[1999–00 Gib LR 313]

ATTORNEY-GENERAL v. BLAND LIMITED

COURT OF APPEAL (Neill, P., Clough and Glidewell, JJ.A.): September 30th, 1999

Landlord and Tenant—rent—rent review—review clause disregarding increases in rental value from buildings constructed by tenant is evidence that parties intended to share increases in value of premises—tenant benefits from value of buildings and landlord benefits from value of site according to development potential—notional development not confined to existing use

Landlord and Tenant—rent—rent review—valuation to take into account decreases in rental value attributable to demolition and reconstruction of buildings when assessing development potential of site, unless expressly disregarded

The parties applied to the Supreme Court for a declaration as to the basis for a rent review under a commercial lease.

The respondent renegotiated its occupation of Government-owned land with the intention of developing the land as a shopping complex. The existing buildings were demolished just after the commencement of the term of the lease, which pre-dated its execution by three years, and the construction of the new buildings was completed less than a year later.

The *habendum* to the new lease explained that the grant of the demised premises was in consideration, *inter alia*, for the respondent's redevelopment and construction work by the building of the new shopping complex. The respondent's covenants permitted a range of uses with the consent of the appellant. A rent review clause provided that, failing agreement by the parties, an arbitrator should nominate a yearly rent at which the demised premises might reasonably be expected to be let at the review date, disregarding any increase in their value attributable to any buildings erected on them since the commencement of the term of the lease.

The respondent obtained a declaration from the Supreme Court (Pizzarello, A.J.) that the new rent should be assessed by the arbitrator on the basis of the market value of the ground rent alone, disregarding any buildings constructed on the site prior to the term of the lease and subsequently demolished. The parties accepted, under the express terms of the lease, that any increase in value attributable to the construction of the present buildings was also to be ignored for this purpose. The proceedings are reported at 1995–96 Gib LR 320.

The parties then sought a further declaration from the Supreme Court as to the practical consequences of this ruling in valuing the site. The Chief Justice ruled (approving the approach adopted by the respondent's valuer) that whilst the valuer was obliged to disregard any increase in the rental value of the premises attributable to the new buildings, their existence was not to be ignored altogether, since those buildings formed part of the premises for which the revised rent was to be calculated. Accordingly, subject to that condition, the site was to be assumed to be available at the date of assessment on the terms and conditions of a hypothetical lease containing all the actual terms and conditions (save as to quantum of rent) in the existing lease.

On appeal, the appellant submitted that (a) since a valuer was required to decide what form of development a hypothetical tenant would consider most profitable within the terms of the lease, the valuation was to be conducted on the basis of the bare site without buildings, on the terms and conditions of the existing lease, taking into account the potential for development within the range of permitted uses; and (b) since the lease clearly permitted the building of a supermarket on the site and, under the Land Law and Conveyancing Ordinance, s.5(2), the appellant could not unreasonably withhold his consent to building plans, the potential development of the site included a much larger shopping complex than the present one.

The respondent submitted in reply that (a) the valuer should not ignore the existence of the current shopping complex on the site for the purpose of valuation, given that the demised premises were the site plus those buildings, and the purpose of negotiating the lease had been to benefit from the recently constructed buildings; and (b) accordingly, the only notional development of the bare site which could be considered under the lease was the current one.

Held, allowing the appeal:

(1) The appellant's approach, assuming the potential for the development of the site with buildings and uses other than those of the present ones, was in compliance with the lease. The commercial purpose of the rent review clause was to ensure that future increases were shared fairly between the parties: the appellant benefiting (by a rent increase) from any increase in value since the previous review based on the development potential; and the respondent alone benefiting from any increase attributable to the buildings it had constructed. The demised premises for the purposes of the rent review would be the site with the buildings on it at the date of the review. Therefore, if at some future review date different buildings had been constructed on the premises, the definition of the demised premises would include them, and any increase in the value of the premises attributable to *them* would be disregarded. The wording of the *habendum* and of the respondent's covenants for the upkeep of the buildings were to be construed accordingly, so as to allow for the demolition of the present buildings for the purpose of agreed

redevelopment of the site as well as to protect the lessor's interests. If the respondent's construction were applied, no practical effect would be given to the covenants envisaging the future construction of buildings with a range of permitted uses (paras. 26–30).

(2) However, the appellant's approach would disregard any *reduction* in rental value due to the existence of the present buildings. A valuer seeking to arrive at a rental value taking into account potential development of the site by the construction of other buildings would have to consider the costs of and resulting from demolition of the existing ones. The appropriate formula was to value the site as if it were clear of buildings, with the option for the respondent to retain the existing buildings or to demolish them and redevelop in accordance with the terms and conditions of the lease save as to rent, such redevelopment being confined to the permitted uses (paras. 31–32; para. 34).

(3) In any event, it would be for the arbitrator rather than the court to determine whether the appellant's valuation accurately reflected the rental value of the premises for a hypothetical tenant, taking into account that a tenant would only willingly contemplate demolishing the existing buildings, constructing new ones and foregoing income in the interim if the long-term profit would exceed that obtainable from the use of the existing buildings (para. 33).

Case cited:
(1) *Basingstoke & Deane Borough Council* v. *Host Group Ltd*., [1988] 1 W.L.R. 348; [1988] 1 All E.R. 824, *dicta* of Nicholls, L.J. applied.

Legislation construed:
Land Law and Conveyancing Ordinance (1984 Edition), s.5(2):

"In all leases whether made before or after the 26th day of September, 1895, containing a covenant . . . against the making of improvements without licence or consent, such covenant . . . shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld . . ."

P.J. Isola for the Crown;
A.V. Stagnetto, *Q.C.* for the respondent.

1 **GLIDEWELL, J.A.:** This is an appeal against the decision of Schofield, C.J. given on April 7th, 1999, on an originating summons to determine the proper construction of the rent review clause in a lease entered into on May 2nd, 1989 between the Governor of Gibraltar, as lessor, and Bland Ltd. ("Blands"), as lessee. The Chief Justice answered the questions posed to him in favour of Blands. The Attorney-General, on behalf of the Governor, now appeals against his decision.

2 Rent review clauses are notoriously productive of litigation. This particular clause, which undoubtedly poses some difficulties in construction, had already resulted in another antecedent issue as to its proper construction being placed before and decided by Pizzarello, A.J. on July 19th, 1996. There was no appeal against his decision, so this is the first time that the construction of the clause has come before this court.

3 The premises demised by the lease consist of a site on the western side of Winston Churchill Avenue, Gibraltar, some 93,000 sq. ft. in extent, with buildings upon it. Blands, and before it an associated company, as predecessor in title, formerly occupied the site as lessees under two leases of separate parcels of land dated December 27th, 1951 and February 1st, 1967, both of which were due to expire on January 1st, 2012. Until 1986 there stood on the site an engineering works used for the purpose of ship repairs.

4 In or about 1986, Blands wished to demolish the works and redevelop the site. No doubt seeking security of tenure for a longer period than that provided by their current leases, they entered into negotiations for the grant of a new lease, which resulted in the grant of the lease of May 2nd, 1989—the subject of these proceedings. In the meantime, Blands demolished the buildings on the site and in their place constructed new buildings consisting of a small supermarket, a restaurant and other shops with car-parking, now known as the Rotunda. This was completed at some time in 1987, *i.e.* before the execution of the new lease.

5 The lease recites that, in consideration for the construction by Blands—the lessee—of the buildings comprising the Rotunda, and the payment by it to the lessor of a premium of £45,000, the lessor has agreed to accept the surrender of the existing leases and to grant a new lease. This new lease is for a term of 86 years from January 1st, 1986. The premises demised by it are defined as "all that piece of ground . . . situate at North Front, Gibraltar together with the buildings erected thereon, which land and buildings are shown coloured pink and blue on the plan annexed hereto . . ." In his judgment on July 19th, 1996 (1995–96 Gib LR at 328), Pizzarello, A.J. found, and in the present proceedings it is accepted, that for the purposes of this rent review, "the demised premises" means the site with the buildings of the Rotunda upon it.

6 For each of the first two years of the term the rent provided for in the lease was a fixed amount, greater in the second year than in the first. But for the next four years, *i.e.* until December 31st, 1991, the rent was at a rate of £13,650 p.a. From January 1st, 1992, for the residue of the term, the rent was to be determined in accordance with the Third Schedule to the lease.

7 Before coming to the Third Schedule, it is necessary to refer to some other relevant terms of the lease. Clause 2 of the *habendum* in the lease starts:

> "In consideration of the works of development and construction carried out by the lessee on the premises described in the First Schedule hereto and in consideration of the payment by the lessee to the lessor of the sum of £45,000 . . . and in consideration of the rents, covenants and conditions hereinafter reserved and contained, the lessor hereby demises unto the lessee all those premises and buildings described in the First Schedule hereto (subject as therein mentioned) (hereinafter called 'the demised premises') . . ."

8 Clause 3 of the lease contains the lessee's covenants, many of which are in standard form for a lease of land with buildings upon it. They include cl. 3(c): "not to erect or build . . . upon the demised premises any building . . . without first submitting plans and specifications and obtaining the written consent of the lessor . . ." Clause 3(d) reads: "to keep . . . the buildings erected on the demised premises and all additions as may from time to time be authorised by the lessor in good and substantial repair and condition." And cl. 3(r) reads:

> "save with the consent in writing of the lessor, such consent not to be unreasonably withheld, not to use the demised premises or any part thereof . . . for any purposes other than for the purposes of shops, stores, restaurant, bar, parking, travel agency, banking and bureau de change and offices."

9 It is necessary to set out the terms of the Third Schedule in some detail. It is headed: "The rent payable by the lessees during the period following December 31st, 1991." Clause 1 defines the phrase "review date" as meaning January 1st, 1992 and January 1st in every tenth year thereafter, and a "review period" as the period between review dates. Clause 2 provides that the rent review is to be upwards only, *i.e.* the rent for the next review period is to be whichever is the greater of the rent previously paid and the rent ascertained in accordance with the provisions of the Schedule. Clause 3 provides that the revised rent will be such as may be agreed between the lessor and the lessee or, in the absence of agreement, determined by an arbitrator, with provisions for the appointment of such an arbitrator. The rent to be awarded by the arbitrator—

> "shall be such as he shall decide is the yearly rent at which the demised premises might reasonably be expected to be let at the relevant review date:
>
> (A) on the following assumptions at that date:

(i) that the demised premises:

(a) are available to let on the open market without a fine or premium with vacant possession by a willing landlord to a willing tenant for a term of ten years or the residue then unexpired of the term of this lease (whichever be the longer);

(b) are to be let as a whole subject to the terms of this lease (other than the amount of the rent hereby reserved but including the provisions for review of that rent);

(c) are fit and available for immediate occupation;

(d) may be used for any of the purposes permitted by this lease as varied or extended by any licence granted pursuant thereto . . .

(B) but disregarding:

(i) any effect on rent of the fact that the lessee its sub-lessees or their respective predecessors in title have been in occupation of the demised premises;

. . .

(iii) any increase in rental value of the demised premises attributable to the existence at the relevant review date of any improvement to the demised premises or any part thereof carried out with consent where required . . .

(iv) any increase in rental value of the demised premises attributable to any buildings erected thereon since January 1st, 1986."

10 In one sense, the issue between the parties in these proceedings can be described as being the proper meaning and effect of cl. 3(B)(iv) but, as I shall say, it can be described more specifically.

11 In the proceedings before Pizzarello, A.J., both parties accepted that the effect of cl. 3(B)(iv) was that any increase in value resulting from the construction of the Rotunda should be disregarded for the purposes of assessing the new rent. They disagreed, however, as to what this meant in practice in the valuation. The dispute was described by the judge in these terms (1995–96 Gib LR at 325):

"The plaintiff [Blands] contended that the rent should be based on the rental value of the ground alone because the Rotunda Building cannot be taken into account pursuant to the provisions of cl. 3(B)(iv). It submitted further that at the date of the lease in 1989, 'the demised premises' meant the premises demised at the time,

namely the Rotunda Building, as the old building did not exist. The defendant [the Attorney-General] contended that the revised rent should be based at rack rent on the rental value of the premises as they stood before the building was demolished. The defendant accepted that the Rotunda cannot be taken into account."

12 Later in his judgment, the learned judge said (*ibid.*, at 328):

"Clause 2 of the *habendum* makes it clear to me that the reference to works of development and construction refers to works which have been completed. The expression is in the past tense. The draftsman knew what the situation on the ground was at the time the lease was signed in 1989.

The premises described in the First Schedule describe perfectly the Rotunda Building."

13 Later he said (*ibid.*, at 329):

"In my view, on the true construction of the lease, the old buildings are not to be taken into account and therefore a declaration is made that on any rent review the new rent is to be assessed on the basis of the market value of the ground rent alone, disregarding any buildings constructed thereon previous to January 1st, 1986 or any building which may have been constructed thereon prior to January 1st, 1986 and subsequently demolished."

14 There has been no appeal against that decision and, although Mr. Isola, for the Attorney-General, was somewhat reluctant to accept it, in my judgment, it was correct. The present summons proceeded on that basis.

15 The disagreement between the parties which has led to the present proceedings emerges from a comparison of the valuations of the respective valuers. The valuer for Blands, when describing his method of valuation, says at para. 5.3 of his report:

"The parties are both agreed that the primary method for calculating the yearly rent should be the residual site-value method. Furthermore, the parties have been able to agree the basic elements of such a calculation . . . The method employed calculates a capital value of the site which then must be converted into a yearly rent on the basis of the assumed terms of the hypothetical lease set out in para. 5.2."

16 At para. 5.4, under the heading: "Completed development to be assumed," he says:

"The lease makes it quite clear that the demised premises include all the buildings which are currently erected on the site, but then we

must assume, in accordance with the rent review provisions, that any increase in rental value as a result of these buildings being erected should be disregarded. This means that, at each review, the residual valuation must assume that the current development is being constructed on the site, regardless of whether or not it would have been appropriate to do so at the review date. The parties are not being asked at each review to speculate on the optimum development for the site, since this would be at odds with the terms of the lease."

17 The valuer for the Governor does not disagree with para. 5.3 of Blands' valuation. He does, however, contest the proposition set out at the end of para. 5.4. He says at the beginning of para. 8 of his valuation:

"We are required under the terms of the lease, as amplified by the decision of the Supreme Court, to consider the annual rental value of the subject property as a cleared site capable of development for the purposes allowed for within the lease."

He then postulates the construction on the site of a supermarket with 30,000 sq. ft. of gross space and car-parking. He calculates a capital value, deducts the cost of construction, finance, fees and developer's profit, and thus arrives at a site value. He then decapitalizes that to arrive at a rent of £1 per square foot of the site area, *i.e.* £92,905.

18 Since the issue thrown up by the respective valuations was again as to the proper interpretation of the lease, Blands' solicitors took out a construction summons on March 15th, 1999. The questions posed in that summons are:

"1. Whether . . . the arbitrator, in determining the rent payable and the review date pursuant to the Third Schedule of the lease, should do so on the basis either—

(a) that the demised premises were available at the date of assessment on the terms and conditions of a hypothetical lease (disregarding any increase in the rental value of the demised premises attributable to any buildings erected thereon since January 1st, 1986) containing the same terms and conditions other than as to quantum of rent as those subsisting between the actual parties to the original lease; or

(b) that the demised premises without any buildings thereon were available at the review date for letting for development as a bare site on the terms and conditions of the lease other than as to the amount of rent, such development being restricted to uses permitted by cl. 3(r) of the lease."

19 Question (a) does not say so in terms, but is obviously intended to mean that it is to be assumed that the only notional development on the

site for the purposes of the valuation is that the Rotunda was to be constructed on the site. The learned Chief Justice understood the question in this sense.

20 At the conclusion of his judgment, the Chief Justice said:

> "On my reading of the Third Schedule to the new lease, and with particular reference to para. 3(B)(iv), the parties must devise a computation on a review of rent which disregards any increase in rental value of the demised premises attributable to the building of the Rotunda. However, that does not mean that the parties are to assume the non-existence or demolition of the Rotunda, for the Rotunda forms part of the demised premises for which a revised rent is to be computed. That is the approach adopted by Blands' valuer, as I understand the position. To assume the non-existence or demolition of the Rotunda or, to put it another way, to disregard its existence other than for the purposes of attributing any increase in rental value because of it, is to go outside the terms of the lease and is to introduce a hypothesis on a hypothesis.
>
> For these reasons, I prefer the construction attached to the new lease put forward by Blands, and I hold that the construction set out at para. 1(a) of the originating summons is the correct construction."

It is against that decision that the Attorney-General now appeals.

21 Mr. Isola, for the Attorney-General, submits that the requirement in Clause 3(B)(iv) to disregard any increase in value attributable to the buildings constituting the Rotunda inevitably means that the valuer is required to arrive at a site value. Both valuers accept that in order to arrive at the value of the cleared site, it is necessary to decide what potential for development the site possesses. Mr. Stagnetto, Q.C., for Blands, in argument was not disposed to accept this second formulation but, in effect, his valuer adopted it.

22 It is at this point that the true issue between the valuers is reached. Mr. Isola argues that the valuers were required to decide what form of development, complying with the terms of the lease, would a hypothetical willing tenant consider most profitable and likely as at January 1st, 1992. Clause 3(r) of the lease permits a range of uses. Clause 3(c) specifically envisages building on the demised premises, subject to the requirement of obtaining the lessor's consent to the plans of such building. In accordance with s.5(2) of the Land Law and Conveyancing Ordinance, as amended in 1957, such consent is not to be withheld unreasonably, and it can therefore safely be assumed that it will be granted. He submits that his valuer's approach was therefore correct and the learned Chief Justice's decision was wrong.

23 Mr. Stagnetto, for Blands, submits that the requirement in cl. 3(B)(iv) to disregard the increase in value resulting from the construction of the Rotunda does not mean that it must be assumed that the Rotunda does not exist. So far I agree with him. Mr. Stagnetto's submission continues that in deciding what development of the notional clear site can properly be assumed, Pizzarello, A.J. has found that "the demised premises" means the land plus the Rotunda, a state of affairs which must therefore be assumed to continue for the whole duration of the lease. Thus, only the notional reconstruction of the Rotunda would comply with the terms of the lease. In effect, Mr. Stagnetto submits, the whole purpose of entering into a new lease in 1989 was to grant the lessee a new and longer term within which to benefit from the Rotunda which it had so recently constructed: see cl. 2 of the *habendum*. The notional new lease would contain that term. It must, therefore, follow that the only development on the site which complied with the terms of the lease would be the Rotunda.

24 We were referred by counsel to a number of English decisions. However, none of them dealt specifically with the point at issue in this case. The only case I have found of any assistance is the decision of the English Court of Appeal in *Basingstoke & Deane Borough Council* v. *Host Group Ltd.* (1). The facts of that case, though in some ways similar, differed in important respects from those of the present case. As here, the demised premises were a plot of land with a building on it, a newly-constructed public house, and the lease was entered into after the construction of the building, although the term was expressed to commence before the public house had been built. The user covenant restricted the use to a public house. The rent review clause provided for the assessment of a reasonable current ground rental value on the basis that the demised premises were a bare site only, clear of buildings. There was, however, no express requirement that the notional new lease or the review should be on the same terms save as to rent as those of the existing lease. The issue was whether such a term could be implied, thus not permitting the valuer to assume any use of the site other than as a public house. The Court of Appeal held that such a term was to be implied.

25 It will be seen that because the user clause was so narrow, no issue arose as to the possible use of the site for any other purpose if the new lease was to be assumed to be on the terms of the existing lease. Thus, the issue in the present case did not arise in that case. There is, however, a short but helpful passage to which I shall refer later in the judgment of Nicholls, L.J., who gave the judgment of the court. It reads ([1988] 1 All E.R. at 827):

> "The evidence before the judge consisted of little more than the lease itself. There was no evidence of any special circumstances

surrounding the execution of the lease. The court was left to draw such relevant inferences as it could from the terms of the lease. One of the inferences which the judge drew was that, as recited, the original tenant had built the public house buildings on the landlord's site, at its own expense, before the lease was granted. Neither party disputed that inference. The judge further inferred, in our view correctly, that whilst one purpose of this rent review clause was to protect the landlord from inflation, another purpose, shown by the choice of a bare site clear of all buildings as the basis on which the valuer was to proceed, was to protect the tenant who had erected the buildings at its expense. The judge observed, and we agree, that the purpose underlying the choice of this clause appeared to be that the landlord and the tenant should share further increases in the value of the developed site on a fair basis."

26 Despite the force of Mr. Stagnetto's submissions, I do not accept them. Pizzarello, A.J., in his judgment of July 19th, 1996, was considering this rent review for the period commencing on January 1st, 1992. For that period the phrase in the First Schedule defining the premises demised as "that piece of ground . . . together with the buildings erected thereon" referred to the buildings comprising the Rotunda, since at that review date they were the buildings erected on the site. If, however, at some future date, with the lessor's consent, different buildings were erected on the site, at the next following review date the definition of the demised premises would be apt to cover the site with those new buildings upon it. It would then be the increase in value attributable to those buildings which would have to be disregarded under cl. 3(B)(iv) of the Third Schedule.

27 As to Mr. Stagnetto's point that the words in cl. 2 of the *habendum* recite the construction of the Rotunda as part of the consideration for the grant of the lease, they could equally well, in my view, refer to the construction of new buildings at some future date as part of the consideration for the grant of the notional new lease at the date of the next rent review.

28 It could be argued, though Mr. Stagnetto did not submit, that the lessee's covenant in cl. 3(d) to keep the buildings in good repair, if read on its own, could be construed as prohibiting demolition of the buildings comprising the Rotunda at any time during the term of the lease, even for the purpose of redevelopment which both lessee and lessor wished to take place. However, when cl. 3(d) is read together with the other covenants and clauses in the lease to which I have referred, it is my view that it can properly be construed as applying to the Rotunda and to any other building added to the Rotunda or built in its place with the lessor's consent. Such a construction would not prevent demolition for the

purposes of agreed redevelopment of the site, and would satisfy the purpose of cl. 3(d), *i.e.* to protect the value of the lessor's interest during and at the end of the term of the lease.

29 The approach adopted by Blands' valuer has the result that no practical effect is to be given to the lessee's covenants in cl. 3(c) and (r) which envisage the construction of buildings on the demised premises at some future date with a range of permitted uses. That cannot be correct.

30 I therefore conclude that the Government's valuer proceeded on a basis which complied with the terms of the lease when he assumed a development of the site by the notional new lessee, with buildings and uses other than those of the Rotunda. I appreciate that the issue was not argued before the Chief Justice as I have expressed it. It is therefore not surprising that he felt constrained to choose between the two questions set out in the summons. However, in my judgment, the correct answer to the questions posed in the construction summons was not that set out in para. 1(a).

31 I now turn to consider a factor which was not reflected in para. 1(b) of the summons nor in either valuation, but which we invited counsel to consider, and upon which we were addressed briefly. Clause 3(B)(iv) of the Third Schedule to the lease requires any increase in rental value of the demised premises attributable to buildings erected since January 1st, 1986 to be disregarded for the purpose of assessing the rent at the review date. It does not require the existence of the Rotunda to be disregarded for any other purpose, nor does it require that any lessening of rental value attributable to the Rotunda is to be disregarded. If, therefore, a valuer is seeking to arrive at a rental value by postulating the possible redevelopment of the site with buildings other than the Rotunda, he must take account of the fact that the Rotunda exists. Thus, in my view, such a valuation must properly include a sum reflecting the costs of and consequent upon the demolition of the Rotunda. I have thought it right to express this view in case there should later be disagreement about the matter, with the prospect of yet a further application to the court.

32 It is at this point that I have found the short passage from the judgment I have quoted from the *Basingstoke* case (1) helpful. As in that case, it is, in my view, clear that the commercial purpose of the present rent review clause is to seek to ensure that future increases in the value of the developed site are shared fairly between the lessor and the lessee. The lessor should benefit by way of an increase in rent from any increase between review dates of the value of the site as such, taking into account any potential it has for development. However, any increase in value which results from the construction by the lessee of new buildings should be for his benefit and not be reflected in increased rent.

33 Although I have reached the conclusion that the Government's valuer has adopted a basis of valuation which complies with the terms of the lease, it is for the arbitrator, not this court, to decide whether he makes out his case on that basis. The hypothetical prospective lessee has to be a willing tenant. It must be assumed that he will only willingly contemplate demolishing the Rotunda, constructing a new building and foregoing income in the meantime if he decides that in the end he will obtain greater profits from adopting that course of action rather than from carrying on trade in the Rotunda without interruption. Which course he would probably decide to adopt is one of the matters with which the arbitrator will no doubt be concerned.

34 Having expressed that note of caution, on the issue of the construction of the lease which is before this court, neither of the questions posed in the summons wholly reflects what in my opinion is the correct basis of valuation, though para. 1(b) is closer. I would direct that this question be amended to read:

> "(b) that the demised premises are to be valued as if they were a clear site without any buildings thereon, with the option for the lessee either to retain the existing buildings comprising the Rotunda or to demolish those buildings and redevelop in accordance with the terms and conditions of the lease other than as to the amount of rent, such redevelopment being restricted to uses permitted by cl. 3(r) of the lease."

35 I would therefore allow the appeal and grant a declaration that para. 1(b), as so amended, is the correct construction.

NEILL, P. and **CLOUGH, J.A**. concurred.

Appeal allowed.