remote to be recoverable. There is nothing in the evidence to warrant the view that delay due to shortage of supplies of suitable timber and the need of, and difficulty in getting a permit for work on a dance floor would have been contemplated as a natural and probable or direct consequence of actual physical damage to the dance floor when the damage was done. But I fail to see how the appellant can recover greater damages because the acts causing the damage were not wrongful but were authorised by National Security Regulations. I am not aware of any rule of law or principle to that effect. I think then that the greatest loss of profits and of goodwill that could properly have been claimed was that attributable to the period that it would in the ordinary course have taken to restore the dance floor after army occupation ceased. The Commonwealth and the appellant thought that six months would be necessary for this work and the Commonwealth offered to pay for the delay during that period in addition to the costs of restoring the floor, although other independent factors were operating that in any event would have prevented the appellant from re-opening this dancing business before such restoration. Gavan Duffy J. decided to allow for loss of profits, but not for any loss of goodwill during this period of six months. As to the profits that would have been earned during that period he

/ allowed

allowed £2,000, but nothing for "decor". I think £2,000 was justified by the evidence. Nothing was in fact spent on "decor" for that period. In this respect it is not in the same category as such items of actual expenditure as rates, taxes, rent and insurance premiums; but it is in the same category as wages, salaries and other items of notional expenditure, and like those items it is not recoverable in addition to loss of profits. As to loss of goodwill, which is taken here to be represented by the cost of advertising to recover the lost patronage, Gavan Duffy J., rightly I think, held that if this was allowable, then in respect of the period of Army occupation it should be taken to have been included in the monthly payments. However the monthly payments ceased with the occupation, but due to the actual physical damage done to the dance floor during such occupation the loss of goodwill was, I think, greater, as the period of inactivity of the dancing business was necessarily extended for a further six months, as estimated. More likely than not this further long delay would have led to an increase in the loss of patrons and have called for an intensification, if not for an extension of the period of the advertising to recover the patronage lost because of army occupation of, and activities in the appellant's premises. The Board of Review thought that £3,000 was a proper allowance for all the advertising estimated to be necessary. This was based on the length of time the claimants would be prevented from carrying on this dancing business in these premises. This seems to me to have been a reasonable allowance; but for the loss of goodwill in respect of the fifty-one months period of army occupation allowance must be taken to have been made in the monthly payments. Taking this finding of £3,000 into consideration an extra allowance for goodwill for this period of six months might be made. But it would be a comparatively small sum arbitrarily fixed and in view of the attitude of the other members of the Court on this point it is not worth while assessing it.

I would dismiss the appeal.

PALAIS DE DANSE PTY. LTD.

v.

THE MINISTER OF STATE FOR THE INTERIOR.

JUDGMENT. FULLAGAR J.

PALAIS DE DANSE PTY. LTD.

v.

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JUDGMENT. FULLAGAR J.

The Commonwealth, acting in pursuance of reg. 54 of the National Security (General) Regulations, took possession of the appellant company's property at St. Kilda, known as the Palais de Danse, on the 27th April 1942. It remained in possession until the 11th July 1946. An agreement as to the compensation to be paid by the Commonwealth was made on the 5th November 1942, and the rights of the appellant company to compensation, which are in issue in this appeal, depend primarily on the construction of that agreement.

Reg. 60D of the National Security (General) Regulations provides that, in cases of which the present is one, a person who suffers loss or damage shall be paid "such compensation as is determined by agreement", or, in the absence of agreement, compensation on the basis therein prescribed. The agreement of the 5th November 1942 was made between the appellant and the Commonwealth, which is, of course, represented by the Minister in these proceedings. It recites in substance the provision of reg. 60D as to the determination of compensation by agreement, and it recites that the appellant "has agreed to accept in respect of the said taking possession and/or the said acts ... compensation for damage or loss at the rate and for the period set out below". The words "the said acts" refer to the acts which the Minister is authorised by the Regulations to do upon or in relation to the land. The agreement went on to provide as follows:-

"I. The Commonwealth shall pay and the Owner shall (except as hereinafter provided) accept as compensation for all damage or loss sustained by the Owner by reason of the said taking possession of and/or the carrying out of the said acts .... in relation to the said land the sum of Two hundred and ninety-four pounds six shillings eight pence for each and every month or pro rata for any part of a month thereof in which the said land is occupied or used by the Commonwealth as aforesaid. For the purposes of this Agreement possession or use by the Commonwealth of the said land shall be deemed to commence on the Twenty-seventh day of April 1942.

II. Such compensation as aforesaid shall be accepted by the Owner in full final and complete satisfaction of all claims of whatsoever kind or nature which the Owner may have as against the Commonwealth directly arising out of the said taking possession of and/or the carrying out of the said acts ... in relation to the said land in pursuance of the said Regulations. BUT subject to the provisions of paragraph VI hereof, WITHOUT PREJUDICE to any claim or claims which the Owner may hereafter be legally entitled to make against the Commonwealth in respect of actual physical damage done to the said land by the Commonwealth during the period of possession or use of the said land by the Commonwealth as aforesaid."

The reference to paragraph VI is a reference to a later provision that the Commonwealth shall not be liable for damage which could have been covered by insurance by the appellant.

The use of the word "directly" in clause II is a little curious. But I do not think it was used with reference to any distinction between claims "directly" arising and claims "indirectly" arising. I think it was used on the assumption that there could be no valid claim except a claim "directly" arising, and I think that the combined effect of clauses I and II, the latter of which is to an extent repetitive, is that the appellant is precluded from making any claim (apart from the monthly payments) for any compensation except a claim "which it may be legally entitled to make against the Commonwealth in respect of actual physical damage done to the land by the Commonwealth during the period of possession". The words "legally entitled" clearly refer to some right existing independently of the agreement, and I think that the reference is to the proviso to reg. 60D(1), which gives a right to claim (in addition to a periodical payment

during the continuance of an "interference" with rights) compensation "in respect of any loss or damage suffered by reason of anything done during the period of the interference which has not been made good and is not covered by the periodical payments". The words "legally entitled" cannot, it would seem, refer to any other basis of claim, because reg. 60K expressly provides that no claim shall be maintained for anything done under the Regulations except for compensation determined by agreement or in pursuance of the Regulations. There are, so far as I am aware, no other relevant regulations. The language of the proviso to reg. 60D(1) would, in my opinion, cover compensation "in respect of actual physical damage done" whether the wider or the narrower of the two meanings of which that expression is capable were adopted.

The respondent contended that the effect of what may be called the proviso to clause II of the agreement was to preclude the appellant from recovering more by way of compensation than the actual cost of making good any physical damage done during the period of occupation. If this construction were correct, the appellant could not, in any circumstances whatever, recover compensation for any loss of profit incurred during any period in which the premises, though vacated by the Commonwealth, could not be used because physical damage had not been made good. I am unable, although it was accepted by Gavan Duffy J., to adopt this construction of the agreement. In my opinion, the proviso to clause II means that the appellant may recover compensation for any loss which the law would regard as occasioned by or flowing from any actual physical damage to the property.

I find three reasons for adopting this construction. In the first place, it seems to me to give to the words "in respect of actual physical damage done" their natural meaning. The word "damage" is, of course, an ambiguous word. It may be used in the sense of "damnum", or it may be used in the sense of "injuria". In the proviso to reg. 60D(1) it is used in conjunction with the word "loss", and clearly means "damnum". In clause II of the

agreement it seems to me clear that it is used as part of an expression which refers to an "injuria". The "doing" of "actual physical damage" is regarded as an "injuria", and "in respect of" that "injuria" such claim may be made as the appellant would be legally entitled, apart from the agreement, to make. This is, in effect, the view put by Mr. Tait, and I think it is the right view. In the second place, the use of the words "legally entitled" necessitates, as I have pointed out, a reference to the proviso to reg. 60D(1), and it involves, I think, a reading together of the language of that proviso and the language of clause II of the agreement. The latter may be assumed to be intended to qualify the former. The only fair and proper way of reading them together enables the appellant, I think, to claim in respect of loss or damage suffered by reason of actual physical damage done to the property. In effect, the proviso to reg. 60D(1) is to be read as if the words "by reason of actual physical damage" were substituted for the words "by reason of anything done". In the third place, if there is any ambiguity in clause II of the agreement, this case is, in my opinion, an extremely clear case for the application of the rule of construction contra proferentem. The agreement is in a printed form prepared on behalf of the Commonwealth, and this is exactly the kind of case in which it is easy to imagine the party who presents the document hoping that the Courts will construe it in a narrow sense, while the other party thinks that it is wide enough to cover all that he is likely to be able justly to claim. In such a case the maxim ought always to be applied to resolve any ambiguity.

The construction of the agreement which I have adopted is that for which the appellant contends. It does not, however, necessarily follow that the appeal succeeds. It is necessary now to consider the appellant's claims and the facts on which they are based.

as I have said,

The Commonwealth, took possession of the Palais de Danse under reg. 54 of the National Security (General) Regulations on the 27th April 1942, and remained in occupation until the 11th July 1946. Certain claims for physical damage to the structure and electrical fittings and other items, but excluding damage to the dance floor, were then made and the appellant accepted £2152 in satisfaction. In September 1947 the appellant lodged a further claim for compensation in a total sum of £42,867. Apart from one item, which was subsequently not pressed, the claim was made under three heads. The appellant claimed compensation for (1) loss of goodwill of its business of dance hall proprietor, (2) loss of profits plus a sum for "standing charges" (rent, rates, etc.) for a period of four years after the Commonwealth ceased to occupy the premises, and (3) damage to the dance floor. Under the third head the basis of claim was the estimated cost of replacement (£5268). A Compensation Board, acting under reg. 60F, allowed under these respective heads (1) £3000, (2) £16,000, (3) £700, making a total of £19,700. The respondent applied to the Supreme Court of Victoria under reg. 60G for a review of this assessment, and the matter came on for hearing before Gavan Duffy J. Gavan Duffy J. held that the first two heads of claim were not in law maintainable at all, but, the respondent conceding that loss of profits for six months ought to be allowed, he reduced the assessment under this head to £2000. In the case of the claim for damage to the dance floor he raised the assessment to £3512. With regard to this last head of claim the appellant does not appeal, and there is no cross-appeal. The net result of the decision of Gavan Duffy J. was to reduce the assessment of compensation from £19,700 to £5512. The appellant appeals to this Court against the decision on its claims for compensation in respect of (1) loss of goodwill of its business, and (2) loss of profits and standing charges.

The claim in respect of loss of goodwill may, I think, be disposed of quite shortly. It may be briefly stated in the following way. The Palais de Danse, before the Commonwealth took possession, was established as one of the leading dance halls in Australia and enjoyed an exceedingly high reputation. When the Commonwealth took possession of the building the appellant's business simply ceased, since it was quite impossible to obtain alternative accommodation. A valuable goodwill has thus been practically destroyed: other dance halls have established themselves and have acquired the custom which the Palais formerly enjoyed. This goodwill cannot be restored except by a very extensive advertising campaign, estimated to cost about £10,000. The Compensation Board awarded a sum of £3000 under this head. Gavan Duffy J. rejected the claim altogether. Its rejection necessarily followed from His Honour's view that the agreement allowed compensation only to the extent of the cost of making good actual physical damage done to the premises. But both before His Honour and before us it was argued that, on the construction of the agreement which I have adopted, a proportion of the ultimate loss of goodwill was attributable to the physical damage done and was claimable as "in respect of" such physical damage. It was not, I think, in the end seriously disputed that the loss of goodwill was at least to a very considerable extent o c c a s i o n e d

by the mere taking possession of the premises by the Commonwealth and the consequent cessation of the company's business. It was said, however, that, because physical damage done could not be made good immediately on the vacating of the premises by the Commonwealth, further loss of goodwill arose from the company's continuing inability to recommence its business after the restoration of possession, and that a substantial part of the total loss of goodwill was therefore properly to be ascribed to "actual physical damage done". Gavan Duffy J. (although, on the view which he took of the agreement, it was not necessary for him to do so) dealt with this contention, holding, in effect, that it was not possible on the evidence to say that the loss of goodwill (which he had no doubt that the appellant had suffered) had been to a material extent brought about by delay in the making good of physical damage as distinct from the mere fact of the Commonwealth's occupation of the premises for four years and three months. I am in complete agreement with His Honour's view. In the absence of evidence to the contrary (and it is difficult to see what evidence could have been given on the subject) it is impossible, I think, to say that it would be necessary, in order to recover lost goodwill, to spend more money at any given time after the cessation of the Commonwealth's occupation than at the end of the four years and three months. And, even on my view of the construction of the agreement, compensation cannot be claimed for loss of goodwill brought about by the mere fact of occupation by the Commonwealth with its necessary consequence of the cessation of the appellant's business.

The claim for loss of profits presents more difficulty to my mind. Again, of course, on the construction of the agreement adopted by Gavan Duffy J., the claim is clearly excluded. But, on the construction which I have adopted, such a claim is not, in my opinion, necessarily excluded. If the position had simply been that the Commonwealth had left the building in a damaged condition, so that a period must necessarily elapse during which ~~the~~ repairs were being executed before the company

could resume its business, I should have had no doubt that it had a valid claim under the agreement for loss of profits during that period. I think that the case of Minister for the Army v. Brisbane Amateur Turf Club (1949) A.L.R. 737, which was decided on reg. 60D, is sufficient authority for this view: see esp. per Dixon J. at p. 756. The nearest analogy is perhaps the case of a breach by a tenant of a covenant to leave in repair: in such cases loss of the benefit of occupation during the period necessary for effecting repairs is considered as flowing from the breach and as being a proper subject for damages: see Woods v. Pope (1835) 1 Bing. N.C. 467, Birch v. Clifford (1891) 1 T.L.R. 103, and Re Carruthers: ex parte Tobit (1895) 15 R. 317. Such damages are not awarded by reason of any special rule relating to the measure of damages for breach of contract but because they are naturally and justly regarded as caused by or flowing from an "injuria". In Woods v. Pope (supra) at p. 468 Tindal C.J. said:- "The amount for which the defendant was liable in respect of the repairs he was bound to perform having been paid into Court, the only question the jury had to consider was what time it would occupy the plaintiff to lay out that money. If the defendant had laid out that money before he quitted the premises, the plaintiff might have occupied them himself: the delay therefore was a consequential injury: it would take the plaintiff some time to effect the repairs which ought to have been done by the defendant." The present case, however, is complicated by the existence of three factors which require careful consideration.

The three factors are these. In the first place, whereas Gavan Duffy J. held that the only satisfactory way of making good the most serious damage to the premises, the damage to the dance floor, was by the provision of a completely new floor, it was quite impossible, at the date when the Commonwealth went out of possession, to provide a new floor within a time which would normally have been reasonable or indeed within any clearly foreseeable time. The primary reason for this was that it was impossible to obtain the necessary material. And, even if the necessary material had been obtainable, the shortage of labour consequent on the war was such

that no permit for the undertaking of the work could have been obtained under National Security Regulations, and the work could not have been lawfully undertaken without such a permit. In the second place, the evidence established, I think, that, even if a new dance floor could have been readily procured - indeed, even if the Commonwealth had left the floor in an undamaged condition - it would not have been profitable to re-open the Palais without carrying out other substantial work by way of reconstruction, renovation and redecoration. The necessity for this work was due mainly to obsolescence, though it was not, I think, entirely dissociated from the necessity of recovering a lost goodwill: at any rate it did not arise from any damage done by the Commonwealth. And, in the third place, precisely the same difficulties were attendant upon the carrying out of this work of reconstruction, renovation and redecoration, as were attendant upon the construction of a new dance floor, though in this case the impossibility of obtaining a permit seems to have been the decisive factor rather than any actual impossibility of obtaining labour and materials, difficult to obtain though these would doubtless have been.

The first of the three factors which I have mentioned would not, in my opinion, by itself create any difficulty. The amount claimable for loss of profits must be ascertained by reference to the estimated time required to make good the "damage done", and the estimate must have regard to actual, and not merely hypothetical, conditions: cf. H.M.S. London (1914) P. 72. The Compensation Board estimated that, under conditions existing at the material time, four years would elapse before the floor could be replaced, and its award of £16,000 for loss of profits was based on this estimate: it awarded four years' profits at £4000 per annum. If the first factor alone had to be considered, I should have thought that the Board's decision was perfectly right. But the Board does not seem to have considered the second and third factors, and these cannot, I think, be left out of account.

The second factor is that, even if no damage to the floor had been done by the Commonwealth, the Palais could not have been opened profitably unless and until ~~such~~ much other work, no responsibility

for which could be placed on the Commonwealth, had been done. It was argued that the necessary causal connexion between the damage to the floor and any loss of profit was therefore destroyed, with the necessary result that no compensation could be recovered for any loss of profit, and a passage in an interesting article by Jeremiah Smith in 25 Harvard Law Review at pp. 108-9 was referred to. But it does not necessarily follow from what I have called the second factor that no claim for loss of profit through damage to the dance floor could be maintained. It all depends on matters of fact. The position may be tested by leaving out of account for the moment the difficulties attendant upon obtaining a permit and obtaining labour and materials. Let it be supposed that the position is simply that, before a profit can be earned, a new dance floor (for which the Commonwealth <u>is</u> responsible) and certain other work (for which the Commonwealth is <u>not</u> responsible) must be done. The inquiry must surely be as to the extent to which (if at all) the length of the non-profit-earning period is increased by the necessity of providing a new dance floor. It might be that the work of providing the new floor could proceed simultaneously with the other work and that both would be completed in about the same time. If so, no loss of profit has been caused by the damage to the dance floor: the company would have suffered exactly the same loss if there had been no damage to the floor, and it can recover nothing from the Commonwealth. On the other hand it might be that the work of providing the new floor would have to wait upon the completion of the other work, or vice versa. In either of such cases, the Commonwealth would be liable in respect of the period required for the provision of the new floor, but not in respect of the period required for the doing of the other work. I have taken what may be described as the two extreme cases. Between the two extremes various states of fact can readily be imagined. When, but not before, the relevant state of fact has been ascertained, it will be possible to say whether the length of the non-profit-earning period has been increased by the necessity of providing a new floor, and, if so, to what extent it has been increased. To the extent to which it has been increased, and no further;

the Commonwealth will be liable in respect of loss of profits, because to that extent and no further has loss of profit been caused by damage in respect of which the Commonwealth is obliged to pay compensation.

The first and third factors which I have mentioned may, of course, affect the amount of compensation (if any) which will be payable, but they cannot, in my opinion, otherwise affect the position. When the assessment of compensation is undertaken, estimates must be made of the time which will be required for the provision of the new floor and for the doing of the other work. Each estimate must, in my opinion, as I have said, be made in the light of all the circumstances existing at the relevant time, which is the date of the vacating of the premises by the Commonwealth, and among the relevant circumstances will be the difficulty or impossibility of obtaining labour and materials for a considerable period and the difficulty or impossibility of obtaining a permit for a considerable period. At the relevant time those difficulties or impossibilities attached both in respect of the procuring of a new floor and in respect of having the other work done. The necessary estimates having been made in the light of all the available evidence, it would be possible to say to what extent, if at all, the non-profit-earning period had been increased by reason of the damage to the floor. Accuracy would, of course, be impossible, but accuracy is generally impossible in such cases. The tribunal charged with assessing damages or compensation must do the best it can to achieve a just result.

The Board's estimate of a non-profit-earning period of four years is not, in my opinion, open to criticism. But its award of compensation on the basis of loss of profits for four years cannot, in my opinion, be supported, because it did not take into consideration the factors which I have mentioned and did not, so far as appears, address itself at all to what is, as

I think, the real question, the question of how far, if at all, the non-profit-earning period was increased by the necessity of procuring a new dance floor beyond what it would have been if the only work necessary had been work for which the Commonwealth was not responsible. Nor, so far as I can see, was any evidence addressed to this question. The Commonwealth was prepared (without, as I understand, admitting any liability) to pay compensation as for loss of profit for six months, and Gavan Duffy J. accordingly awarded a sum of £2000 on this basis. There is, in my opinion, no evidence to support an award based on any longer period than six months, and indeed I do not think that there is evidence to support an award based even on that period. The Commonwealth, however - properly, I thought, because on any view the agreement seems to have precluded the appellant from obtaining really just compensation - did not challenge the award of £2000 as for loss of profit.

For the above reasons I am of opinion, subject to one point, that this appeal should be dismissed. That one point, however, remains outstanding. The appellant maintains that, a basis of loss of profit for six months being accepted, the amount payable is not £2000 but £2500. The Commonwealth having accepted that basis and agreed to assessment of compensation on that basis, the question of the amount payable on that basis should, in my opinion, be dealt with by us.

The question arises in this way. The Board, whose figures were accepted by Gavan Duffy J. and by the parties before this Court, based its calculation on the average annual profit actually earned by the appellant over a period of seven years ending on the 30th June 1941, and added a sum representing "standing charges", i.e. expenditure (such as rent and rates) which would have to be made by the company whether it was carrying on business on the premises or not. The figure thus arrived at was approximately £5000, and, if there were nothing more to be considered, the appellant would be entitled to one half of that sum, viz. £2500. There was, however, evidence which (though tendered by the company

for another purpose) indicated that very considerable expenditure was necessary at intervals of from five to ten years on the "décor" or decoration scheme of the Palais. In the seven year period which the Board had taken there had been in fact very little expenditure on "décor". The Board, therefore, thought it "reasonable to assume that the remaining life of the existent décor would have expired during the hiring even if the property had not been taken by the Commonwealth". Therefore, they said, "by the middle of 1946 the company would, in the normal course have been compelled to undertake one of its periodical extensive re-decorations of its premises, and, in the light of its expenditure in 1934 and the very considerably inflated costs obtaining in 1946, the cost thereof would have been not less than £7,000. On the basis of a seven years life this represents an additional expense of £1,000 per annum to that shown by the accounts of the years mentioned."

The Board accordingly deducted £1000 from the annual sum of £5000 which it had arrived at, and assessed the company's annual loss resulting from inability to resume its business at £4000.

Whether the above reasoning is correct seems to depend on whether the assumed expenditure on décor ought to be regarded as a recurrent charge lying in the same category as the cost of ordinary maintenance such as painting and normal repairs, or as expenditure of a capital nature, analogous to the expense of providing new plant and resulting in the creation of an asset with an estimated life of seven years and properly the subject of an allowance for depreciation accordingly. (Cf. Rhodesia Railways Ltd. v. Collector of Income Tax, Bechuanaland Protectorate (1933) A.C. 368). The Board, I think, took the former view. The evidence is not as clear as it might have been, and I have felt some difficulty over the matter, but on the whole I am of opinion the Board was wrong and that the latter is the correct view. The main considerations leading to this conclusion are, I think, (1) the nature of the work represented by the

expenditure, as described by Mr. Curwen, and (2) the fact that it seems to have been common ground that it was proper not to debit the whole of the expenditure to the year in which it was incurred but to "spread" it over an estimated "life" of something which the expenditure produced.

So regarding the assumed expenditure in question, I would myself think that it was wrong, in constructing the company's hypothetical profit and loss account, to debit anything for depreciation of décor at all, and for this reason. If we assume that the company has spent £7000 at the beginning of a period of seven years in the provision of décor, the position is not that the company is the poorer by that sum and that it must recoup what it has lost at the rate of £1000 per annum. The position at the beginning is simply that it has £7000 worth of décor instead of £7000 in money: it is neither poorer nor richer by its expenditure of £7000. And, if it debits its profit and loss account with £1000 each year for seven years under the heading of depreciation of décor, the debiting does not represent an expenditure of £1000. The company is simply <u>maintaining</u> its financial position. That is to say, at the end of each accounting period it has £1000 more in money and £1000 less in décor than at the beginning of the accounting period. This does not seem to me to be a relevant factor in determining what it has lost through inability to carry on its business.

It may be, however, that, from an accountant's point of view, the strictly correct method of proceeding would involve bringing into account, in the hypothetical profit and loss account, a debit for depreciation of décor. But, if this be done, then, in order to ascertain what the company has really lost, a similar amount must be added to the hypothetical net profit so arrived at. It is true enough to say that the company's loss which we are considering is the loss of the profit which

it would have made if it had been able to resume carrying on its business immediately. And the most natural way of ascertaining that loss is by reference to the profit made in preceding years when the company was carrying on its business. But, if we merely ascertain the net profits of those preceding years according to the ordinary and normal methods of accounting, the sum at which we arrive will not represent the real loss which the company has sustained. This is because, in such an ascertainment of past profits, certain items of expenditure (of which rent and rates may be taken as typical) will have been brought into account on the debit side. During the period with which we are concerned, the period during which the company is unable to carry on its business, those items of expenditure will still have to be met by the company. In order, therefore, to make good to the company what it is really losing, we must add on to the estimated net profit ascertained by normal accounting methods those items of expenditure which will still have to be met although the business is not in fact being carried on.

In the case of such items as rent and rates the position is obvious enough. It is perhaps less obvious that the item of £1000, which we assume to be entered on the debit side in estimating net annual profit lost, stands on exactly the same footing, but it seems to me that it must stand on exactly the same footing. Such a debit does not represent an actual payment out of money, as do such items as rent and rates. But it does represent, when it is taken into account in the ordinary way in ascertaining profit, a sum by which the value of an asset has diminished during the accounting period. It is brought into account because, and only because, a particular asset is worth less (or is assumed to be worth less) at the end of the period than it was at the beginning of the period. But, if we are to assume that such a debiting ought to be made, we shall not do justice to the company unless we also assume that its "décor" was in fact depreciating

during the accounting period to the extent of the allowance made. We cannot fairly assume that an allowance ought to be made for depreciation of an asset during the period when the company was unable to carry on its business, unless we also assume that depreciation of an asset was in fact taking place during that period. And, if we make the latter assumption, it follows that we must treat actual depreciation in fact as a "standing charge" or equivalent to a standing charge, a charge which ex hypothesi goes on although the company cannot carry on business. If we do not do this, we shall not give to the company the true measure of its loss: we shall give it £1000 per annum less than it has really lost. This was, I think, in substance the view put by Mr. Meredith, the accountant who gave evidence before the Board, and it seems to have been accepted by Mr. Scott, a member of the Board. I think that Mr. Meredith and Mr. Scott were right.

The result of the view which I take is that the sum of £5000, and not the sum of £4000, must be adopted as the estimated annual loss of the company which is relevant. And, if compensation on that basis is to be allowed in respect of a period of six months, the amount which the company should receive is not £2000 but £2500.

For the above reasons I am of opinion that the order of the Supreme Court of Victoria should be varied by substituting for the amount of £5512 the amount of £6012, and that otherwise the appeal should be dismissed. Since the appellant has failed except as to a comparatively trifling sum, and since its right to that sum depends, as I think, on a concession made by the respondent, it should pay the costs of the appeal. The case should be remitted to the Supreme Court in order that it may deal with the costs reserved by the order of Gavan Duffy J.

PALAIS DE DANSE PROPREITARY LIMITED

V.

THE MINISTER OF STATE FOR THE INTERIOR

JUDGMENT KITTO J.

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On 27th April 1942, under the powers conferred by reg. 54 of the National Security (General) Regulations, possession was taken on behalf of the Commonwealth of the building known as the Palais de Danse at St. Kilda. The appellant company was at that date in possession of the building under the provisions of a deed which entitled it to the occupancy of the building for a term of ten years from 1st October 1942 with an option of renewal for a further five years. It had been carrying on in the building for many years a business of a dance hall proprietor.

The Commonwealth's possession of the building continued until 11th July 1946. In respect of the Commonwealth's interference with the appellant's rights of possession, being rights of a continuing nature, the appellants became entitled by virtue of the proviso to reg. 60D to claim as compensation a periodical payment during the continuance of the interference, and also to make a further claim within two months after the date upon which the interference ceased in respect of any loss or damage suffered by reason of anything done during the period of the interference (except damage resulting from war operations) which had not been made good and was not covered by the periodical payment. An agreement was entered into on 5th November 1942 between the appellant and the Commonwealth whereby a periodical payment at the rate of £294. 6. 8 per month became payable by the Commonwealth to the appellant during the period of the Commonwealth's occupation as compensation for all damage or loss sustained by the appellant

by reason of the Commonwealth's taking of possession or the carrying out of any of its acts, prohibitions or restrictions pursuant to the National Security Regulations. This compensation was accepted by the appellant in full, final and complete satisfaction of all claims it might have against the Commonwealth directly arising out of the taking of possession or the carrying out of the acts, prohibitions or restrictions referred to but without prejudice to any claim or claims which the appellant might thereafter be legally entitled to make against the Commonwealth in respect of actual physical damage done to the land by the Commonwealth during the period of possession or use of the land by the Commonwealth.

Under the proviso to reg. 60D the appellants submitted a further claim after the Commonwealth's occupation had ceased, alleging that it had suffered loss and damage (not resulting from war operations) of which it gave particulars under six heads. It was necessary for the appellant to establish in respect of each of the heads of its claim (1) that the alleged loss or damage was suffered; (2) that it was suffered by reason of something done by the Commonwealth during the period of its occupation; (3) that it had not been made good; (4) that it was not covered by the periodical payment and (5) that it was within the "without prejudice" provision in the agreement of 1942.

The claim was considered by a Compensation Board and on appeal by Gavan Duffy J. From this learned judge's decision the present appeal is brought in respect of two only of the items of the claim.

By the first of these items the sum of £22,872 was claimed for loss of the opportunity to earn profits by carrying on the business of the Palais during the four years immediately following the termination of the Commonwealth's possession on 11th July 1946. Evidence was adduced by the appellant which established that during the Commonwealth's occupation physical damage was done to the building and that, while some of the damage was made good by

reparation or payment, other damage, particularly to the dance floor, was not made good. The appellant's case was that the building as delivered up to it was in such a condition that a dance hall business could not be profitably conducted without installing a new dance floor, and that the work could not be done for at least four years because of the impossibility of obtaining within a lesser time either suitable timber for the work or a permit from the Building Directorate without which the work could not lawfully be done.

Gavan Duffy J. found on the evidence that the floor in the state in which the Commonwealth left it could be used for dancing and was no worse for this purpose than other dance floors being successfully used in Melbourne; but he accepted evidence called by the appellant which satisfied him that "in the peculiar position in which the Palais now stands" it would not be possible to re-open the Palais with the floor in its then condition with any reasonable expectation of making profits. The reference to the peculiar position in which the Palais stood was a reference, as I understand it, to the fact mentioned elsewhere in His Honour's judgment that the occupation of the Palais by the Commonwealth had resulted in the dancing business being drawn away from St. Kilda to other quarters, and that in order to bring back that business and operate again at a profit it would be necessary to provide premises and floor decoration and conveniences on an outstanding scale.

The learned judge made no finding as to whether it was impossible to effect the necessary work before 1950, though the Compensation Board had so found. I am prepared to assume that the Board came to a correct conclusion on this point. It is to be noticed, however, that the work referred to included much more than the provision of a new dance floor. According to a letter written by the appellant to the Building Directorate on 9th March 1948, extensive rehabilitation and modernisation was necessary before the ballroom could be re-opened to the public, and that work would

principally consist of -

"(a) rebuilding the front towers;

(b) rebuilding the main entrance to the building;

(c) provision in the main ballroom for a new plaster ceiling;

(d) entire rebuilding and reorganisation of cafe and kitchen sections of the building;

(e) rebuilding retiring rooms;

(f) all the consequential painting, decorating and electrical wiring incidental to the above."

No mention was made of the floor in that letter and Mr. Curwen, the manager of the Palais and a director of the appellant company, gave evidence which in my opinion showed quite plainly that the re-opening of the Palais with any prospect of conducting the business at a profit depended upon the carrying out of extensive alterations in addition to the installation of a new floor. Several passages from Mr. Curwen's evidence on this point are quoted by His Honour and I need repeat only one of them. Mr.Curwen was asked - "So even if your floor had been in perfect condition, if you had not been able to obtain a permit you still could not have opened the Palais because you could not have carried out your general rehabilitation"? He replied "That is so".

It was contended for the appellant, notwithstanding this evidence, that thedamage done to the building by the Commonwealth was a cause of the appellant's inability to recommence its business during the four years following the cessation of the Commonwealth's occupation and that the appellant's claim for loss of profits during that period should therefore be held to be, within the meaning of the proviso to reg. 60D, a claim in respect of loss or damage suffered by reason of acts of the Commonwealth during its interference with the appellant's right of occupation and should also be held to be, within the meaning of the "without prejudice" clause in the agreement of 1942, a claim in respect of actual physical damage done to the land by the Commonwealth during the period of its possession. I am unable to accept this

contention. In my opinion the true view is that the loss of profits during the four years in question has been suffered by reason of the fact that by the time when the Commonwealth relinquished possession of the Palais a situation had arisen in which the appellant could not re-establish its business in less than four years, even if the building had never been damaged at all. That situation was that, in order to re-open in such a style as to enable competition with other similar businesses to be successful, the work described in the appellant's letter of 9th March 1948 had to be done, and that the necessary permit to enable it to be done was unprocurable. (I appreciate that the letter I have mentioned was written nearly two years after the Commonwealth gave up possession, but I think the evidence is clear that the work it described was regarded by the appellant as essential in 1946). That being the situation, I think Mr. Adam was right in his submission that the physical damage done by the Commonwealth was not even a contributing cause of the loss of the four years' profits, that loss being attributable solely to the appellant's exclusion from the building between 1942 and 1946, the consequential closing down of its business, and the existence at the time when the building was restored to it of a scarcity of materials and an altered state of the law whereby a permit, unobtainable in fact, was required.

I am therefore of opinion that the appellant's claim for loss of profits was not such a claim as was authorised by the proviso to reg. 60D and was not a claim "in respect of actual physical damage done to the land by the Commonwealth" within the meaning of the agreement of 1942, however widely that phrase may be construed.

The Commonwealth, however, offered to pay to the appellant a proper amount of compensation in respect of its inability to recommence its business during the six months following the date when possession was restored to the appellant. Gavan Duffy J. held that the compensation which should be

awarded pursuant to that offer was the amount of the profits which the appellant could have made during the six months period. It was not contended before this court that His Honour was wrong in so holding, but his method of calculating the profits was challenged in one respect. The method adopted by His Honour was as follows:- The average adjusted profits of the appellant's business were ascertained in respect of two periods, one being the three years prior to 30th June 1941 and the other being the seven years prior to that date. These profits were £4,531 and £4,192 respectively. To each of these figures was added a sum of £888, being the amount of certain "standing charges". These charges consisted of expenditure which the appellant would have had to meet in the relevant six months, whether it carried on business or not. The amounts thus arrived at were £5,419 and £5,080, and £5,000 was taken as a round figure which was considered to be a fair approximation to the annual rate of profit the appellant would be likely to make during the six months in question. But the learned judge then deducted £1,000 from this sum on the ground that in the calculation no allowance had been made for an item of expenditure in respect of what was termed "decor". The appellant's experience in conducting the business of the Palais had shown that approximately every seven years it was necessary to refurbish the ballroom with decorative designs and the like in order to create an atmosphere pleasing to the patrons. The cost of doing so was about £7,000, and the practice of the appellant had been to charge in its accounts one-seventh of this sum as an annual outgoing. The decor in existence when the Commonwealth took possession of the building had outlived its usefulness before the date upon which the building was restored to the appellant; so that if the appellant had been in a position to recommence its business on that date it would have had to renew the decor and to charge £1,000 of the cost as an item of expenditure in the first year's profit and loss account.

It was contended for the appellant that either this item

should not have been included in the calculation at all, or, if included, it should have been counterbalanced by a corresponding addition to the standing charges. I am clearly of opinion that the learned judge was right in taking the item into account. His task was to determine a notional profit which the appellant would have been likely to make in a period following the termination of the Commonwealth's occupation if it had been in business during that period. Clearly he could not determine that notional profit by reference to the accounts of other periods which contained no provision for expenditure on decor, without making an adjustment to allow for that expenditure in consequence of the evidence which established that it would have had to be incurred in order to enable the notional profit to be earned. The notional expenditure must be allowed for when it is shown that the notional profit could not have become an actual profit unless the notional expenditure had actually been incurred.

It is perhaps not so clear that if the expenditure on decor is allowed for as an outgoing of the business, it should not also be added to the standing charges. I am prepared to assume that it would have to be treated as a standing charge if the provision of decor amounted to the acquisition of a capital asset. But on the evidence I do not think that this is so. It seems to me that expenditure on decor every seven years is a recurring expenditure of a non-capital nature, and that the portions of it which are brought into each year's profit and loss account are for that reason not in the same category as depreciation of a capital asset. In my opinion they should not be included among the standing charges.

I am therefore of opinion that the learned judge arrived at a correct conclusion in regard to this item of the appellant's claim.

The second of the items which were the subject of this appeal concerns a sum of approximately £10,000 which the appellant alleges it would have had to spend for advertising (over and above such advertising as would have been necessary in the ordinary course

of business if the Commonwealth had never taken possession of the building) in order to restore the goodwill which had been lost by reason of the fact that the Palais business had been closed for four years and would necessarily remain closed for another four years.

It was conceded that in respect of so much of the goodwill as had been destroyed during the four years of the Commonwealth's occupation of the building the appellant had accepted the periodical payment provided for in the agreement of 1942 as full compensation and accordingly could not make any further claim; but the appellant claimed to be entitled to receive one-half of the abovementioned sum of £10,000, contending that the destruction of goodwill should be regarded as a continuing process and the consequent loss should be treated as accruing de die in diem over the whole period of eight years. This contention was unsupported by any evidence so far as I can discover. Certainly no witness said that a greater sum would need to be spent on advertising in 1950 than in 1946 in order to recover the lost goodwill. It may be added that the appellant's claim lodged on 30th September 1947 was accompanied by a report dated 24th September 1947 from a firm of advertising experts upon whose estimate of advertising costs the claim for £10,000 was based, and the effect of that report, as I read it, was that the whole damage to goodwill had then already been done.

Gavan Duffy J. came to the conclusion that there was no evidence to suggest and no reason for thinking that the damage to goodwill had been increased by the inability of the appellant to re-open the Palais in 1946 and that, as the loss suffered by the appellant in this regard arose out of the taking and keeping in possession by the Commonwealth, the appellant had already been compensated for it under the agreement of 1942. I see no reason for differing from this conclusion and I would add that in my opinion, even if the unavoidable delay in re-opening after the Commonwealth gave up possession of the building increased the

loss of goodwill, that loss cannot be claimed under the "without prejudice" clause in the agreement of 1942 because, for the reasons already given, the delay cannot be attributed in any sense to the physical damage done to the building by the Commonwealth and therefore the claim is not "in respect of actual physical damage", even on the wide construction of those words for which the appellant contended.

In my opinion the appeal should be dismissed.