

A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—11TH AND 12TH DECEMBER 1969

COURT OF APPEAL—13TH, 16TH, 17TH, 18TH AND 19TH NOVEMBER 1970

HOUSE OF LORDS—24TH AND 25TH APRIL AND 14TH JUNE 1972

B **Banning v. Wright (H.M. Inspector of Taxes) (1)**

*Income tax, Schedule D—Excess rents—Case VIII rents—Sublease rents—Subletting in breach of covenants in head lease—Payments to head lessor in consideration of subsequent consent—Whether paid as consideration for variation or waiver of lease terms—Income Tax Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.10), s.175; Finance Act 1963 (c.25), ss.20(6) and 22(4) and Sch. 4, paras. 8 and 9.*

C *Income tax, Schedule D—Further assessment—Discovery—Appeal settled by agreement—Unauthorised deduction allowed—Whether further assessment competent to withdraw it—Income Tax Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.10), ss. 50(2), 175 and 510.*

D *The Appellant was tenant of two shops under a lease for seven years from March 1958, with an option to renew for a further seven years. He sublet them for use as a betting shop and a store and offices respectively in breach of covenants against subletting for such purposes without the lessor's consent. On discovering this, the lessor threatened proceedings for re-entry. In September 1963 the lessor offered to settle for £1,250 and the surrender of the option for renewal, and in October 1963 he offered instead to accept £3,000 and allow the option to stand.*  
E *The offer stated that the £3,000 was based on rents paid by the subtenants. The lessor accepted the Appellant's request to split the £3,000 into £1,250 and £1,750, but only on the terms that nothing was returnable if the option should not be exercised. On 10th February 1964 the Appellant paid the lessor £3,000 by two cheques for £1,250 and £1,750 respectively.*

F *On 23rd September 1963 the Appellant's accountants told the Inspector of Taxes that his landlords had challenged his right to sublet and were demanding that the sublease rents to the extent of £1,250 should be surrendered to them; they asked for that sum to be deducted in the assessment to income tax in respect of excess rents made on the Appellant for the year 1962–63, which was then under appeal. The Inspector agreed in principle and asked to be told when the question of the subletting was finally determined. After further correspondence, in which*  
G *they did not mention the lessor's amended offer, the accountants stated on 11th March 1964 that the arrangements previously notified to the Inspector had been confirmed and payment made. The appeal against the assessment was then settled by reducing it to an agreed sum which took account of the deduction requested. Following a letter from the accountants in June 1965 claiming a measure of relief for later years in respect of the balance of the £3,000 it emerged that the original*  
H *offer had been superseded, and on reviewing the facts a new Inspector raised an additional assessment for 1962–63 to disallow the deduction of £1,250.*

I *On appeal against the additional assessment for 1962–63 the Appellant contended that there had been an agreement taking effect under s.510, Income Tax Act 1952, to allow the deduction, which was in the nature of a concession, and that in the absence of evidence that new material facts had been discovered the agreed concession could not be withdrawn by an additional assessment. On appeal against*

(1) Reported (H.L.) [1972] 1 W.L.R. 972; 116 S.J. 509; [1972] 2 All E.R. 987.

*an assessment in respect of excess rents for the year 1963-64 and assessments under Case VIII of Schedule D for the years 1964-65 and 1965-66, he contended that the sums of £1,250 and £1,750 making up the £3,000 were each paid as consideration for the variation or waiver of the terms of the lease and so ranked for relief under para. 9 of Sch. 4 to the Finance Act 1963. The Special Commissioners held that neither part of the £3,000 was paid as consideration for the variation or waiver of the terms of the lease, and found that the first assessment for 1962-63 was settled on the basis of information which was not accurate.*

*In the Court of Appeal the Crown did not maintain that the Inspector was not in possession of the relevant facts when he agreed to the deduction of £1,250 for 1962-63, but contended that, since the deduction was admitted by the Appellant to have been extra-statutory, there could have been no agreement that he was entitled to it.*

*Held, in the Court of Appeal, that, since it raised the precise question decided by the agreement leading to the amendment of the original assessment, the additional assessment for 1962-63 in respect of the £1,250 was not sustainable.*

*Held, in the House of Lords (Lord Morris of Borth-y-Gest dissenting), that the £1,750, having been paid for the lessor's abandonment of the right to rely on the specified breaches of covenant to bar the Appellant from exercising his option to renew, was paid in consideration of the waiver (or alternatively the variation) of a term of the lease.*

#### CASE

Stated under the Income Tax Management Act 1964, s. 12(5), and the Income Tax Act 1952, s. 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 14th February 1968 Bernard John Banning (hereinafter called "the Appellant") appealed against the following assessments to income tax:

	Description of profits	Amount of assessment
1962-63 (further)	Excess rents .. .. .	£1,250
1963-64 (further)	Excess rents .. .. .	£1,162
1964-65	Income from property .. .. .	£1,557
1965-66	Income from property .. .. .	£1,600

2. Shortly stated, the questions for our decision were:

(a) whether and to what extent the sum of £3,000 paid by the Appellant in circumstances hereinafter mentioned was deductible from rents received by the Appellant, pursuant to s. 175 of the Income Tax Act 1952 and/or paras. 8 and 9 of Sch. 4 to the Finance Act 1963;

(b) whether the further assessment for the year 1962-63 in the amount of £1,250 was a valid assessment on the ground that there was evidence of a discovery on the part of the Respondent Inspector of Taxes.

3. The following documents were proved or admitted before us:

- (a) Copy lease dated 16th September 1959 hereinafter mentioned.
- (b) Agreed bundle of copy correspondence.
- (c) Agreed bundle of copy assessments.

Copies of such of the above as are not annexed hereto as exhibits are available for inspection by the Court if required.

A 4. We find the following facts proved or admitted:

(1) By the lease (hereinafter called "the lease") dated 16th September 1959 and made between (1) James Keay and William Edward Keay (therein called "the Lessors") and (2) the Appellant (therein called "the Lessee") certain premises, including two shops described as 388 and 390 Lichfield Road, Aston, were demised to the Appellant for a term of seven years from 17th March 1958 at the yearly rent of £330.

B (2) The lease contained the following covenants (*inter alia*) on the part of the lessee:

"2. . . (3) To keep the demised premises including the drains and sanitary and water apparatus and all fixtures and additions thereto in tenable repair and condition throughout the term and without any alterations except such as shall be sanctioned in writing by the Lessors and to yield up the same in such repair and condition (except as aforesaid) at the determination of the term

C (4) To paint with two coats of good lead and oil colour in a workman-like manner all the outside parts of the demised premises and also will once in every seven years of the said term and in each case the painting to be done in the last year of the term as well in like manner paint paper and colour all the inside parts of the demised premises which are usually painted papered and coloured

D (5) Not without the previous consent in writing of the Lessors to carry on or to permit or suffer to be carried on in or upon the demised premises or any part thereof any trade or business whatsoever other than that of a Garage Proprietor Tyre Repairer and Distributor Motor Sales Dealer and the like . . . . .

E (8) Not to assign underlet or part with the possession of the demised premises or any part thereof without the written consent of the Lessors such consent however not to be unreasonably withheld in the case of a respectable and responsible person . . . . .

F (12) If the Lessee shall desire to renew the present demise at the expiration of the last year of the said term and shall give to the Lessors three months notice in writing of such his desire and if the Lessee shall up to the time of the giving of notice have paid the rent and performed and observed the covenants on his part hereinbefore contained then the Lessors will grant to the Lessee a new Lease of the said premises for a further term of seven years to commence from the date of the determination of this demise and shall contain similar covenants and conditions to those herein contained except this covenant for renewal".

G (3) The lease also contained the following proviso for determination and re-entry:

H "4(i) If the rent hereby reserved or any part thereof shall at any time be unpaid for twenty one days after becoming payable (whether formally demanded or not) or if the covenants on the part of the Lessee herein contained shall not be performed or observed or if the Lessee shall become bankrupt or make any assignment for the benefit of his creditors or suffer any distress or process of execution to be levied upon his goods or in the event of the Lessee being a limited company shall be wound up whether voluntarily or compulsorily (unless in the case of a voluntary liquidation for the purpose of reconstruction or amalgamation) the Lessors may forthwith or at any time thereafter enter upon the said premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to the right of action of the Lessors in respect of any antecedent breach of any of the Lessee's covenants herein contained".

(4) In or about February 1960 the freehold reversion in the said premises was acquired by Ansells Brewery Ltd., and subsequently it became vested in a holding company, The Holt Brewery Co. Ltd. (hereinafter called "the lessors"). A

(5) Shortly after execution of the lease the Appellant, after taking advice which was subsequently found to be erroneous, sublet parts of the demised premises without obtaining any previous consent in writing of the lessors. He sublet 388 Lichfield Road to one Donnelly for use as a betting shop, and 390 Lichfield Road to Dowley & Darby (Soft Ices) Ltd. for use as a store and offices. Neither use was for the purpose of a trade or business of a type specified in clause 2(5) of the lease. B

(6) By letter to the Appellant dated 22nd August 1962, the said Ansells Brewery Ltd. alleged contravention of various terms of the lease, and referred in particular to subclauses (3), (4), (5) and (8) of clause 2. C

(7) By letter to the Appellant dated 15th February 1963, the lessors enclosed a notice in duplicate under s. 146 of the Law of Property Act 1925. The notice read as follows:

"In the matter of a Lease dated 15th September 1959 and made between James Keay and William Edward Keay of the one part and Bernard John Banning of the other part. To Bernard John Banning of 513 Lichfield Road Aston Birmingham 6 the Lessee of All Those two shops and premises with the outbuildings thereto belonging known as Numbers 388 and 390 Lichfield Road Aston Birmingham comprised in a Lease dated the 15th day of September 1959 and made between James Keay and William Edward Keay of the one part and Bernard John Banning of the other part the reversion whereon is now vested in The Holt Brewery Company Limited whose registered office is at Aston Brewery Aston Cross Birmingham 6 and to all others whom it may concern. We, Pinsent & Co., of 6 Bennetts Hill Birmingham 6 Agents for the above mentioned The Holt Brewery Company Limited Hereby Give You Notice as follows: D

1. By the above mentioned Lease you the said Lessee covenanted that you would not without the previous consent in writing of the Lessors carry on or permit or suffer to be carried on in or upon the demised premises or any part thereof any trade or business whatsoever other than that of a Garage Proprietor Tyre Repairer and Distributor Motor Sales Dealer and the like. E

2. The above mentioned covenant has been broken and the particular breaches complained of are the underletting to J. Donnelly of No. 388 Lichfield Road for use as a betting office and the underletting of No. 390 Lichfield Road to Messrs. Dowley and Darby (Soft Ices) Limited for use as a store and offices without the previous consent in writing of the Lessors. G

3. We require you to remedy the afore-mentioned breaches of covenant and to make compensation therefor in money to us. 4. If you fail to comply with this Notice within twenty-eight days of the date hereof it is the intention of The Holt Brewery Company Limited to re-enter upon the demised premises and forfeit the said Lease and claim damages for breach of covenant. Dated 15th February, 1963." H

(8) Thereafter negotiations proceeded in correspondence between the lessors' solicitors (Messrs. Pinsent & Co.) and the Appellant's solicitors (Messrs. Owen & Co.), culminating in a settlement. This settlement took the form of an agreement the terms of which were set out in letters dated 17th October 1963 and 9th December 1963. Copies of all letters which were produced and read at the hearing as forming part of the negotiations are annexed hereto in the bundle lettered "A"(1). I

A (9) In accordance with the terms of the agreement the Appellant on 10th February 1964 paid the lessors the sum of £3,000, and the lessors thereafter discontinued the proceedings which they had set in motion. The sum of £3,000 was paid as to £1,250 by one cheque and as to £1,750 by another cheque.

B (10) The original assessment in respect of excess rents for the year 1962-63 was in the amount of £500. On the basis of information supplied by the Appellant's accountants (Messrs. Russell, Durie, Kerr, Watson & Co.) in their letter dated 23rd September 1963 to H.M. Inspector of Taxes, and confirmed in a subsequent letter dated 11th March 1964 between the same parties, the said assessment of £500 was in March 1964 reduced to £310. Following further correspondence between the same parties an additional assessment for the year 1962-63 was made in the amount of £1,250, notice thereof being issued on 16th January 1967. Copies of all letters which were produced and read at the hearing as forming part of this correspondence are annexed hereto in the bundle lettered "B"<sup>(1)</sup>.

(11) Copies of the notices of assessment relating to the years under appeal, together with a memorandum dated 26th July 1967 from H.M. Inspector of Taxes, are annexed hereto in the bundle lettered "C"<sup>(2)</sup>.

D 5. It was contended on behalf of the Appellant:

(a) (i) that the consent of the lessor to the subleases in favour of J. Donnelly Esq. and Dowley & Darby (Soft Ices) Ltd. was retroactive consent because the subleases had commenced to run before the lessor communicated its consent to the lessee;

E (ii) that the retroactive consent of the lessor constituted a variation and/or waiver of the terms contained in clause 2(5) of the lease;

(iii) that it was a necessary consequence of the receipt of that part of the consideration of £3,000 which amounted to £1,250 that the claims of the lessor under clause 2(5) and clause 2(8) and clause 4 of the lease were extinguished;

F (iv) that it was a necessary consequence of the retroactive consent of the lessor to the subleases and the receipt of that part of the consideration of £3,000 which amounted to £1,750 that the claim of the lessor under clause 2(12) of the lease for the surrender of the option of renewal was extinguished;

(v) that the sum of £3,000 as apportioned by the lessee fell within the ambit of s. 22(4) of the Finance Act 1963 and so ranked for relief under the provisions of paras. 8 and 9 of Sch. 4 to that Act;

G (b) (i) that there had been a conditional agreement that a deduction in the sum of £1,250 should be allowed in determining the assessment in respect of excess rents for 1962-63;

(ii) that the deduction in the sum of £1,250 was in the nature of a concession;

(iii) that the agreement was to become unconditional and did become unconditional as soon as the payment in the sum of £1,250 was made to the lessee, and consequently there was for the purposes of s. 510 of the Income Tax Act 1952 an agreement or determination which could not be subsequently reopened;

H (iv) that, in the absence of any evidence on the part of H.M. Inspector of Taxes that any new material facts had emerged since the determination of the assessment for 1962-63 by his predecessor, it was not possible to withdraw the agreed concession by means of an additional assessment in respect of the above year.

<sup>(1)</sup> See pages 432 and 436-7 *post*.

<sup>(2)</sup> Not included in the present print.

6. It was contended on behalf of the Inspector of Taxes:

(a) (i) that no part of the said £3,000 paid by the Appellant to the lessors was deductible in computing the Appellant's liability to assessment either under s. 175 of the Income Tax Act 1952 or under Sch. 4 to the Finance Act 1963;

(ii) that no part of the said £3,000 was payment of rent under the lease;

(iii) that no part of the said £3,000 was consideration for the waiver or variation of any of the terms of the lease, within the meaning of s. 22(4) of the Finance Act 1963; and

(iv) that the appeal should be dismissed;

(b) (i) that the further assessment for 1962-63 in the amount of £1,250 was validly made; and

(ii) that the appeal on this aspect should be dismissed.

7. The following cases were cited by the parties: *Glenboig Union Fireclay Co. Ltd. v. Commissioners of Inland Revenue* 12 T.C. 427; 1922 S.C. (H.L.) 112; *Duke of Westminster v. Commissioners of Inland Revenue* 19 T.C. 490; [1936] A.C. 1; *Hose v. Warwick* (1946) 27 T.C. 459; *Cenlon Finance Co. Ltd. v. Ellwood* 40 T.C. 176; [1961] Ch. 634; [1962] A.C. 782; *Kidston v. Aspinall* (1963) 41 T.C. 371; *Society of Medical Officers of Health v. Hope* [1960] A.C. 551.

8. We, the Commissioners who heard the appeal, took time to consider our decision and give it in writing on 10th June 1968 as follows:

(1) The main question for our decision is whether, and if so to what extent, the sum of £3,000 paid by the Appellant is deductible against rents received, pursuant to s. 175 of the Income Tax Act 1952 and s. 22 of the Finance Act 1963 and paras. 8 and 9 of Sch. 4 to the latter Act. The answer depends on whether in the events which happened that sum or part thereof became payable by the Appellant as consideration for the variation or waiver of any of the terms of the lease dated 16th September 1959 (hereinafter referred to as "the lease") and so was a sum to which the provisions of s. 22(4) of the Finance Act 1963 apply.

(2) The notice dated 15th February 1963 complained of specified breaches of covenant and required the Appellant to remedy them and make compensation therefor in money. Following this notice negotiations took place, and on 16th September 1963 the lessors' solicitors wrote to the Appellant's solicitors saying that the lessors were prepared "to settle this matter" on (*inter alia*) the Appellant's (a) paying the sum of £1,250 and (b) undertaking to surrender the lease at the end of the current term, namely March 1965, and relinquishing "the right to an option for renewal".

After having received a letter from the Appellant's solicitors dated 9th October 1963 (a copy of which was not before us) the lessors' solicitors wrote again to the Appellant's solicitors on 17th October 1963, stating that the lessors were prepared to consent to the underlettings referred to in the notice dated 15th February 1963 and "will also drop their claim for a surrender of your client's right to the option of renewal which was contained in the original lease" on the terms (*inter alia*) that the Appellant should pay the sum of £3,000.

After a question of apportionment of this sum had been raised the lessors' solicitors wrote on 9th December 1963 to the Appellant's solicitors saying that the lessors had no objection to the Appellant's apportioning the sum

A of £3,000. They added that they wished to make it quite clear that the sum of £1,750 would not be returned should the Appellant decide not to take up the option.

Thereafter payment was made by the Appellant of the sum of £3,000.

B (3) Having consented as part of the settlement that was reached to the underlettings, the lessors thereupon ceased to seek any remedy by re-entry and forfeiture or to pursue any claim to damages for breach of covenant. They also no longer claimed the surrender of the Appellant's option of renewal contained in clause 2(12) of the lease, a right which under the terms of that sub-clause was dependent on (*inter alia*) the lessee's having up to the time of the giving of notice "performed and observed the covenants on his part hereinbefore contained".

C (4) Having given careful consideration to the evidence before us as to the terms upon which the £3,000 was paid and to the arguments addressed to us, we are of the opinion that the sum of £3,000 was, as to £1,250 thereof, paid in respect of consent to the underlettings, such consent taking effect in relation only to the future in accordance with the terms of the lease, but being given on the understanding that as respects what had happened previously D the lessors would no longer seek any remedy by re-entry and forfeiture or claim damages for breach of covenant. In these circumstances the £1,250 did not in our view become payable either wholly or partly as consideration for the variation or waiver of any of the terms of the lease.

E (5) We are further of opinion that the sum of £3,000 was, as to the balance of £1,750, paid to ensure that the lessors would drop their claim for a surrender of the Appellant's "right to the option of renewal". The wording of clause 2(12) of the lease was left unaltered, and we see no sufficient reason to suppose that the dropping of the claim of itself impliedly involved assent to any variation of the terms of that subclause. We are accordingly of opinion, and hold, that the balance of £1,750 also did not become payable either wholly or partly as consideration for the variation or waiver of any of the terms of the lease.

F (6) For the year 1962-63 there was also raised before us the question whether the additional assessment for that year was validly made. As regards this matter, the Appellant's accountants stated in their letter dated 23rd September 1963 that "the landlords have challenged Mr. Banning's right to sublet part of the property and are demanding that rents to the extent of £1,250 be surrendered to them". In a schedule enclosed with this letter containing a computation of excess rents this amount was shown as a deduction from the rents received. G

On 18th November 1963 the Appellant referred in a letter which he wrote to his solicitors to his "having been in communication with my Inspector of Taxes in connection with the original payment of £1,250 and having agreed the position arising with him . . ."

H On 30th January 1964 the Inspector of Taxes wrote a letter to the Appellant's accountants saying (*inter alia*) that he would

I "like to know what is the current position in relation to the sub-letting. I would have expected the out of court settlement to be more speedily determined but perhaps you could say what is delaying the final settlement. Since the Excess Rents are otherwise agreed at £310 for the year it would seem that tax on this amount could be paid now . . ."

Subsequently, in a letter dated 11th March 1964, the Appellant's accountants stated that: "We understand that the position with regard to subletting

by Mr. Banning has now been finalised and the arrangements previously notified to you confirmed and payment made.” A

The original assessment for the year 1962–63 was then adjusted to the sum of £310 on the basis of the information contained in the above letters dated 23rd September 1963 and 11th March 1964. The appeal before us was made against an additional assessment for that year in the sum of £1,250.

The question whether this additional assessment could validly be made depends on whether the particular point in question had been settled by the agreement reached as respects the original assessment pursuant to the provisions of s. 510 of the Income Tax Act 1952: see *Cenlon Finance Co. Ltd. v. Ellwood* 40 T.C. 176, per Upjohn L.J., at page 196. B

The passage from the letter dated 23rd September 1963 quoted above does not seem to us to have been a correct or adequate statement of the position, which was, shortly, that the lessors were threatening re-entry and forfeiture unless compensation was paid, such compensation being claimed in an amount based on rents from the underlettings. Further, the passage from the letter dated 11th March 1964 quoted above did not correct the inaccuracy. Thereafter, in a letter from the Appellant's accountants to the Inspector dated 24th June 1965, the position is again stated inaccurately, the £1,250 being described therein as “additional rent” and the £1,750 as “paid for the new Lease, as a premium”. It was not until 15th October 1965 that the Appellant's accountants wrote to the Inspector accurately summarising the position. C D

It was not contended before us that the Inland Revenue Department was aware at the material time of the terms of the letters dated 16th September 1963 and 17th October 1963. As we understand the position, the first assessment for the year 1962–63 was settled on the basis of the information contained in the letters dated 23rd September 1963 and 11th March 1964, which, as we have said, were in our view not accurate. E

On these facts we find, on the appeal made against the additional assessment, that the particular point in question had not been settled by agreement under s. 510 of the Income Tax Act 1952. We hold, accordingly, that the additional assessment for the year 1962–63 was validly made. F

(7) We leave figures to be agreed on the basis of our decision in principle set out above.

9. Figures were agreed between the parties on 10th October 1968, and on 29th October 1968 we determined the assessments:

- (a) by reducing the further assessment for 1962–63 to £1,158; G
- (b) by confirming the further assessment for 1963–64 in the amount of £1,162;
- (c) by confirming the assessment for 1964–65 in the amount of £1,557; and
- (d) by reducing the assessment for 1965–66 to £792.

10. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and on 1st November 1968 required us to state a Case for the opinion of the High Court pursuant to the Income Tax Management Act 1964, s. 12(5), and the Income Tax Act 1952, s. 64, which Case we have stated and do sign accordingly. H



A 11. The question of law for the opinion of the Court is whether our decision was erroneous in point of law.

B. James }  
G. R. East } Commissioners for the Special Purposes  
                  } of the Income Tax Acts

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B London, W.C.1.  
21st July 1969

The case came before Foster J. in the Chancery Division on 11th and 12th December 1969, when judgment was given in favour of the Crown, with costs.

*Marcus Jones* for the taxpayer.

C *J. Raymond Phillips Q.C.* and *Patrick Medd* for the Crown were not called upon to argue.

The following cases were cited in argument:—*Hose v. Warwick* (1946) 27 T.C. 459; *Glenboig Union Fireclay Co. Ltd. v. Commissioners of Inland Revenue* 12 T.C. 427; 1922 S.C. (H.L.) 112; *Duke of Westminster v. Commissioners of Inland Revenue* 19 T.C. 490; [1936] A.C. 1; *Dodd v. Haddock* (1964) 42 T.C. 229; *Davies v. Abbott* (1927) 11 T.C. 575; *Cenlon Finance Co. Ltd. v. Ellwood* 40 T.C. 176; [1961] Ch. 634; [1962] A.C. 782; *Hoystead v. Commissioner of Taxation* [1926] A.C. 155; *Society of Medical Officers of Health v. Hope* [1960] A.C. 551; *Lissenden v. C.A.V. Bosch Ltd.* [1940] A.C. 412; *Andrew v. Taylor* (1965) 42 T.C. 557; *Rex v. Commissioners of Taxes for St. Giles and St. George, Bloomsbury* (ex parte *Hooper*) 7 T.C. 59; [1915] 3 K.B. 768.

E **Foster J.**—This is an appeal by way of Case Stated by the Special Commissioners under the Income Tax Management Act 1964, s. 12(5), and the Income Tax Act 1952, s. 64, against an additional assessment to income tax made for the fiscal year 1962-63. Two questions are raised: first, whether and to what extent the sum of £3,000 paid by the Appellant, in circumstances which I will mention later, was deductible from rents received by the Appellant, pursuant to s. 175 of the Income Tax Act 1952 and paras. 8 and 9 of Sch. 4 to the Finance Act 1963, and, second, whether the further assessment for the year 1962-63 in the amount of £1,250 was a valid assessment on the grounds that there was evidence of a discovery on the part of the Respondent Inspector of Taxes.

G By a lease dated 16th September 1959, made between James Keay and William Edward Keay and the Appellant, certain premises including two shops described as 388 and 390 Lichfield Road, Aston, were demised to the Appellant for a term of seven years from 17th March 1958 at a yearly rent of £330. The lease contained the usual covenant to repair and to paint. Clause 2(5) of the lease was a covenant in these terms:

H “Not without the previous consent in writing of the Lessors to carry on or to permit or suffer to be carried on in or upon the demised premises or any part thereof any trade or business whatsoever other than that of a Garage Proprietor Tyre Repairer and Distributor Motor Sales Dealer and the like”.

Clause 2(8) was the usual covenant not to assign or underlet, and clause 2(12) was in these terms:

**(Foster J.)**

“ If the Lessee shall desire to renew the present demise at the expiration of the last year of the said term and shall give to the Lessors three months notice in writing of such his desire and if the Lessee shall up to the time of the giving of notice have paid the rent and performed and observed the covenants on his part hereinbefore contained then the Lessors will grant to the Lessee a new Lease of the said premises for a further term of seven years to commence from the date of the determination of this demise and shall contain similar covenants and conditions to those herein contained except this covenant for renewal ”.

The lease also contained the usual provision for determination and re-entry. In or about February 1960 the freehold reversion in the premises was acquired by Ansell's Brewery Ltd., and subsequently it became vested in a holding company, The Holt Brewery Co. Ltd., whom I will call “ the lessors ”.

Shortly after the execution of the lease, which was in September 1959, the Appellant sublet parts of the demised premises without obtaining any previous consent in writing of the lessors. The subletting was apparently done on advice, which was not only subsequently found to be wrong but for which he received damages. He sublet 388 Lichfield Road to one Donnelly for use as a betting shop, and 390 Lichfield Road to Dowley & Darby (Soft Ices) Ltd. for use as a store and offices. Neither use was for the purpose of a trade or business of the type mentioned in clause 2(5) of the lease.

By a letter to the Appellant dated 22nd August 1962, Ansell's Brewery Ltd. alleged contravention of the various clauses of the lease, and referred in particular to subclauses (3), (4), (5) and (8) of clause 2. Nothing appears to have been done by the Appellant to remedy that situation. By a letter to the Appellant dated 15th February 1963, the lessors enclosed the usual notice under s. 146 of the Law of Property Act 1925, and mentioned in that letter the covenant in regard to the user and the covenant in regard to the underletting of the premises. It would seem, although there is no finding of fact, that the lessors did in fact start proceedings for re-entry, forfeiture and possession of the premises. Negotiations proceeded in correspondence between the lessors' solicitors and the Appellant's solicitors and they eventually arrived at a settlement. The settlement took the form of an agreement in three letters, which I will read. The first was dated 16th September 1963, when the solicitors to the lessors wrote to the solicitors to the lessee in these terms:

“ We refer to our letter of the 12th September. Our clients are prepared to settle this matter by your client: (1) Paying the sum of £1,250 0s. 0d. (2) Paying the rent now outstanding from the 24th June 1962. (3) Undertaking to surrender his Lease at the end of the current term, namely, March 1965, and relinquishing the right to an option for renewal. (4) Complying with the repairing covenants in the Lease. ”

The next letter is dated 17th October 1963, when the lessors' solicitors again wrote to the lessee's solicitors:

“ Our clients are prepared to consent to the lease to Dowley & Darby (Soft Ices) Ltd. and to the sub-letting of the office to J. Donnelly for use as a betting office, and will also drop their claim for a surrender of your Client's right to the option of renewal which was contained in the original lease on the following terms: 1. Your Client pays the sum of £3,000. 2. Your Client pays the rent now outstanding from 24th June, 1962. 3. Your Client complies with the repairing covenants in the Lease. The figure of £3,000 is based on the terms of the underlease to Dowley & Darby

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A (Soft Ices) Ltd., and on the assumption that Donnelly pays a rental of £12 per week, inclusive of rates.”

On 9th December 1963 is the third letter, in which the lessors' solicitors wrote to the lessee's solicitors:

B “Our Clients inform us that they have no objection to your Client apportioning the sum of £3,000. We wish however to make it quite clear that the sum of £1,750 0s. 0d. will not be returned, should your client decide not to take up the option. We shall be obliged, therefore, to receive your client's cheque for £3,000 0s. 0d. together with the rent outstanding from the 24th June 1962, as soon as possible.”

C In accordance with the terms of that agreement, on 10th February 1964 the Appellant paid to the lessors the sum of £3,000, and the lessors thereafter discontinued the proceedings which they had set in motion. The sum of £3,000 was paid as to £1,250 by one cheque and as to £1,750 by another cheque.

The first question depends on whether the sum of £3,000 or part of it was paid as consideration for the variation or waiver of any terms of the lease within the meaning of s. 22(4) of the Finance Act 1963, and I will read that subsection. It is in these terms:

D “Where, as consideration for the variation or waiver of any of the terms of a lease, a sum becomes payable by the tenant otherwise than by way of rent, the lease shall be deemed for the purposes of this section to have required the payment of a premium to the landlord (in addition to any other premium) of the amount of that sum; but in computing tax chargeable by virtue of this subsection the duration of the lease shall be treated as not including any period which precedes the time at which the variation or waiver takes effect or falls after the time at which the variation or waiver ceases to have effect, and notwithstanding anything in subsection (1) of this section rent treated as arising by virtue of this subsection shall be deemed to become due when the contract providing for the variation or waiver is entered into.”

F The question therefore is whether the payment of the sum of £3,000 was paid as consideration for the variation or waiver of any terms in the lease. In my judgment it was not so paid. It was paid by the lessee to the lessor as consideration for the lessor not to pursue his claim for re-entry or foreclosure and nothing else.

G The split of £3,000 into £1,250 to rent and £1,750 as premium for the covenant was conjured up by the Appellant's accountant to obtain a tax advantage from the lessors' original offer. This appears from the letter, which was not read to me, of 6th November 1963, where he says this:

H “However, we feel if the payment of £3,000 is divided as we suggest in our draft letter to Messrs. Owen & Co. the payment of £1,250 can be set against the 1962-63 excess rents assessment, as has been agreed with the Inspector of Taxes, subject to confirmation that this sum has in fact been paid. With regard to the balance of £1,750 it would appear that we would be able to claim this against excess rents assessments spread over the remaining term of your lease from the date of renewal.”

I On the second question the taxpayer makes two submissions. First, that the terms of the letters of 23rd September 1963 and 11th March 1964 constituted an agreement between the parties and therefore the Crown cannot go back on that bargain. There is plenty of authority that, where in certain cases the Crown and the taxpayer have come to an agreement, each party must abide by that

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agreement. But there can be no agreement where one party is not seized of the facts, as in this case. The letters of 23rd September 1963, 11th March 1964 and 24th June 1965 were, in my judgment, dishonest and untrue. I will read the letters. The first, 23rd September 1963, was from the Appellant's accountant to the Inspector of Taxes, and para. (2) reads as follows:

"(2) We enclose a schedule showing our computation of excess rents in this matter, and in this connection it seems to us that as regards 388/390 Lichfield Road, since the property does not belong to Mr. Banning, but is rented by him from the Holt Brewery Co. for £330 per annum, the resultant figure is simply a profit on letting, rather than 'excess rents'. In this connection, the landlords have challenged Mr. Banning's right to sub-let a part of this property and are demanding that rents to the extent of £1,250 be surrendered to them. We understand the action will be settled out of court on this basis, and that Mr. Banning's tenancy will expire now in March of next year."

The letter of 11th March 1964 is again by the Appellant's accountant to the Inspector of Taxes. The first paragraph reads as follows:

"In reply to your letter of 6th March, we understand that the position with regard to sub-letting by Mr. Banning has now been finalised and the arrangements previously notified to you confirmed and payment made."

On 24th June 1965 the lessee's accountant again wrote to the Inspector of Taxes, in these terms:

"Owing to a dispute between our client and the Solicitors who originally acted for him in the settlement with the landlords regarding 388/390 Lichfield Road, we are having some difficulty in obtaining a copy of the Lease dated 17th March 1958, and the correspondence regarding the out-of-Court settlement. As soon as they are obtained we will let you have the relevant documents. We would draw your attention, meanwhile, to the fact that £1,250, being additional rent payable to the landlords on this property in connection with the original Lease, has already been allowed as a deduction in the 1963-64 assessment"—I think that figure should have read "1962-63". The letter goes on: "In view of this, we have only claimed £1,750, being the balance of the £3,000 paid for the new Lease, as a premium. We consider that the sum of £1,750 is a payment as defined in Section 22 of the Finance Act 1963, and is allowable as a deduction under Schedule 4, paragraph 8, of the Finance Act, 1963."

It was not until 15th October 1965 that in a letter to the Inspector of Taxes, again by the Appellant's accountant, the true position began to be disclosed. It reads:

"In our view the correspondence in this matter, particularly the letter dated 16th September 1963 from Messrs. Pinsent & Co., to Messrs. Owen & Co., and the further letter dated 18th October 1963 from Owen & Co. to our client, clearly set out the position, and we made the following points:—  
1. The head lessor required the payment of the sum of £1,250 together with an undertaking to surrender the Lease at March, 1965, and relinquish the right to an option for renewal. 2. The head lessor later agreed to accept the sum of £3,000 in settlement, and agreed to drop their claim for surrender of the right to the option of renewal contained in the original lease. 3. As stated in the third paragraph of the letter dated 18th October 1963, the figure of £3,000 was based on the terms of the Underlease granted by our client to Dowley & Darby, and on the assumption that the other tenant

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A paid a rental of £12 per week. We consider that as the figure of £3,000 is based on the rents payable under the sub-tenancy and Underlease granted by our client, the payment to the head lessor constitutes a surrender, in part or in full, of rents ”

—and I do not think I need read any more of that letter. Even the letter of 15th October 1965, which I have just read, did not fully reveal the true position to the Crown.

B In my judgment there was no agreement between the parties which could bind the Crown. On the second submission the Appellant admits that the letters of 16th September 1963 and of 17th October 1963, which I have read, were not disclosed to the Crown before 15th October 1965. I have no doubt that there was a great deal of discovery by the Crown in October 1965 as to the true nature of the transaction, and perhaps it would be kind to the Appellant and his accountant if I said no more. I therefore dismiss the appeal with costs.

Have I got to do anything else, Mr. Phillips?

Phillips Q.C.—No, my Lord. I am obliged.

D The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Russell, Sachs and Buckley L.JJ.) on 13th, 16th, 17th, 18th and 19th November 1970, when judgment was given unanimously against the Crown on the assessment for 1962–63 and in favour of the Crown on the assessments for 1963–64 to 1965–66, the Crown to pay half the taxpayer’s costs in the Court of Appeal and below.

*Marcus Jones* for the taxpayer.

E *J. Raymond Phillips Q.C.* and *Patrick Medd* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:— *Davies v. Abbott* (1927) 11 T.C. 575; *British Sugar Manufacturers Ltd. v. Harris* 21 T.C. 528; [1938] 2 K.B. 220; *Hanoman v. Rose* [1955] A.C. 154; *Society of Medical Officers of Health v. Hope* [1960] A.C. 551; *Bwlfa and Merthyr Dare Steam Collieries (1891) Ltd. v. Pontypridd Waterworks Co.* [1903] A.C. 426; *Glenboig Union Fireclay Co. Ltd. v. Commissioners of Inland Revenue* 12 T.C. 427; 1922 S.C. (H.L.) 112; *Anderton & Halstead Ltd. v. Birrell* 16 T.C. 200; [1932] 1 K.B. 271; *Bean v. Doncaster Amalgamated Collieries Ltd.* (1946) 27 T.C. 296; *Edwards v. Bairstow* 36 T.C. 207; [1956] A.C. 14; *City & Westminster Properties (1934) Ltd. v. Mudd* [1959] Ch. 129; *Duke of Westminster v. Store Properties Ltd.* [1944] Ch. 129; *Downie v. Turner* [1951] 2 K.B. 112; *Commissioners of Inland Revenue v. Mackinlay’s Trustees* 22 T.C. 305; 1938 S.C. 765; *Slaney v. Kean* 45 T.C. 415; [1970] Ch. 243; *Andrew v. Taylor* (1965) 42 T.C. 557; *Cansick v. Hochstrasser* (1961) 40 T.C. 151.

H **Russell L.J.**—There are two points in this appeal, which is from a decision of Foster J. upholding a decision of the Special Commissioners in favour of the Crown. The first point concerns the question whether a sum of £3,000 paid by the taxpayer to his lessor should, by virtue of s.22 of the Finance Act 1963 and paras. 8 and 9 of Sch. 4 to that Act, be the basis of allowable deductions in respect of the years 1963–64 onwards against rents receivable by the taxpayer under two subleases. The second point concerns the question of an additional assessment which in effect seeks to overset a deduction of £1,250 which was

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allowed in an agreed computation leading to a previous amended assessment for the year 1962–63 of excess rents from the same sublettings, the question being whether this additional assessment is a valid one. The sum of £1,250 that I have mentioned is in fact part of the same £3,000. A

The case has been argued at very great length, but in the end I think the answer under both heads is a reasonably short one. I will take first the case of the £3,000. Section 22(4) of the Finance Act 1963 is in the following terms: B

“ Where, as consideration for the variation or waiver of any of the terms of a lease, a sum becomes payable by the tenant otherwise than by way of rent, the lease shall be deemed for the purposes of this section to have required the payment of a premium to the landlord (in addition to any other premium) of the amount of that sum; but in computing tax chargeable by virtue of this subsection the duration of the lease shall be treated as not including any period which precedes the time at which the variation or waiver takes effect or falls after the time at which the variation or waiver ceases to have effect, and notwithstanding anything in subsection (1) of this section rent treated as arising by virtue of this subsection shall be deemed to become due when the contract providing for the variation or waiver is entered into.” C D

The question, therefore, is whether the £3,000 was paid as consideration for the variation or waiver of any of the terms of the head lease to the taxpayer. But if it was so, then not only does the spreadover effect of the payment tend to operate to increase the liability of the head lessor to tax on the rents receivable, but the mirror operation of Sch. 4 to the Act operates in relief of the tenant taxpayer's similar liability, and it is the aim of the taxpayer on this point to take advantage of that mirror operation. E

What happened was this. By a lease dated 16th September 1959 between the then freeholders and the Appellant taxpayer, certain premises, including two shops described as 388 and 390 Lichfield Road, Aston, were demised to the taxpayer for a term of seven years from 17th March 1958 at a yearly rent of £330. The lease contained, among other covenants on the part of the lessee, clause 2(5): F

“ Not without the previous consent in writing of the Lessors to carry on or to permit or suffer to be carried on in or upon the demised premises or any part thereof any trade or business whatsoever other than that of a Garage Proprietor Tyre Repairer and Distributor Motor Sales Dealer and the like ”. G

Covenant (8) provides that the lessee was not to assign, underlet or part with the possession of the premises without the consent of the lessor, such consent not to be withheld in the case of a respectable and responsible person. Covenant (12) reads:

“ If the Lessee shall desire to renew the present demise at the expiration of the last year of the said term and shall give to the Lessors three months notice in writing of such his desire and if the Lessee shall up to the time of the giving of notice have paid the rent and performed and observed the covenants on his part hereinbefore contained then the Lessors will grant to the Lessee a new Lease of the said premises for a further term of seven years to commence from the date of the determination of this demise and shall contain similar covenants and conditions to those herein contained except this covenant for renewal ”. H I

The lease also contained a proviso for determination and re-entry in common form in, *inter alia*, the event of the lessee not performing or observing his covenants.

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A Soon after that lease the taxpayer sublet 388 Lichfield Road to one Donnelly for use as a betting shop, and 390 to a company called Dowley & Darby (Soft Ices) Ltd. for use as a store and offices. These sublettings were without the consent of the reversionary landlord and were therefore in breach of covenants (5) and (8). That put the taxpayer in peril of forfeiture of his lease, and of course consequential loss of his sublease rents and his option to renew. The reversioner B complained, and ultimately served a notice under s.146 of the Law of Property Act 1925 pointing to a breach of covenant (5)—that is the user covenant. The reversioner also initiated forfeiture proceedings. There were negotiations for settlement of the matter, which culminated in the settlement of which the terms in the present case are to be found in an offer letter from the reversioner dated 17th October 1963, to this effect:

C “Our clients”—that is the reversioner—“are prepared to consent to the lease to Dowley and Darby (Soft Ices) Limited and to the subletting of the office to J. Donnelly for use as a betting office and will also drop their claim for a surrender of your client’s right to the option of renewal which was contained in the original lease on the following terms: (1) your client pays the sum of £3,000. (2) Your client pays the rent now outstanding from 24th June 1962. (3) Your client complies with the repairing covenants in the lease. The figure of £3,000 is based on the terms of the underlease to Dowley and Darby (Soft Ices) Limited, and on the assumption that Donnelly pays a rental of £12 per week, inclusive of rates.”

D That is a letter to the taxpayer’s solicitors from the solicitors for the reversioner, who were by then, I think, a company called the Holt Brewery Co. Ltd. The E £3,000 was paid on those terms in February or March 1964, and the forfeiture proceedings were withdrawn or otherwise not proceeded with.

In those circumstances the question is, can it be said that the £3,000 was paid in consideration of the variation or waiver of any of the terms of the head lease? Certainly there was no such variation, and that I think is not contended. But was there a waiver of any term? Foster J. held that there was not, but that F the £3,000 was paid in consideration of the lessor not pursuing his claim to re-enter and forfeit. I myself think that this is correct. That which was waived was not any term but a breach of a term. Moreover, taking covenant (5), which is the user covenant, or covenant (8), the subletting covenant, in both cases, it was pointed out to us, the lease recognised in terms that that which was done would not be a breach of covenant if the consent were previously given. G The consent subsequently given in exchange for £3,000 under the settlement was for the purpose of mending the breach by, in effect, treating the consent given as retrospective in its effect. Whatever might be said if, for example, covenant (5) had been absolute in its terms, it did in fact contain within it the seed of legitimate departure from the stated user area by a consent given without the need for any contract varying or waiving any term of the lease. Accordingly on this H point I support the Judge’s decision.

I now turn to the second point, which requires rather more examination of detail. The matter between the taxpayer and the head lessors had for some time been under discussion when, by a letter of 16th September 1963, the head lessors said that they were prepared to settle the matter on certain terms. That letter says:

I “Our clients are prepared to settle this matter by your client: (1) Paying the sum of £1,250; (2) Paying the rent now outstanding from the 24th June, 1962; (3) Undertaking to surrender his Lease at the end of the current term, namely, March 1965, and relinquishing the right to an option for renewal; (4) Complying with the repairing covenants in the Lease.”

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It is quite plain that the £1,250 was a figure intended to be related to the supposition that by going outside the user referred to in covenant (5) the taxpayer had secured for himself higher rents than would otherwise have been the case. The head lessors in effect were, it might be said, proposing to cut themselves in on that higher rent. No doubt earlier discussions will have been on this broad basis. The letter of 17th October 1963, which I have already read, makes this plain.

At the time of the offer of 16th September the situation about the computation of excess rents of the taxpayer under s.175 of the Income Tax Act 1952 was that there had been an assessment at £500 in respect of the year 1962-63 which had been appealed against. The accountants for the taxpayer on 23rd September 1963 wrote to the Inspector in this manner:

“We enclose a schedule showing our computation of excess rents in this matter, and in this connection it seems to us that as regards 388/390 Lichfield Road, since the property does not belong to Mr. Banning, but is rented by him from the Holt Brewery Company for £330 per annum, the resultant figure is simply a profit on letting, rather than ‘excess rents’. In this connection the landlords have challenged Mr. Banning’s right to sub-let a part of this property and are demanding that rents to the extent of £1,250 be surrendered to them. We understand the action will be settled out of court on this basis, and that Mr. Banning’s tenancy will expire now in March of next year.”

The enclosure is headed, “Mr. B. J. Banning. Excess rents 1962-63”. It sets out:

“513-517 Lichfield Road, Rent per B. J. Banning Limited, £200. Net annual value £180. Excess £20. 378-380 Lichfield Road. Rents, 11 months at £37 10s. 0d. per month, £412 10s. 0d. Allow for repairs, £72.” That results in £340 5s. Then one deducts the net annual value at £52, showing an excess of £288 5s. This came to a total of £308 5s. Then: “388/390 Lichfield Road. Rents received at £12 per week, £624; at £86 13s. 4d. per month”—that would be Donnelly—“£1,040. Total £1,664. Less claimed by landlords £1,250. Less rent paid £330. Less rates and water paid £176.”

That shows a figure of £1,756 by way of deduction, thus exceeding the rents actually received and showing a “nil” for excess rents in respect of 388 and 390 Lichfield Road for that year.

At this time the accountants clearly assumed that the settlement would go forward on the basis of the offer of 16th September. On 22nd October 1963, after the amended offer from the head lessors, the Inspector, who did not know of it, wrote:

“In connection with the Excess Rents arising on 388 and 390 Lichfield Road, I shall be glad if you will advise me when the question of the sub-letting is finally determined, and confirm that the amount of £1,250 has been paid. The Net Annual Value of 378 and 380 Lichfield Road is £50 5s. which increases the total of Excess Rents to £310”—

that is following and adopting the calculation sent by the taxpayer’s accountants, which I have already read out, and making the difference, since it reduces the net annual value from £52 to £50 5s., that the total of excess rents is increased by £1 15s. to £310.



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- A The accountants on 24th October answered that letter saying:  
“ . . . with regard to the excess rents arising on 388 and 390 Lichfield Road, we will advise you when the sub-letting question is determined. We note that the net annual value of 378 and 380 is £50 5s. and agree that the excess rents total is £310.”
- B Internally on the taxpayer’s side correspondence shows that the accountants suggested that the £3,000 should be apportioned as to £1,250 as already agreed with the Inspector to be set against excess rents for 1962–63 and £1,750 in respect of the retention of the option to renew the lease. Plainly this was the basic make-up of the figure of £3,000. As to the additional £1,750, the head lessor, no doubt having taken the view that the beneficial sublettings were likely to continue into the extended term, if it should be extended, had no objection to that apportionment, and on 9th December 1963 wrote as follows:  
“ Our clients inform us that they have no objection to your client apportioning the sum of £3,000. We wish however to make it quite clear that the sum of £1,750 will not be returned, should your client decide not to take up the option.”
- C This clearly recognised that the additional £1,750 was for the retention of the option to renew.
- D The Inspector on 11th December inquired whether the subletting question had been determined, and on 30th January 1964 wrote:  
“ I should like to know what is the current position in relation to the sub-letting. I would have expected the out of court settlement to be more speedily determined but perhaps you could say what is delaying the final settlement. Since the Excess Rents are otherwise agreed at £310 for the year it would seem that tax on this amount could be paid now and I should like your observations on this.”
- E The accountants answered on 3rd February:  
“ . . . we have written Mr. Banning today to find out whether the settlement as regards the sub-letting has yet been made, but we do know that a fortnight ago there was still some argument about the terms of the final payment. We can agree, however, that excess rents of £310 for 1962–63 can be correctly assessed.”
- F The Inspector inquired again on 6th March: “ I . . . should like to know what is the present position regarding the sub-letting.” By this time the £3,000 had been paid, in a cheque for £1,250 and another cheque for £1,750. The accountants replied: “ . . . we understand that the position with regard to sub-letting by Mr. Banning has now been finalised and the arrangements previously notified to you confirmed and payment made.” Subsequently there was an amended assessment for 1962–63 in respect of the excess rents of the taxpayer in that figure of £310 pursuant to the agreement between the Inspector and the accountants.
- G
- H Subsequently the accountants, on behalf of the taxpayer, attempted to secure allowances in respect of the £1,750 on the grounds which I have already mentioned in connection with the £3,000 claim, they being rather less demanding than has been counsel for the taxpayer before us, who sought to use the whole £3,000 under the 1963 Act, and also to retain the allowance in the 1962–63 assessment of £1,250. Upon this it emerged that the original suggested settlement, which envisaged penalising the taxpayer by £1,250 and the loss of his option to renew, had been superseded by the one which was accepted, by which an extra £1,750 was to be paid by the taxpayer to the head lessor for the retention of his option. This was considered by the new Inspector, who, after consideration of the documents showing this, then rejected the claim as to £1,750 and raised
- I

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an additional assessment for 1962-63 on the ground that the £1,250 which had been allowed as a deduction in the computation was not so allowable in law on the proper construction of s. 175(1) of the 1952 Act. It was in the course of correspondence on that point that the taxpayer's accountants wrote on 24th June 1965, with a view to explaining why in fact he was only claiming tax relief under the 1963 Act in respect of £1,750, saying that the £1,250, "being additional rent payable to the landlords", had already been allowed as a deduction in the 1962-63 excess rents computation. A B

The learned Judge, not in any way encouraged thereto by counsel for the Crown, who was not called upon below, stigmatised the three letters of the accountants of 23rd September 1963, 11th March 1964 and 24th June 1965 as "dishonest". I wish to say that I regard that description as wholly unjustified. It may well be that the £1,250 is not properly to be described as it was in the letter of 24th June 1965; but, as I have indicated, the purpose of that passage in the letter was to say that the whole of the £3,000 was not claimed as being within the 1963 Act. As to the letter of 23rd September 1963, it seems to me to be a perfectly fair commercial description of the fact that in substance the head lessors were demanding that sublease rents to the extent of £1,250 should be surrendered to them. As to the letter of 11th March 1964, saying that "the arrangements previously notified to you have been confirmed", that seems to me, assuming that the letter of 23rd September was, as I think, a reasonable commercial view of the first offer, to be perfectly understandable. The only change in any commercial sense was that an extra £1,750 was being paid for the retention of the option, which it might well be thought, and quite reasonably so, could not be relevant to the assessment of excess rents for 1962-63. I can well understand the accountants, in perfect honesty, saying that the arrangements previously notified to the Inspector on 11th March 1964 had been confirmed and payment made. C D E

Having devoted some time, but I think importantly, to rebutting a charge against a professional man of dishonesty in the exercise of his profession, I return to the question whether the additional assessment for excess rents for 1962-63 is sustainable. I say at once that the Crown in this Court did not seek to support the grounds upon which either the Special Commissioners or the Judge decided this point in favour of the Crown, because it appeared, and I think rightly, to the Crown that the grounds of their decision were, in substance, that by reason of what was said by the taxpayer's accountants there was no agreement between the Inspector and the taxpayer. The discussion in this Court was based on somewhat different matters, with which I must deal. F G

Section 175(1) of the 1952 Act is in the following terms:

"If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of Schedule D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Schedule A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the provisions of Part III of this Act) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of Schedule A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases." H I

(Russell L.J.)

- A This section was designed, as I understand it, to meet the fact that Schedule A valuations or revaluations had got so far behind, thanks largely perhaps to the aftermath of the war, that some system was required to remedy the consequent loss of taxable income. Accordingly the section applied the old Schedule A system of valuation to current rents under actual lettings, so that the exercise required in this case a calculation of the annual rents under the two actual subleases that I have mentioned, and required also regard being had to the other terms of the subleases.

- It was argued for the taxpayer that the other terms of the subleases allowing particular user should be considered against the background that they were in breach of the head lease for that reason, and that in consequence the rents charged should be reduced in order to find the proper rackrent for the notional Schedule A valuation. I am unable to find any justification for this approach on the language of the subsection. The subsection appears to me to confine the question to consideration of the rents to which the taxpayer was entitled under the terms of the subleases, and to the terms of the subleases taken by themselves. On the other hand—and this is not seriously disputed—it might well be considered not unfair or unreasonable that, in the assessment of the excess rents for 1962–63, the fact that the head lessor was exacting a payment that I have described as, in effect, his cut of the sublease rents, should be regarded at least extra-statutorily as a deduction from the computation of the taxpayer's excess rents for taxation purposes.

- The first requirement for validity of the additional assessment in this case is that the Inspector, whether the same Inspector or a previous Inspector, should make a discovery. I refer to what is now s.5(3) of the Income Tax Management Act 1964, which says:

- “If an inspector or the Board discover—(a) that any income which ought to have been assessed to tax at the standard rate or to surtax has not been assessed, or (b) that an assessment to tax at the standard rate or to surtax is or has become insufficient, or (c) that any relief which has been given is or has become excessive, the inspector, or, as the case may be, the Board may make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged.”

- It is decided by authority that this may be a finding out of new relevant facts or belated realisation of the true law: see *Cenlon Finance Co. Ltd. v. Ellwood*<sup>(1)</sup>. I very much doubt whether here there was a finding out by the second Inspector of new relevant facts, for I do not think that a full explanation to the first inspector of the shift from £1,250 plus an abandonment of the option to renew to £3,000 minus that abandonment would have had the slightest effect on his acceptance of £1,250 as a proper deduction in his computation of excess rents for 1962–63. But let us assume that in some sense the second Inspector made a relevant discovery, perhaps with a cry of “Eureka!” in his bath, that the £1,250 was not justifiable in law under s.175(1). We then reach the stage in argument that, as asserted by the taxpayer before the Special Commissioners, and indeed in his notice of appeal, the allowance of £1,250 was to be regarded as a concession in agreement by the first Inspector. We then have to consider the operation of s.510 of the 1952 Act. That provides that:

- “(1) Subject to the provisions of this section, where a person gives notice of appeal to the General Commissioners, the Special Commissioners or the Board of Referees against an assessment to, or a decision of any

(1) 40 T.C. 176; [1962] A.C. 782.

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kind with respect to, income tax other than surtax or surtax, and, before the appeal is determined by the Commissioners or Board, the surveyor or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Commissioners or Board had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.”

Now here, I recall, there had been an assessment in the sum of £500. That assessment had been appealed against. Here was an agreement, it is perfectly plain, that the assessment should be varied to accord with the computation displayed in the enclosure to the letter from the accountants of 23rd September 1963, which I have already read, conditional only on the £1,250 being paid. The section that I have just read has been considered judicially, and particularly perhaps in *Chancery Lane Safe Deposit and Offices Co. Ltd. v. Commissioners of Inland Revenue*<sup>(1)</sup>; and in that case it was in effect said that the section is limited in its operation to cases in which the point in dispute was the subject-matter of the agreement. The point now in dispute here is whether the £1,250 was an allowable deduction in computing the amount of the excess rents chargeable to tax for the year 1962-63. I myself cannot see, in the light of the letter and the attached computation of 23rd September 1963 and the subsequent correspondence leading to the final agreement of the computation—and the unconditional agreement of the computation at £310—that the point of the deductibility was not precisely the subject of agreement. There it is expressly set out. There it is expressly agreed.

It was in the end argued for the Crown that the first Inspector must (a) have known that s.175 did not in law justify the deduction, and therefore (b) must have made an extra-statutory concession. It was accepted by the Crown that by virtue of s.510 the agreement to allow the deduction of £1,250 would have disqualified the additional assessment either if the first Inspector had thought that s.175 covered the case or if he thought that s.175 might cover the case. But it was argued that the contentions before the Special Commissioners and in the grounds of appeal asserted a concession. Therefore, it is said that the new Inspector's contention that s.175 does not cover the case, and the other Inspector's concession involving the assumption that s.175 does not cover the case equally, does not involve an agreement on the basis now in question, and accordingly s.510 does not apply. I hope that I have fairly stated the contentions, because I am bound to say that I do not understand the argument; I can only therefore reject it. I do not in truth know the basis upon which the first Inspector allowed the deduction put forward by the accountants in the letter which I have already read and its attached schedule.

The Crown refrained from producing the first Inspector, I believe out of retirement, to give evidence. He was not told in terms that the £1,250 was a transfer by agreement from the sublease rents to the head lessor as an extra head-lease rent. He may have thought that the deduction was justified as such. He may have thought that it was arguable but uncertain that it should be regarded as such. He may have thought that, though quite certainly the deduction was not justified on the true construction of s.175, it would be better to make an extra-statutory concession. We do not know in fact. But one thing

(1) 43 T.C. 83; [1966] A.C. 85.

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A is quite clear, and that is that the precise question raised by the additional assessment was decided by the agreement leading to the amended assessment at £310. In those circumstances, in my judgment, the additional assessment was not sustainable.

In my view, accordingly, the appeal should be in part allowed, but should be remitted to the Special Commissioners to review the additional assessment for 1962-63 in the light of this judgment, if my brothers are in agreement with it. It may however—this is a matter for discussion—be possible quite simply to say that the assessment for 1962-63 should stand in the figure of £310.

Sachs L.J.—I agree that, so far as the deduction of £1,250 referred to in the enclosure to the letter of 23rd September 1963 is concerned, this appeal should be allowed, and that so far as any further deduction claimed by the taxpayer is concerned the appeal should be dismissed.

Being in agreement both with the Order proposed by Russell L.J. and his analysis of the effect of the provisions of the various Statutes which have come under discussion, there seems no need for me to deal with each of the many points canvassed before us, despite the fact that we are differing in part from what was decided in the judgment under appeal. It does, however, seem right to emphasise that, to my mind, there is nothing in the series of letters written on behalf of the taxpayer to the Inspector of Taxes, starting with that of 23rd September 1963 and ending with that of 11th March 1964, that can be said to be dishonest. On the contrary, the first of those letters states fairly the effect in commercial terms of the effect of the landlords' demand for £1,250, and nothing that later transpired altered that situation.

Upon the correspondence it is particularly plain that in truth the further £1,750 which was paid, albeit as part of a composite sum of £3,000, related to a different set of benefits, including the consent to the subletting referred to in the letter of 18th October 1963. The apportionment of the £3,000 into two parts of £1,250 and £1,750 respectively was not only one to which the parties to the agreement assented but it was one that was fair. It is clear also that the £1,250 in question was something which ought, in fairness, to have been allowed, in some such way as is shown in the schedule to the letter of 23rd September, as a deduction. It is also manifest that, though in law that deduction could only be allowed as a concession, the particular concession made by the Inspector must plainly have been allowed by him with his eyes open to the realities of the situation. So much, then, for the suggestion that there was anything of which the Crown could fairly complain as regards the material before the Inspector, or as to the fact that he made a concession.

The only other point to which I would refer concerns s.510 of the Income Tax Act 1952 and s.50(2) of the same Act. The latter reads:

“An appeal, once determined by the Commissioners, shall be final, and neither the determination of the Commissioners, nor the assessment made thereon, shall be altered, except by order of the court when a case has been required as provided by this Act.”

By virtue of s.510 an agreement disposing of an appeal has the same effect as a determination under s.50. The distinction between the effect of a determination under that section by the Commissioners and a decision of a competent court of record was explained in *Commissioners of Inland Revenue v. Sneath* (1)[1932] 2 K.B. 362, at page 386, where Greer L.J. said, with regard to such a

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determination: "It is final not as a judgment *inter partes* but as the final estimate of the statutory estimating body." For reasons with which he dealt further in his judgment, he explained why the well-known passage in *Hoystead v. Commissioner of Taxation*<sup>(1)</sup> could not in *Sneath's* case<sup>(2)</sup> be applied to an assessment relating to the fiscal year 1928-29 when the determination of the Commissioners had related to each of two earlier years. Nonetheless, a determination of the Commissioners must, to my mind, be deemed to take into account any point properly before them, save in so far as s.50 provides for alteration upon a case stated. A B

In a great number of cases where appeals are settled by agreement there is, in the nature of things, no or no full record in correspondence or elsewhere of the arguments on which the parties were prepared to rely. In such cases it seems to me that it should *prima facie* be assumed that each side would have raised in support of their case all points that were reasonably open and arguable and that all such points must thus *prima facie* be regarded as having been before the Commissioners and taken into account by them in the same way as if there had been a decision on appeal. C

In the *Chancery Lane* case 43 T.C. 83 the passage in the judgment of Harman L.J., at page 94, which was approved in the House of Lords by Lord Morris, at page 119, and Lord Wilberforce, at page 128, related to a question that had not been in the minds of either of the parties. The relevant passage in the judgment reads: D

"That there had been an agreement upon the footing of the tax then demanded was clear enough, but the point now in issue was not then raised nor was the question in the minds of either of the parties. The Commissioners so held, and this is a question of fact on which I do not think this Court is at liberty to take a different view." E

That passage clearly stemmed from that part of the Stated Case set out at page 88, in which it was said:

"It was clear from the evidence that the particular question of liability to tax on interest paid out of capital was not in the mind of the Company's agents or of the first Inspector in 1957, when the first assessment was the subject of interviews and correspondence between the two sides." F

In other words, the *Chancery Lane* case was a perhaps unusual instance of one in which the *prima facie* assumption was rebutted by plain evidence.

The present case, on the other hand, is one in which there is no record either of any of the arguments adduced or of any which it was proposed to adduce, and there is thus here no ground upon which it can be said to be shown that some point relevant to the concession made was not taken into account. That portion of the argument for the Crown that appeared to rely on absence of knowledge as to what points the Inspector had in mind when making the concession failed. For that and the other reasons already mentioned by Russell L.J. I can see no reason for going behind this particular s.510 agreement. G H

As regards the £1,750 I do not propose to add anything to what was said by Russell L.J., and accordingly I agree with the Order which he proposed.

(1) [1926] A.C. 155, P.C.

(2) 17 T.C. 149.

- A **Buckley L.J.**—I agree, and I do not wish to add anything in regard to that part of the case which relates to the £1,750. In regard to the £1,250, in my judgment the matter is clearly disposed of by the statutory provisions contained in s.510 of the Income Tax Act 1952, read in conjunction with s.50(2) of the Act, which was at the relevant time still in operation. It has been held that the final effect of an agreement under s.510 relates only to the particular matter agreed
- B by that agreement. But in the present case it seems to me to be manifest that the particular matter which was agreed was that in the view of the first Inspector, who made the assessment in the sum of £310, the sum of £1,250 was a sum proper to be taken into account in reduction of the taxpayer's excess rent. Whether the Inspector considered that it was proper to be taken into account under statutory provisions or as an extra-statutory concession seems to me to
- C be neither here nor there; he agreed that it was a proper sum to be taken into account, and it is not, in my judgment, open to the Revenue at a later date to resile from that agreement.

I agree that the appeal should be allowed in that respect, but should fail in regard to the £1,750.

- D **Russell L.J.**—Well, Mr. Jones and Mr. Phillips, what is the proper form of Order? I suppose, on the £1,250 part we would declare that the additional assessment for the year 1962–63, made on 16th January 1967, of excess rent in the further sum of £1,250 is not validly made?

- E **Phillips Q.C.**—I think your Lordships should order that it be discharged. That the 1962–63 further assessment was additional to the earlier assessment; so the earlier assessment was only on the balance; and that has always been given force.

**Russell L.J.**—Yes. So that we declare that it is not validly made and order that it be discharged.

**Phillips Q.C.**—Yes, my Lord.

**Russell L.J.**—What do we do about the other part? The appeal is dismissed as to the £3,000 claim. I am not quite sure what happens.

- F **Phillips Q.C.**—I think it stands like this technically. There is only one appeal before your Lordships; so that will have to be allowed. So far as the years of assessment are concerned, I think it is right to say that the assessments for 1963–64 and 1964–65 and 1965–66 are still standing, and the learned Judge decided in the same sense, so that it is not necessary to say anything about them.

- G **Russell L.J.**—What do you say, Mr. Jones? Do we simply say, allow the appeal and make a declaration on the Order as to the £1,250? Is that all, you say, Mr. Phillips?

**Phillips Q.C.**—I think your Lordship—

**Russell L.J.**—Do you say that we simply say, appeal allowed, and make a declaration in the Order as to £1,250, and say nothing with regard to the £3,000?

**Phillips Q.C.**—That will have the correct result, yes, my Lord.

- H **Russell L.J.**—Very well. Is that acceptable to you, Mr. Jones?

**Jones**—My Lord, I would—

**Russell L.J.**—It sounds a little odd to me, if you simply say, allow the appeal and make a declaration, and do not say anything about the bigger claim. A

**Jones**—In my submission your Lordships might be disposed to discharge the additional assessment for 1962–63 and confirm the remaining assessments.

**Russell L.J.**—Which are the other assessments?

**Jones**—My Lord, they cover the fiscal years 1963–64 to 1965–66.

**Russell L.J.**—Yes. We confirm the assessments for 1963–64, 1964–65 and 1965–66 in the amounts stated in para. 9 of the Case. B

**Phillips Q.C.**—Yes, my Lord.

**Russell L.J.**—We confirm the assessments set out in para. 9(b), (c) and (d) of the Case. Now what is the situation about costs?

**Jones**—My Lord, the appeal, as my learned friend has said, has succeeded.

**Russell L.J.**—Half the appeal has succeeded; the other half has failed. C

**Jones**—I understood my learned friend a moment ago to say that the appeal as such has succeeded. He does not appear to be resiling from that concession. May I ask that your Lordships be disposed to make an Order for costs in favour of the Appellant?

**Russell L.J.**—What was the Order below?

**Jones**—Dismissed with costs. D

**Russell L.J.**—What happened before the Special Commissioners?

**Jones**—My Lord, there was no jurisdiction to award costs.

**Russell L.J.**—Are you asking for costs here and below?

**Jones**—If your Lordships please.

**Phillips Q.C.**—My Lords, in my submission the appropriate Order would be that there should be no Order for costs here, and no Order for costs in the Court below. One is not really concerned with the technicalities. I agree that it is only one appeal, although there were two points in the appeal. As to that, one has succeeded and the other has failed; and I would have thought, with the greatest respect, that it would be fair to say that half the time had been devoted to each. E

**Russell L.J.**—What do you say to that suggestion, Mr. Jones, apart from the fact that you do not like it? F

**Jones**—The Appellant has had to come to this Court. The appeal has succeeded, as my learned friend has said. In those circumstances, it would be my respectful submission that an appropriate Order for costs should follow.

**Russell L.J.**—If you had not fought the £3,000 point here and below, naturally you would be entitled to your costs. G

**Jones**—I do not think there is anything that I can add on the question, my Lord.



A

*(The Court conferred)*

**Russell L.J.**—Our Order as to costs is that the Crown should pay half the taxpayer's costs here and below.

**Phillips Q.C.**—If your Lordship pleases.

**Jones**—My Lord, if the Appellant should be so advised to take the matter further on that part of the Order which is unfavourable to him, would your Lordships be disposed to say that he has leave?

**Russell L.J.**—No, we would not.

**Jones**—If your Lordship pleases.

**Russell L.J.**—Do you have any further application to make, Mr. Phillips?

**Phillips Q.C.**—No, my Lord.

C The taxpayer having been granted leave by the Appeal Committee of the House of Lords to appeal against the above decision so far as relating to the assessments for 1963–64 to 1965–66, the case came before the House of Lords (Lord Hailsham of St. Marylebone L.C. and Lords Reid, Morris of Borth-y-Gest, Simon of Glaisdale and Salmon) on 24th and 25th April 1972, when judgment was reserved. On 14th June 1972 judgment was given against the Crown, with costs (Lord Morris of Borth-y-Gest dissenting).

*Marcus Jones* for the taxpayer.

*I. Edwards-Jones Q.C.* and *Patrick Medd* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Downie v. Turner* [1951] 2 K.B. 112; *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74; *Plymouth Corporation v. Harvey* [1971] 1 W.L.R. 549; *Duke of Westminster v. Store Properties Ltd.* [1944] Ch. 129; *Mitas v. Hyams* [1951] 2 T.L.R. 1215; *Finch v. Underwood* (1876) 2 Ch.D. 310.

F **Lord Hailsham of St. Marylebone L.C.**—My Lords, these proceedings originate in a Case stated by the Special Commissioners dated 21st July 1969 arising out of an appeal against four assessments to income tax. At that stage the case raised two questions, namely, (a) whether and to what extent a sum of £3,000 paid by the Appellant in circumstances thereafter mentioned was deductible from rents received by the Appellant pursuant to s. 175 of the Income Tax Act 1952 and/or paras. 8 and 9 of Sch. 4 to the Finance Act 1963; (b) whether a further assessment for the year 1962–63 in the amount of £1,250 (which in fact related to part of the £3,000) was a valid assessment on the ground that there was evidence of a discovery on the part of the Inspector of Taxes. The Special Commissioners decided both questions in a sense adverse to the Appellant, and were upheld by Foster J. on 12th December 1969. On 19th

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November 1970 the Court of Appeal (Russell, Sachs and Buckley L.J.J.) dismissed the Appellant's appeal on the first of the two points, but declared in the Appellant's favour on the second. The effect of this decision, which has been accepted by the Crown, is that of the £3,000 referred to in the first question £1,250 has been treated as deductible by the Appellant in calculating his liability to income tax on excess rents for the year 1962-63, and the appeal, therefore, substantially affects only the balance of £1,750 remaining out of the £3,000 to which the first question relates.

At the material times the Appellant was the tenant of premises known as 388 and 390 Lichfield Road, Aston. The lease (dated 16th September 1959) was for seven years from 17th March 1958, but was renewable for a further period of seven years at the option of the tenant on giving three months' notice. This option, however, could only be exercised if up to the time of the giving of the notice the tenant had paid the rent and performed and observed the covenants of the lease.

The relevant term of the lease containing the option to renew was clause 2(12), and was in the following terms:

"(12) If the Lessee shall desire to renew the present demise at the expiration of the last year of the said term and shall give to the Lessors three months notice in writing of such his desire and if the Lessee shall up to the time of the giving of notice have paid the rent and performed and observed the covenants on his part hereinbefore contained then the Lessors will grant to the Lessee a new Lease of the said premises for a further term of seven years to commence from the date of the determination of this demise and shall contain similar covenants and conditions to those herein contained except this covenant for renewal".

In addition to the option to renew, the lease contained covenants to paint and repair (clause 2(3) and 2(4)) and also covenants against assigning or under-letting without the consent of the landlords (clause 2(8)) and against permitting (without the consent of the landlords) the demised premises to be used for any trade or business except that of "a garage proprietor, tyre repairer and distributor motor sales dealer and the like" (clause 2(5)). There were the usual provisions for forfeiture and re-entry for breach of covenant (clause 4(i)). The exact terms of these covenants are not material.

In the events which happened, the Appellant committed breaches of the two covenants restricting user and against subletting by subletting the two premises respectively for use as a betting shop and a store and offices, in each case without obtaining the necessary consent. The names of the unauthorised subtenants were respectively Donnelly and Dowley & Darby (Soft Ices) Ltd. In the result, the landlords complained, served a notice under s. 146 of the Law of Property Act 1925, and instituted proceedings for forfeiture and re-entry. The payments which fall to be discussed in the present proceedings arise out of a compromise of the dispute thus arising between the Appellant and his landlords. The nature of this compromise appears fairly completely from correspondence passing between the two parties and incorporated in the Case. I refer to these letters in detail at a later stage in this opinion.

The negotiations for the compromise, so far as is relevant, were in three stages. In the first stage, by letter dated 16th September 1963, the landlords proposed a payment of £1,250 as consideration for the abandonment of his right of re-entry and possibly any right to damages for breach of covenant, but on condition that the lease terminated without option to renew at the expiry of the original term of seven years. In the second stage, by letter dated

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- A 17th October 1963, as a result of representations on behalf of the tenant, the landlords modified their original proposals by increasing the proposed payment to £3,000, but dropped the claim to terminate the lease at the end of the original term of seven years without the option of renewal. In the third stage, the Appellant proposed and the landlords accepted that the £3,000 should be split into the original sum of £1,250 for the continuance of the unauthorised tenancies and the balance of £1,750 for the retention of the option to renew, but the landlords in accepting this apportionment made it plain that the £1,750 was not to be returnable even (as we were informed in fact occurred) if the option were not exercised. This appears from a letter of the landlords of 9th December 1963. This apportionment of the £3,000 was thus not merely colourable; it corresponded exactly to the first two stages of the negotiation, and payment was in fact effected on 10th February 1964 by two separate cheques for £1,250 and £1,750.

- B The result of the appeal depends on the answer to the question whether the £3,000 (or the balance of £1,750) was the consideration for the variation or waiver of any of the terms of the lease. If it were, the effect of s. 22(4) of the Finance Act 1963 is that the payment would be treated as a premium for the purposes in s. 22(4) and that the Appellant must succeed. If not, the appeal must be dismissed.

- C The effect of s. 22(1) of the Finance Act 1963 is that, where payment of a premium is required under a lease of premises let for not more than 50 years, the landlord is made liable to pay income tax on it for the year in which the premium is received. The amount payable is based on a notional income calculated according to a formula, depending, amongst other things, on the length of the term and the amount of the premium. This is provided by s. 22(1) of the Act. Subsections (2), (3) and (4) of s. 22 deal successively with possible methods of avoiding the charge imposed on the landlord by subs. (1). Thus subs. (2) provides a method of preventing a mode of avoidance which might take the form of imposing on the tenant an obligation to effect structural alterations in lieu of a premium. Subsection (3) is designed to forestall any device which, in lieu of a premium, provided for the capitalisation of part of the rent or the imposition of a capital fee for surrender of the lease. It is in the context of these provisions against avoidance that s. 22(4) must be considered. The subsection aims at treating as premiums payments made as consideration for the variation or waiver of any of the terms of the lease. Section 22(4) is in the following terms:

- D “Where, as consideration for the variation or waiver of any of the terms of a lease, a sum becomes payable by the tenant otherwise than by way of rent, the lease shall be deemed for the purposes of this section to have required the payment of a premium to the landlord (in addition to any other premium) of the amount of that sum; but in computing tax chargeable by virtue of this subsection the duration of the lease shall be treated as not including any period which precedes the time at which the variation or waiver takes effect or falls after the time at which the variation or waiver ceases to have effect, and notwithstanding anything in subsection (1) of this section rent treated as arising by virtue of this subsection shall be deemed to become due when the contract providing for the variation or waiver is entered into.”

E By s. 25(6) the provisions of s. 22(4) apply to variations or waivers which, like the provisions of the compromise agreement now under discussion, not themselves being made in pursuance of a contract entered into before 4th April 1963, are nevertheless variations or waivers of a lease granted before the begin-

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ning of the year 1963-64. There is no special definition of the expressions "variation" or "waiver" either in the definition section, s. 32, or elsewhere in the Act. A

The first contention for the Crown was that, notwithstanding the fact that they were not challenging the adverse decision of the Court of Appeal in respect of £1,250 part of the £3,000, which was founded on a separate compromise between the Inspector of Taxes and the Appellant, the sum of £3,000 paid on 10th February 1964 was indivisible for the purposes of the point at issue and in order to arrive at the result the House was not entitled to divide it into its component parts of £1,250 and £1,750. I am not sure that even if this contention were accepted the Crown would necessarily succeed, but in my view the contention is not really open to the Crown. The course of the negotiations between the Appellant and his landlords clearly showed that the separate payments of £1,250 and £1,750 were not merely colourable. The £1,250 was consideration for the landlords' waiving the forfeiture of the lease and possibly any right to sue for damages for breach of contract. The £1,750 was a separate sum paid in consideration for the restoration of the right to exercise the option to renew, which, by virtue of the provisions of clause 2(12) of the lease, had lapsed on the commission by the Appellant of the breaches of the two relevant covenants. Quite apart from this, it seems to me the fact that the payment of £1,250 had been the subject of a separate agreement between the Appellant and the Inspector, which the Crown does not now seek to challenge, puts it beyond the power of the Crown to rely on this contention. Thus, the sole question at issue appears to me to depend on the answers to two questions (1) what was the consideration for the payment of the cheque for £1,750, and (2) was that consideration a variation or waiver of the terms of the lease within the meaning of s. 22(4) of the Finance Act 1963? B  
C  
D  
E

The answer to the first question seems to me to admit of little doubt. It was common ground between the parties that on 16th September 1963, when the negotiations for settlement began, the Appellant was in breach of covenant with his landlords, and, subject to any right of relief against forfeiture, was liable to have his lease forfeited and to pay any damages proved to have been caused by his breaches of covenant. In addition, when the option otherwise would have been available to him, the Appellant would have been incapable of satisfying the conditions of the option clause in so far as these required that the Appellant should, at the relevant date, have "performed and observed the covenants on his part" contained in the earlier clauses of the lease. In their letter of 16th September 1963 the landlords had written: F  
G

" 388/390 Lichfield Road, Aston. We refer to our letter of the 12th September. Our clients are prepared to settle this matter by your client:— (1) Paying the sum of £1,250.0s.0d. (2) Paying the rent now outstanding from the 24th June, 1962. (3) Undertaking to surrender his Lease at the end of the current term, namely, March, 1965, and relinquishing the right to an option for renewal. (4) Complying with the repairing covenants in the Lease. We shall be pleased to hear whether these conditions are acceptable to your client. Yours faithfully "

H

The condition numbered (3) in this letter gave rise to objection on the part of the Appellant, whose solicitors wrote in reply on 9th October 1963:

" . . . He [the Appellant] feels unable, however, to agree to No. 3 because he does not desire to relinquish his right to an option of renewal which was contained in the original lease "

I

This letter led to the second proposal of the landlords' solicitors of 17th October 1963. This was in the following terms:

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A " 388/390 Lichfield Road, Aston. We have now received our Clients' further instructions on your letter of 9th October. Our Clients are prepared to consent to the lease to Dowley & Darby (Soft Ices) Limited and to the sub-letting of the office to J. Donnelly for use as a betting office, and will also drop their claim for a surrender of your Client's right to the option of renewal which was contained in the original lease on the following terms:— (1) Your Client pays the sum of £3,000. (2) Your Client pays the rent now outstanding from 24th June, 1962. (3) Your Client complies with the repairing covenants in the Lease. The figure of £3,000 is based on the terms of the underlease to Dowley & Darby (Soft Ices) Ltd., and on the assumption that Donnelly pays a rental of £12 per week, inclusive of rates. We shall be pleased to hear whether your Client is prepared to agree to the settlement on the above terms. Yours faithfully".

C This offer was evidently accepted subject to the apportionment of the £1,750, since the next letter in the negotiations exhibited to the Case is dated 9th December 1963 from the landlords' solicitors and reads:

D " 388/390 Lichfield Road, Aston. Our Clients inform us that they have no objection to your Client apportioning the sum of £3,000. We wish however to make it quite clear that the sum of £1,750.0s.0d. will not be returned, should your Client decide not to take up the option. We shall be obliged, therefore, to receive your Client's cheque for £3,000.0s.0d. together with the rent outstanding from the 24th June, 1962, as soon as possible."

E From this it is perfectly plain that the consideration for the additional £1,750 to make up the original £1,250 to £3,000 was for the restoration, or retention, of the right to exercise the original option to renew the lease despite the breaches of covenant, and for nothing else. It was not paid as a consideration for the landlords' waiving their right to forfeit or their right to sue for damages for breach of covenant, or for forgoing their right of re-entry. It was a payment for which the Appellant secured that, notwithstanding his breaches of covenant, F he was nevertheless entitled to exercise his original option to renew the lease for a further period of seven years. The question which now remains is whether the consideration so described was a variation of one of the terms of the lease or a waiver of one of the terms of the lease within the meaning of s. 22(4) of the Finance Act 1963. The question of variation was somewhat summarily dealt with by the Court of Appeal. Russell L.J., who alone dealt with the matter at all, contented G himself by saying<sup>(1)</sup>: "Certainly there was no such variation, and that I think is not contended." Counsel appeared to agree before us that, in so far as Russell L.J. appears in this passage to allege that no contention was advanced on behalf of the Appellant to the effect that the consideration for the payment was a variation in the term of the lease, he appears to have been in error. Certainly before your Lordships' House Counsel for the Appellant advanced the contention H with unabated zeal. How far the contention succeeds I will consider in due course.

I The meaning of the expression "waiver" in s. 22(4) gave rise to controversy. Counsel for the Crown submitted that it bore a somewhat specialised meaning. Variation of a term in the lease, he argued, meant that the term varied continued to appear in the lease, but in an amended form. Waiver of the term, however, meant, he argued, that the term no longer appeared to all. For this purpose, therefore, "waiver" in the section is equivalent to "excision", and to nothing else. My Lords, I cannot myself attach this limited meaning to the expression

(1) See page 435 ante.

**(Lord Hailsham L.C.)**

“waiver”. In *Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co.* [1940] 3 All E.R. 60 Lord Wright discussed the ordinary meaning of the term, which, as my noble and learned friend Lord Simon of Glaisdale pointed out in the course of the argument, derives from the same root as the word “waif”—a thing, or person, abandoned. In the case cited Lord Wright said, at page 70:

“The word ‘waiver’ is a vague term used in many senses.” (Stroud’s Judicial Dictionary lists at least thirteen.) “It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase, he claims in *assumpsit* and waives the tort. It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by *laches*.”

In my view, the primary meaning of the word “waiver” in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. This appears to accord with the dictionary meaning of the term and with the two discussions of the subject, each to the same or similar effect, in Halsbury’s Laws of England, 3rd edn. vol. 14 (1956), Equity, page 637, and vol. 37 (1962), Tort, page 152. In the former of these it is said:

“Waiver is the abandonment of a right. . . . A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist.”

My Lords, in my opinion in s. 22(4) of the Finance Act 1963 the expression “waiver” bears this meaning. A more sophisticated discussion of the relation between variation and waiver than is required for the present purpose is to be found in Cheshire and Fifoot’s Law of Contract, 7th edn. (1969), page 500.

We are now in a position to apply the expression “waiver” to the facts of the present case. The consideration for the payment of £1,250, part of the sum of £3,000 paid on 10th February 1964, was the abandonment by the landlords of their right of forfeiture and re-entry in respect of the Appellant’s admitted breaches of contract. The consideration for the payment of £1,750, the balance of the sum of £3,000, was the abandonment by the landlords of their right to rely on the limiting words of clause 2(12) of the lease which restricted the exercise by the Appellant of his option to renew the lease to the case where he had “paid the rent and performed and observed the covenants” contained in the lease. At the time of the negotiation the landlords were entitled to the benefit of this stipulation, and as the result of the negotiation they abandoned it. In my opinion, therefore, they waived it, at least to the extent that the negotiation, which was limited to settling the dispute arising from past and ascertained breaches of covenant, provided.

It is, I consider, true in both cases that the relevant terms in the lease remained unaltered. If, unknown to the landlords, the Appellant had already been guilty of breaches of covenant not contained in the s. 146 notice, or if after the settlement he became guilty of further breaches, the landlords would have become again entitled to rely on the terms of the lease relating to forfeiture, re-entry and damages for breach of covenant. They would also have been entitled to rely on the new breaches as giving renewed force to the limiting words in clause 2(12) restricting the option to renew. But they had abandoned or waived their right to forfeit or re-enter or to rely on the limiting words so far

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- A as these were affected by the admitted breaches of covenant covered by the s. 146 notice. So far as regards these breaches they had waived the terms of the lease. Russell L.J. held that the terms were not waived, because he considered that (1) "the £3,000 was paid in consideration of the lessor not pursuing his claim to re-enter and forfeit. . . . That which was waived was not any term but a breach of a term." He further thought that the covenants breached "recognised in terms that that which was done would not be a breach of covenant if the consent were previously given", and he went on to argue that "the consent subsequently given in exchange for £3,000 under the settlement was for the purpose of mending the breach by, in effect, treating the consent given as retrospective in its effect."

- My Lords, I am not altogether able to follow Russell L.J. in his distinction between waiver of a term and waiver of a breach of a term. Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the Appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the Appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy to the breach. I cannot construe "waiver" as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches and as regards unascertained or future breaches. I am equally unable to regard a compromise forgiving a past default as the same thing as a consent licensing in advance conduct for which a prior licence is required by the terms of a contract.

- E There is possibly a simpler way of looking at the matter. Before the negotiation for settlement no exercise of the option to renew was open to the Appellant. He had lost the option as the consequence of his breaches of covenant. This was because of the terms in which clause 2(12) defined the right of option to renew. After the completion of the settlement there was a valid option to renew, notwithstanding the breaches, on the terms of the old clause 2(12). This must either be because the contractual rights and obligations of the parties had been varied by agreement or because some part of them had been waived by the landlords. In the former case there was a variation. In the latter case the change was due to a waiver of one of the terms of the lease, even though the waiver was limited to the breaches specified in the s. 146 notice. I prefer the latter alternative, but in either case s. 22(4) of the Finance Act 1963 applied to the payment, since on either view the consideration for the change was the payment of £1,750. It would only not apply if either (a) "waiver" in the section means the total exclusion of one of the terms of the lease or (b) "waiver of a breach" is something inherently different from "waiver of a term". With each of these contentions I have already dealt.

- H The result is that the appeal succeeds. The Crown must pay the costs of the appeal in your Lordships' House and of the proceedings in the Court of Appeal and before Foster J.

- I **Lord Reid**—My Lords, this appeal depends on the true interpretation of the word "waiver" in s. 22(4) of the Finance Act 1963. Unless a word is a term of art with a settled technical meaning one ought, I think, to consider first its meaning as an ordinary word of the English language. There is surprisingly little general discussion of its meaning in a legal context although it is frequently so used. The most general explanation of the word cited in argument is in the

(1) See page 435 ante.

**(Lord Reid)**

speech of Lord Wright in *Smyth & Co. v. Bailey & Co* [1940] 3 All E.R. 60, A  
at page 70. He said:

“ The word ‘ waiver ’ is a vague term used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase he claims in *assumpsit* and waives the tort. It is also used B  
where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by *laches*. The use of so vague a term without further precision is to be deprecated.”

So it is clear that the word is not a term of art. It always, I think, involves C  
the idea of giving up or abandoning some right or rule. But more often than not such abandonment is only for a time. One may speak of waiving formalities on some occasion: that does not mean that the formalities or rules are changed but only that they need not be observed on that occasion. They will govern the next occasion unless they are again waived. Similarly, if a person is entitled to some advantage or privilege or payment periodically or on certain occasions D  
he may waive his right on one occasion without prejudicing the assertion of that right on subsequent occasions.

The question at issue arises in this way. The Appellant held a lease under which he was prohibited from subletting without the consent of the lessors. It also contained an option to renew the lease and a provision for forfeiture. The Appellant did sublet without consent. The lessors then commenced proceedings for forfeiture. Then there were negotiations, and eventually on 17th E  
October 1963 the parties agreed that in consideration of a payment of £3,000 by the Appellant the lessors would consent to the subletting and drop the proceedings for forfeiture so that the Appellant would still have his option to renew the lease.

When the Appellant was assessed to income tax on rents received by him F  
he claimed a deduction on account of his having paid that sum of £3,000. He has already received relief in respect of £1,250 in circumstances which I need not relate. He now claims relief in respect of the balance of £1,750. The Appellant founds on s. 22(4) of the Finance Act 1963. Admittedly if that provision applies to this case the appeal must be allowed. The scheme of the section is that, where a premium is payable under a lease, the landlord is regarded as G  
having received more rent and is taxable on a sum determined under the provisions of the Act, and the tenant who pays the premium gets a relief, the nature and extent of which I need not state in detail. The Appellant's case is that by virtue of subs. (4) the outstanding sum of £1,750 is to be treated as such a premium. Subsection (4) provides: “ Where, as consideration for the variation or waiver of any of the terms of a lease, a sum becomes payable by the tenant H  
otherwise than by way of rent ” that sum shall be deemed to be a premium. So the short and only question is whether that sum of £1,750 was paid “ as consideration for the variation or waiver of any of the terms of ” the Appellant's lease. Giving to the word “ waiver ” what I think is its ordinary meaning as a word of the English language it seems to me to be clear that the lessors did I  
waive their contractual rights under terms of the lease to insist on forfeiture and to maintain that the Appellant was no longer entitled to his option to renew the lease. In so doing they waived terms of the lease.



(Lord Reid)

A The Crown's case is, I think, twofold. They say that in this context "waiver" means altering the terms of the lease, and that what the lessors waived in this case was not any term of the lease but the breaches of the lease of which the Appellant had been guilty. The latter point was dealt with very briefly in the Court of Appeal, probably because it was not fully argued for the Appellant. Russell L.J. said, in the course of a brief passage in his judgment<sup>(1)</sup>:

B "Was there a waiver of any term? Foster J. held that there was not, but that the £3,000 was paid in consideration of the lessor not pursuing his claim to re-enter and forfeit. I myself think that this is correct. That which was waived was not any term but a breach of a term."

But you cannot waive a breach: you can only waive a right. Russell L.J. clearly meant that what was waived was the right to re-enter which resulted from the breach. But that right is a right given by a term of the lease, and I am unable to see any difference between waiving a term and waiving a right given by that term unless the Crown's second contention is right. That contention appears to me to place an unnatural limitation on the ordinary meaning of the word "waiver". One party to a contract says to the other that he need not observe a contractual prohibition on this occasion but of course he must observe it on future occasions. That appears to me to be a clear case of waiver of that prohibition. I see no justification for restricting the use of the word to the case where the party says that the other need never observe the prohibition again. I can find nothing in the context of s. 22 to require or even to point to an intention that the word should have this limited meaning. Nothing was said to shew that giving the word its ordinary meaning would lead to a result that cannot reasonably be supposed to have been intended. On the contrary, it appears to me that to give this restricted meaning to the word might prevent the full operation of the scheme of this section.

I would therefore allow this appeal.

**Lord Morris of Borth-y-Gest**—My Lords, the Appellant was formerly the lessee of two shops known as 388 and 390 Lichfield Road, Aston. His lease (dated 16th September 1959) was for a period of seven years from 17th March 1958. The yearly rent payable was £330. There were various covenants. Under one of these (no. (5)) no trade or business was to be carried on (unless with the previous consent in writing of the lessors) other than that of a garage proprietor, tyre repairer and distributor, motor sales dealer and the like. Under another (no. (8)) the lessee covenanted not to assign, underlet or part with possession of the premises without the lessors' written consent (which was not to be unreasonably withheld in the case of a respectable and responsible person). There was an option of renewal for a term of seven years.

Shortly after the execution of the lease the Appellant sublet in breach of his covenants. He had taken advice which was subsequently found to be erroneous. He sublet no. 388 for use as a betting shop at a rental of £12 a week. He sublet no. 390 for use as a store and offices at a rental of £86 13s.4d. a month. The sublettings therefore yielded him £1,664 a year. Two consequences followed. One was that at a later date the lessors alleged contraventions of various terms of the lease and began forfeiture proceedings. After correspondence had taken place a settlement was reached. The proceedings were discontinued and the Appellant, on 10th February 1964, paid £3,000 to the lessors. The other consequence was that certain assessments to tax upon excess rents were made upon the Appellant. The Appellant appealed against these assessments.

(1) See page 435 *ante*.

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The payment of £3,000 was made by two separate cheques: one was for £1,250 and the other for £1,750. There was apparently an agreement with the Inspector of Taxes that an amount of £1,250 could be set against the 1962-63 excess rents assessments. But, for reasons and in circumstances fully recounted in the judgment of Russell L.J., the Inspector at a later date, i.e., on 16th January 1967, raised an additional assessment for 1962-63: that additional assessment has, however, by the decision of the Court of Appeal now been discharged. As the Crown has accepted the decision of the Court of Appeal in regard to that additional assessment the facts concerning it need not be explored. The question that remains relates to the amount of £1,750. Shortly stated, the question is whether for tax purposes the Appellant can deduct that sum from the rents received by him. He claims that he can do so in reliance upon the provision contained in s. 22(4) of the Finance Act 1963. What he asserts is that the sum of £1,750 became payable by him as consideration for the variation or waiver of certain terms of his lease, with the result that his lease should be deemed to have required the payment of a premium to his landlords and with the consequence that, by reason of what Russell L.J. called the "mirror operation" of Sch. 4 to the Act, relief of his liability to tax would result.

It becomes necessary, therefore, to consider carefully the arrangements or agreements that resulted in the payment of the sum of £3,000 of which the £1,750 is a part. Was the sum paid "as consideration for the variation or waiver of any of the terms of a lease"? On this (the sole remaining issue in the litigation) the Appellant has hitherto been continuously unsuccessful. The facts concerning the arrangements or agreements which the parties made are not in doubt. There is no need to resort to any presumption or inference in reaching a decision as to what took place. The facts as proved or admitted are recorded in the Case Stated. The sublettings which took place were in breach of covenants (5) and (8). By a letter dated 22nd August 1962 the lessors complained both of these breaches and also of breaches of covenant (3) (which related to keeping and yielding up the premises in tenantable repair and condition) and covenant (4) (which related to the times and manner of inside and outside painting). On 10th December 1962 solicitors for the lessors wrote to the Appellant's solicitors and asked for "proposals for dealing with" the breaches, stating that unless they were forthcoming proceedings would be started. At that stage the only proposal made by the Appellant was that he might be allowed to continue as lessee. The solicitors for the lessors by their letter of 9th January 1963 stated: "Having regard to the breaches of covenant which have occurred our clients are not prepared to permit this and we have accordingly been instructed to take proceedings for forfeiture of the Lease." They enquired, however, whether it would not be simpler and quicker for the Appellant to surrender. That course was not acceptable to the Appellant, and there followed a notice to him under s. 146 of the Law of Property Act 1925. The breaches specified were the breaches of covenant (5). Certain discussions then took place between the solicitors. They did not result in a settlement. In July 1963 the lessors instituted forfeiture proceedings in the County Court. The lessors' solicitors wrote on 13th August 1963 that their clients were still prepared to settle the matter amicably and would consider any further proposals. Following further correspondence the lessors' solicitors wrote a letter on 16th September 1963 in which they stated:

"Our clients are prepared to settle this matter by your client—  
 (1) Paying the sum of £1,250. (2) Paying the rent now outstanding from the 24th June 1962. (3) Undertaking to surrender his Lease at the end of the

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A current term, namely, March 1965, and relinquishing the right to an option for renewal. (4) Complying with the repairing covenants in the Lease."

The making of the second condition suggests that, in breach of covenant additional to the breaches of covenants (3), (4), (5) and (8), the payment of rent was in arrears. Condition (3) in the letter had reference to the following term in the lease:

B "2. . . . (12) If the Lessee shall desire to renew the present demise at the expiration of the last year of the said term and shall give to the Lessors three months notice in writing of such his desire and if the Lessee shall up to the time of the giving of notice have paid the rent and performed and observed the covenants on his part hereinbefore contained then the Lessors will grant to the Lessee a new Lease of the said premises for a further term of seven years to commence from the date of the determination of this demise and shall contain similar covenants and conditions to those herein contained except this covenant for renewal".

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The Appellant was willing to agree to conditions (1), (2) and (4) but not to condition (3). He did not wish, as his solicitors intimated in a letter of 9th October 1963, "to relinquish his right to" the option of renewal contained in the lease. He wanted it to be clear that the sublettings could continue, i.e. that of no. 388 "to the Commission Agent" and also that of no. 390: the latter sublease was apparently to expire on 31st December 1964, which would be before the end of the seven-year term of the lease. There followed a further letter from the lessors' solicitors, dated 17th October 1963, which contained the following proposals:

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E "Our Clients are prepared to consent to the lease to Dowley & Darby (Soft Ices) Limited and to the sub-letting of the office to J. Donnelly for use as a betting office, and will also drop their claim for a surrender of your Client's right to the option of renewal which was contained in the original lease on the following terms: (1) Your Client pays the sum of £3,000. (2) Your Client pays the rent now outstanding from 24th June 1962. (3) Your Client complies with the repairing covenants in the Lease. The figure of £3,000 is based on the terms of the underlease to Dowley & Darby (Soft Ices) Ltd., and on the assumption that Donnelly pays a rental of £12 per week, inclusive of rates. We shall be pleased to hear whether your Client is prepared to agree to the settlement on the above terms."

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G The Appellant was agreeable to those terms so far as they concerned the lessors, but for his own purposes and with tax considerations in mind he wished to pay the £3,000 to his lessors in two separate sums. As he had been in communication with the Inspector of Taxes with regard to the amount of £1,250, he wanted the balance of £1,750 to be regarded as payable in reference to the survival of his option for a renewal of his lease. If the contents of the letter of 16th September 1963 are compared with those of the letter of 17th October 1963, it does seem clear that the difference between the two sums of £1,250 and £3,000 (i.e. the sum of £1,750) bore reference to the preservation of the option for renewal. The lessors, as their solicitors stated in a letter of 9th December 1963, did not object to an apportionment by the Appellant of the sum of £3,000 provided it was clear that the sum of £1,750 was not returnable even if the option was not exercised. The £3,000 was paid on 10th February 1964. The sublettings in breach of covenant had taken place shortly after 16th September 1959. So in due course the Appellant paid the lessors sums of £1,250 and £1,750. The arrears of rent (amounting to £495 to the end of 1963) had also to be paid. The

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lease was undoubtedly still in existence. After the settlement to which I have referred it still had a period to run. Its term continued until March 1965. The questions arise (1) had there been a variation of any of the terms of the lease, and (2) had there been a waiver of any of the terms of the lease. It seems clear from the judgment of Russell L.J. that he did not consider that it was being contended in the Court of Appeal that there had been a variation. This, however, would, I am sure, not debar your Lordships from holding that there was a variation of the terms if such was the correct conclusion.

It becomes necessary to consider how matters stood in the period after the settlement. If the sublessees named in the letter of 17th October 1963 had gone out of possession had the Appellant freedom to sublet to whom he liked? I think clearly not. Covenant (8) still bound him. Could he have sublet for use for the purposes of any trade or business? I think clearly not. Covenant (5) still bound him. Could he have disregarded his obligations as to internal and external paintings? I think clearly not; covenant (4) still bound him. Could he have disregarded his obligations to keep the premises in repair? I think clearly not; covenant (3) still bound him. Could he have disregarded any of his obligations in regard to the payment of rent? I think clearly not. The covenants remained in full force and effect. The negotiations to which I have referred, and which led to the settlement which I have mentioned, were in relation to the breaches of covenants which had taken place. If a term of a lease has not been observed, and if because of this discussions then take place between a lessor and a lessee, various results might follow. The lessor might insist upon exercising all such rights as he had. The lessor might agree to vary the term in question so that for the future it would be operative but in some altered form of words. The lessor might agree that the term need no longer be observed and that the lease should continue as though the term was deleted. The lessor might agree that the lease should continue and that the term in question should remain unaltered but that past breaches of it should (on terms) be forgiven. In my view, the settlement reached by the parties in the present case was on the latter basis.

The conclusion which I have expressed applies equally in regard to the option contained in clause 2 (12). That term of the lease would only come into play if the Appellant desired to renew the lease "at the expiration of the last year of the said term", which was in March 1965. He would have to give three months' notice in writing of his desire. He would have to satisfy the condition precedent that up to the time of giving such notice he should have "paid the rent and performed the covenants" contained in the lease. He would then be entitled to a new lease. If the Appellant had given the requisite three months' notice before March 1965 that he desired to have a new lease for a further term of seven years what would it have been open to the lessors to say? They might say that he had not paid rent in the period following the settlement. If that were so, the Appellant could not get his new lease. He could not satisfy the condition precedent. The lessors might say that in the period following the settlement the covenants in the lease had not been performed and observed. If that were so, then again the Appellant could not get his new lease. But what if the lessors asserted the breaches of covenant of which they had complained in 1962 and 1963? In my view, the Appellant would be entitled to say that the lessors had waived those breaches. No court would allow the lessors to assert those breaches. The Appellant had (by paying £3,000, and more particularly by paying £1,750, being part of the £3,000) given consideration for a promise (either express or at least clearly implied) on the part of the lessors that if and when the Appellant became (apart from the events which were the subject of the settlement) entitled to a new lease they would not seek to assert

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- A that in the period before the settlement he had failed to perform and observe certain covenants. The term (clause 2 (12)) remained a term of the lease. It remained unaltered. It was not varied. It did not disappear. The condition precedent contained in it still existed. All that had happened was that certain past breaches of other terms of the lease (which as terms also remained unaltered) had been waived. The lessors would be estopped from asserting those past breaches.
- B Stated otherwise, the lessors in the present case, while not waiving the condition precedent which was a part of the option clause (2 (12)), waived their right (in respect of the breaches which were the subject of the settlement) to assert that the condition precedent was not satisfied. In my view, there was no waiver of any term or of any part of any term of the lease. It is important to remember that the enquiry is not whether there was waiver of something but
- C whether there was waiver "of any of the terms of a lease".

The findings of the Special Commissioners were clear and definite. They were as follows:

- "(4) Having given careful consideration to the evidence before us as to the terms upon which the £3,000 was paid and to the arguments addressed to us, we are of the opinion that the sum of £3,000 was, as to £1,250 thereof, paid in respect of consent to the underlettings, such consent taking effect in relation only to the future in accordance with the terms of the lease, but being given on the understanding that as respects what had happened previously the lessors would no longer seek any remedy by re-entry and forfeiture or claim damages for breach of covenant. In these circumstances the £1,250 did not in our view become payable either wholly or partly as consideration for the variation or waiver of any of the terms of the lease. (5) We are further of opinion that the sum of £3,000 was, as to the balance of £1,750, paid to ensure that the lessors would drop their claim for a surrender of the Appellant's 'right to the option of renewal'. The wording of clause 2(12) of the lease was left unaltered, and we see no sufficient reason to suppose that the dropping of the claim of itself impliedly involved assent to any variation of the terms of that subclause. We are accordingly of opinion, and hold, that the balance of £1,750 also did not become payable either wholly or partly as consideration for the variation or waiver of any of the terms of the lease."
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- In so far as those findings are findings of fact they are of course unassailable: in so far as they are decisions as to the legal effect of what was done they are,
- G in my view, correct.

The learned Judge, Foster J., said<sup>(1)</sup>:

- "The question therefore is whether the payment of the sum of £3,000 was paid as consideration for the variation or waiver of any terms in the lease. In my judgment it was not so paid. It was paid by the lessee to the lessor as consideration for the lessor not to pursue this claim for re-entry or foreclosure and nothing else."
- H

While I agree with the conclusion of the learned Judge my analysis of the facts as set out above is on a somewhat broader basis. In the Court of Appeal Russell L.J. (with whose judgment Sachs and Buckley L.J.J. in their judgments expressed agreement) said<sup>(2)</sup>:

- "In those circumstances the question is, can it be said that the £3,000 was paid in consideration of the variation or waiver of any of the terms of the head lease? Certainly there was no such variation, and that I think is not contended. But was there a waiver of any term? Foster J. held
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<sup>(1)</sup> See page 431 *ante*.

<sup>(2)</sup> See page 435 *ante*.

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that there was not, but that the £3,000 was paid in consideration of the lessor not pursuing his claim to re-enter and forfeit. I myself think that this is correct. That which was waived was not any term but a breach of a term. Moreover, taking covenant (5), which is the user covenant, or covenant (8), the subletting covenant, in both cases, it was pointed out to us, the lease recognised in terms that that which was done would not be a breach of covenant if the consent were previously given. The consent subsequently given in exchange for £3,000 under the settlement was for the purpose of mending the breach by, in effect, treating the consent given as retrospective in its effect. Whatever might be said if, for example, covenant (5) had been absolute in its terms, it did in fact contain within it the seed of legitimate departure from the stated user area by a consent given without the need for any contract varying or waiving any term of the lease. Accordingly on this point I support the Judge's decision." A B C

I would add that when the payment of £1,750 was made it was expressly made with the object of preventing the possibility that past breaches of covenant could be asserted to defeat the exercise of the option to renew. In agreement with Russell L.J., I consider that there was no waiver of any term of the lease but that there was a waiver of certain breaches of some terms. Furthermore, I think that there is an essential difference between the two. The notion which is implicit in a waiver is that of abandonment. Sometimes as between two possible but alternative courses or rights there has to be a choice or election. One is chosen and the other is abandoned. If there is only one right, then it may be given up or abandoned. If there is a claim which could be made, there may be a forbearance from making it in circumstances which involve that it cannot later be made. In most cases, therefore, the word "waiver" means the abandonment of a legal right. D E

In the present case the question arises whether the sum of £1,750 which was a part of the settlement figure of £3,000 was paid as consideration for the variation or waiver of any of the terms of the lease. If a term of a lease is varied it should be possible to express clearly in words what the term as varied is. As to waiver, let it be supposed that there is a term which provides definitely that a lessee is not during the period of a lease to carry on a certain activity on the premises. If the lessor gives consent to the carrying on of the activity for the full period of the lease then he has waived that term. The term will have gone. He will have abandoned his right to insist on compliance. If, on the other hand, the lessor finds that the activity has, without his knowledge, been carried on, he may insist on future compliance while at the same time giving up or abandoning his right to redress or some particular form of redress for the past breach. He will not have waived the term but he will have waived the breach of the term. This distinction between waiving of a breach and waiving of a term has long been recognised. Thus, in *Doe d. Boscawen v. Bliss* (1813) 4 Taunt. 735, where the then existing authority of *Dumpor's case*<sup>(1)</sup> was recognised, there was a covenant in a lease against underletting. The covenant had been broken and the landlord with knowledge of the breach received rent. The Court rejected a contention that "after the condition broken by the first underletting and the forfeiture once waived, the condition was gone for ever". Gibbs J. said<sup>(2)</sup>: "This is a question whether the landlord by overlooking a former underletting, has waived the right of re-entry for a subsequent underletting. That is too strong a proposition, I think, to be made much of." F G H I

The general principle is thus stated in Hill and Redman's Landlord and Tenant, 15th edn. (1970), at page 525:

(1) (1603) 4 Co. Rep. 119.

(2) 4 Taunt. 735, at p. 736.

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- A “Where the breach of covenant which gives the right of re-entry is a continuing breach there is a continually recurring cause of forfeiture, and receipt of rent or the levying of distress is only a waiver of the forfeiture incurred up to the date when the rent was due, or the distress was levied, and the lessor is not precluded from taking advantage of the breach continuing since such date . . . A waiver of the benefit of a covenant or condition in a lease only extends to the particular breach of covenant or condition to which it relates, and is not a general waiver of the benefit of the covenant or condition”: see the cases cited.
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It is of course provided by s. 148 of the Law of Property Act 1925 that an actual waiver by a lessor of the benefit of a covenant or condition does not extend to any instance or to any breach of covenant or condition save that to which the waiver specially relates and does not operate as a general waiver of the benefit of any such covenant or condition. If a lessor is aware of a continuing breach and acquiesces in it for a long period the Court may presume either that he has released the covenant or that he has granted a licence for some particular user: see *Hill and Redman, op. cit.*, page 289 and cases cited in the note, where it is stated:

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- D “It is most important to distinguish between (1) waiver of past breaches and (2) acquiescence or implied release which releases the covenant in the future. The same conduct may be relied upon as raising either implication but a longer period of conduct is necessary to support an implied release.”

- E An example of a waiver (or release) of a covenant is seen in *Hepworth v. Pickles* [1900] 1 Ch. 108. On a conveyance of land there was a restrictive covenant which would prevent the use of any building on the land as an inn, tavern or beerhouse. Shortly after that conveyance beer and spirits were sold in a house on the land and such sales continued openly and notoriously for upwards of 24 years. Following lessor and lessee cases such as *Gibson v. Doeg* (1857) 2 H. & N. 615, Farwell J. held that the covenant had been waived or released.
- F

- In my view, when the settlement in the present case was arranged there was no variation or waiver of any term of the lease. There was a waiver of past breaches or a waiver or abandonment of one or more remedies open to the lessors. The subtenancies had been granted in breach of covenant. For the period following the settlement consent to the subtenants' remaining in possession was given. It was a consent given pursuant to and under a term that had not been waived but which continued in force. So also, and similarly for the future period, consent was given to the user for the future period of the premises by the subtenants for the purposes of their particular businesses. The covenants remained unaltered. They retained their full force and vigour. Nor was there any variation or waiver of clause 2 (12). That clause is a unilateral clause giving an option to the lessee. When the sum of £1,750 was paid it was received by the lessors on the basis that the waiver of past breaches was to be unconditional. The terms of the option remained, and the Appellant would not be able to exercise his option if there were any future breaches of any of the terms of the lease. The Appellant by paying the £1,750 could proceed on the basis that if the time came when he wished to exercise his option the lessors would not assert that the breaches of covenant which were prior to the payment of £1,750 disentitled him from satisfying the condition precedent.
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- I

I would dismiss the appeal.

**Lord Simon of Glaisdale**—My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend on the Woolsack, and I agree with it. In particular, I agree that the £1,750 was a payment by which the Appellant secured the right to exercise the option under clause 2(12) of the lease notwithstanding his breaches of covenant; and that the crucial question is whether in these circumstances the £1,750 was “consideration for the variation or waiver of any of the terms of” the lease, within the meaning of s. 22(4) of the Finance Act 1963.

It was argued for the Crown that there was neither variation nor waiver, since the terms of the lease remained at the end of the transaction exactly the same as they had been throughout. As regards waiver, this seems to me to be an incorrect criterion—both as a matter of ordinary and legal terminology and on authority. Alternatively, I think that the terms of the lease were varied by collateral agreement. Both in ordinary and in legal usage “waive” originally meant “abandon” generally. Nowadays, in ordinary usage “waive” signifies the relinquishment of anything which one has the right to expect, as in “waive the formalities”; in legal usage “waive” and “waiver” signify the relinquishment of a legal right (which, of course, implies a correlative legal obligation). Such expressions as “waive the tort”, “waive the forfeiture” or “waive the term” are legal shorthand: they mean, respectively, “relinquish the rights accruing to the injured party in respect of a civil wrong committed against him by the tortfeasor”, “relinquish the right accruing to the landlord to re-enter the demised premises by reason of a breach of covenant of the lease” and “relinquish the rights accruing to the promisee by reason of the relevant term of the contract.” In the last instance the rights may be either the primary ones conferred by the contract (i.e., to performance of its promises) or the secondary ones conferred by law for breach of the contractual promises (i.e. to withhold performance of reciprocal promises—called compendiously, in the case of a lease, “forfeiture”—though the lease may, subject to modification by s. 146 of the Law of Property Act 1925, itself give the right; and/or to damages): see Diplock L.J. in *R. V. Ward Ltd. v. Bignall* [1967] 1 Q.B. 534, at page 548. “Waive the term” is also apt to include relinquishment of the right to performance of a condition precedent (see Addison on Contracts, 11th edn. (1941), pages 55 and 145–6). Here, undoubtedly, the lessors relinquished their right to the performance of a condition precedent.

So much for the terminology. But there is also the authority of case law against the argument for the Crown. In *Doe d. Boscawen v. Bliss* (1813) 4 Taunt. 735 the lessor had reserved to himself under the lease a right of re-entry on breach of covenant not to relet. It was accepted that he had waived his right to re-enter arising from one underletting, but it was held that he did not thereby lose his right to re-enter on a subsequent underletting. Similarly, waiver of the right to re-enter on one breach of covenant to repair did not amount to waiver of his right to re-enter on a subsequent want of repair. This rule—that waiver of one breach of a term does not preclude reliance on a subsequent breach of the same term—received statutory recognition in 23 & 24 Vict. c. 38, s. 6: see also *Doe d. Baker v. Jones* (1850) 5 Ex. 498. In these cases the term in the lease remained exactly the same after what was held to be the first waiver—otherwise it could not have been relied on as giving rise to forfeiture on subsequent breach. This demonstrates that the test of waiver is not whether or not the term remains in existence, on the face of it unaltered.

The law drew a distinction between “waiver” and “variation” in order to obviate inequities liable to result from s. 4 of the Statute of Frauds 1677: see Chitty on Contracts, 23rd edn. (1968), page 581, para. 1241. Cheshire and Fifoot, Law of Contracts, 7th edn. (1969), page 500, regard the distinction as being without essential juridical significance. But when the two words are used in a taxing Statute, it is natural to suppose that the draftsman was trying to



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- A cover two different situations. If so, "waiver of a term" would be apt to refer to the total relinquishment of the primary rights conferred by the term; "variation of a term" the modification of the primary rights conferred by the term. If this is correct, the lessors here, in my view, "waived" a term (i.e., the condition precedent to the exercise of the option), since they relinquished the right to rely on its existing breach. But it could be argued that the true view is that the term was varied, in that in effect a proviso by way of licence of the previous unlicensed subletting and change of user was written into clause 2(12). This tends to suggest that Cheshire and Fifoot are right that there is no essential juridical difference between waiver and variation. It is unnecessary in the instant case to determine whether what occurred is more appropriately to be described as variation or waiver of the term: it was certainly one or the other.
- C I would therefore allow the appeal.

**Lord Salmon**—My Lords, I have had the advantage of reading the speech of my noble and learned friend the Lord Chancellor. I agree with it, and would therefore allow the appeal.

*Questions put:*

- D That the Order appealed from be varied, and that the cause be remitted to the Chancery Division with a direction to proceed in accordance with the majority opinions expressed in this House.

*The Contents have it.*

That the Respondent do pay to the Appellant his costs here and below.

*The Contents have it.*

- E [Solicitors:—Ward, Bowie & Co., for George Mitchell, Colman & Co., Birmingham; Solicitor of Inland Revenue.]
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