# Local Court
## New South Wales

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| Case Name: | **Wallalong Land Developments Pty Limited v Charles Joseph Warren [2024] NSWLC** |
| Medium Neutral Citation: | Wallalong Land Developments Pty Limited v Warren |
| Hearing Date(s): | 25 June 2024 |
| Date of Orders: | 26 August 2024 |
| Date of Decision: | 26 August 2024 |
| Jurisdiction: | Special Jurisdiction |
| Before: | Magistrate Olischlager |
| Decision: | Pursuant to section 20(1) of the Landlord and Tenant (Amendment) Act 1948 the Court sitting as a Fair Rents Board makes a determination to fix Fair Rent at $50.00 per month in respect to the property known as “Lot 105” 1A Flowers Drive Catherine Hill Bay NSW. The determination takes effect on the date of the filing of this application being 16 August 2023. |
| Catchwords: | Landlord and Tenancy, protected estate, exercise of jurisdiction of Fair Rent Tribunal, determination of fair rent |
| Legislation Cited: | Landlord and Tenant (Amendment) Act 1948 |
| Cases Cited: | Clyne v Wilson & Lewis [1967] 1 NSWR 595<br>Rathborne v Abel (1964) 38 ALJR 293<br>Rathborne v Hamill (1966) 84 WN(Pt 1) 504<br>Clyne v East (No1) (1967) 68SR(NSW)385 |
| Texts Cited: | |
| Category: | Principal judgment |
| Parties: | Wallalong Land Developments Pty Limited (Applicant) |

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| | Charles Joseph Warren (Respondent) |
| Representation: | Counsel:<br>A Maroya (Applicant)<br><br>G James AM KC (Respondent)<br>P Lane (Respondent)<br>L James (Respondent)<br><br>Solicitors:<br>P Kilmurray Kilmurray Lawyers (Applicant)<br>C Wong Tenants Union of NSW Co-op Ltd (Respondent) |
| File Number(s): | 2023/00260686 |
| Publication Restriction: | Nil |

## JUDGMENT

1 Oscar Wilde wrote in 1889 *"life imitates art far more than art imitates life"*. As if to illustrate that point the present case before the Court appears to have been lifted from the script of the classic Australian film *"The Castle"*. Mr Warren is an 80 year old man who has lived in a miner's cottage at Catherine Hill Bay for most of his life. His grandparents lived in the cottage before him. For as long as Mr Warren can recall he has been paying rent on the cottage at a rate of $50 per month. The cottage is situated on land owned by Wallalong Land Developments Pty Ltd (Wallalong). Wallalong is a property development company seeking to develop the land. Mr Warren's occupation of the cottage is an impediment to any proposed development proceeding.

2 Wallalong initiated eviction proceedings in the Supreme Court. Those proceedings were discontinued in November 2022 when it became apparent that Mr Warren was a "protected tenant" under the Landlord and Tenant (Amendment) Act 1948. Wallalong subsequently commenced these proceedings in the Local Court seeking a determination of rent payable by Mr Warren under section 18(1) of the Landlord and Tenant (Amendment) Act 1948.

3 Mr Warren resists an increase in rent which would impact his ability to live out his remaining years in the cottage. To again draw from The Castle, for Mr Warren, *"It's not a house. It's a home."*

4 Despite such emotive words it remains necessary for the Court to apply the law. In this instance, the Court is required to apply a law which, prior to these proceedings, may have been considered nothing more than a curious legal vestige from the previous century.

5 The issue of jurisdiction of the Local Court to hear and determine the application pursuant to section 18(1) of the Landlord and Tenant (Amendment) 1948 was considered in an earlier hearing by this Court on 19 February 2024. It was agreed between the parties that the premises occupied by Mr Warren, known as Lot 105 1A Flowers Drive Catherine Hill Bay, are subject to the provisions of

the Landlord and Tenant (Amendment) Act 1948. The Court concluded that the Act continues in force in respect to prescribed premises by virtue of Schedule 2 Part 7 clause 24 of the Residential Tenancies Act 2010. Despite there being no separately constituted Fair Rents Boards since 30 September 1987 magistrates, and now the Local Court, remain conferred with jurisdiction to exercise the functions and powers of Fair Rents Boards. That includes the power to make a Fair Rent determination.

6 The provisions of the Landlord and Tenant (Amendment) Act 1948 that are relevant to making a determination of Fair Rent are contained in sections 20 and 21:

"20. Determination of application

(1) Where an application has been made for the determination of the fair rent of any prescribed premises other than shared accommodation, the Fair Rents Board shall, after making such inquiries and obtaining such reports (if any) as it considers necessary, and after considering any representations made by any person whose rights may be affected by the determination, determine the fair rent of the prescribed premises at an amount equal to the rent of the prescribed premises at the prescribed date adjusted by such amount as the Board deems proper having regard only to the matters specified in section 21…

…

(4) In this section, the prescribed date, in relation to any prescribed premises, means the thirty-first day of August, one thousand nine hundred and thirty-nine, or, where the prescribed premises were not in existence on that date, the date on which the erection of the premises was completed."

Section 21 outlines the matters that the following matters that shall be considered when making a determination of fair rent:

“(a) the capital value of the premises at the prescribed date, or, if the premises were not in existence on that date, on the date on which the erection of the premises was completed.

(b) the lessor’s liability for annual rates and insurance premiums in respect of such premises and fixtures thereon,

(c) the estimated annual cost of repairs, maintenance and renewals of the premises and fixtures thereon,

(d) the estimated amount of annual depreciation in the value of the premises and the estimated time per annum during which the premises may be vacant,

(e) the rents, fixed by a determination in force under this Part, of other prescribed premises (other than premises which are the subject of an agreement in force under section 17A or of a determination made under Division 4AA) which:

(i) are in the locality of,

(ii) are subject to the same provisions of this Act as are, and

(iii) are otherwise comparable in all respects to,

The premises the subject of the application,

(f) the rate of interest charged upon overdrafts by the Commonwealth Bank of Australia

(g) any services provided by the lessor or lessee in connection with the lease or the value of any goods leased with the premises.

(h) any obligation on the part of the lessee to effect any improvements, alterations or repairs to the premises at his or her own expenses,

(i) the conduct of the parties, and

(i) the amount, if any, that the Fair Rents Board is satisfied was necessarily expended by the lessor since the prescribed date referred to in subsection (4) of section 20 upon the improvement or structural alteration of the premises (but not including decoration, repairs or maintenance).

In determining the fair rent of any premises the Fair Rents Board shall not make any allowance by reason of any loss which might be imposed upon the lessor by an order fixing the rent of the premises at an amount less than the lessor's liability under a mortgage of, or contract of sale in respect of, the premises, or under a hire purchase agreement or contract of sale in respect of any goods leased with the premises.

Notwithstanding any other provision of this Act, a Fair Rents Board shall not, in making a determination or a variation of a determination, of the fair rent of any prescribed premises have regard to any capital value of those premises other than the appropriate capital value of those premises referred to in paragraph (a)."

7 Section 21(1A) to (1C) list further matters to be considered including any land tax payable, agent's collecting commission, the financial circumstances of the lessor and lessee. Section 21(1D) to (1E) precludes a Fair Rents Board from making allowance under (1)(f) in excess of the interest rate charged by the Commonwealth Bank at the date of the determination as against the date of the 31 August 1939 or any increase greater than 8% of any lessor costs identified in (1)(j).

**Evidence Produced by the Parties**

8 It is agreed between the parties that there has never been a previous determination by the Fair Rents Board in respect of the premises occupied by Mr Warren. There is no written lease agreement and the arrangements for payment of rent continued informally by oral agreement between Mr Warren

(and his grandparents before him) and managers of the Wallarah Coal Company that employed Mr Warren. That agreement in relation to rent has continued since the Applicant purchased the land from Coal & Allied Operations Pty Ltd and Catherine Hill Bay Land Pty Ltd on 13 February 2017. This is a first determination in respect of the property by the Court exercising the powers of a Fair Rents Board.

**Applicant Evidence**

9 The Applicant has engaged an expert property valuer to provide a report on fair rent. Mr Robert Tew is a registered valuer with an Associate Diploma of Business Real Estate Valuation and experience within the industry since 1988.

10 Mr Tew prepared an initial report dated 15 June 2023 providing opinion evidence that the market rental value of Mr Warren's property as at 11 April 2023 was $28,500 per annum gross or $548.00 per week.

11 In reaching that conclusion Mr Tew had regard to a number of factors and assumptions including:

- The property has a lettable area of 1,475m$^2$.
- The property is vacant residential land serviced with electricity, septic services and tank water and frontage to a formed public road.
- The property is assumed to be fit for residential occupancy.
- Rent is subject to annual review in accordance with the annual movement in the consumer price index.
- The lessee is responsible for maintenance, repair and insurance of all lessee improvements.

12 Mr Tew has considered comparisons between the subject land and rental yields being achieved for other residential assets with the objective to adduce current market rental value/fair rent.

13 Mr Tew has provided a supplementary report dated 4 June 2024 seeking to address comparable sales and rentals as at 31 August 1938. This supplementary report appears to have been prepared having regard to the obligation under section 20(1) of the Landlord and Tenant (Amendment) Act 1948 to determine fair rent as at the prescribed date adjusted by such amount as the Board deems proper. The prescribed date is 31 August 1939. Mr Tew, conceded error in that he refers to the incorrect date of 31 August 1938, however, he maintained that the error by one year did not alter his conclusions regarding fair rent.

14 The supplementary report contains details of historical searches of property values. Mr Tew has undertaken searches of NSW Valuer General's rating and taxing valuations carried out at that time for residential properties in surrounding suburbs:

- Part Lot 14 Catherine Hill Bay Rd Milray – Improved Value as at 12/1940 £13
- Lot 27 Pelican Street Swansea – Improved Value as at 1/1937 £35
- Lot 3 Rawson Street Swansea – Improved Value as at 1/1937 £30
- Lot 2 Kennedy Street Swansea – Improved Value as at 1/1937 £35
- Lot 24 Willis Street Swansea – Improved Value as at 1/1937 £35
- Lot 23 Pelican Street Swansea – Improved Value as at 1/1937 £50
- Lot 12 Sturt Street Swansea – Improved Value as at 1/1937 £50

15 Mr Tew has also provided historical search of advertised rental properties advertised during the period 16 December 1936 to 19 January 1939:

- Belmont Furnished Cottage rent £2 per week
- Swansea Weekend Cottage rent £8 per week
- Belmont Furnished Cottage rent £2 10/ per week
- Belmont Weatherboard Cottage rent £1 per week

16 Mr Tew has formed the opinion having regard to VG rate notices that the subject land would have had a market range between £30 to £35 as at the prescribed date. Mr Tew notes that there is a significant disparity in rental rates and notes that some rates might reflect holiday rentals as opposed to residential rentals. In the absence of comparative rentals Mr Tew has taken an approach of determining rent on the basis of current rental yields. Mr Tew has had regard to rental yield rates in the area of Catherine Hill Bay in 2022. Mr Tew forms the opinion that the rental yield rates range between 2.85% to 4.36%.

17 Mr Tew adopted a 4% yield rate. Applying this rate to an improved land value of £30 provides a market rent rate between £1.2/ and £1.4/ per annum. Mr Tew forms a view that the market value of rent as at the 31 August 1938 is £1.3/ per annum or 2/.5p per week.

18 Mr Tew converts Australian pound into British pounds have regard to exchange rates and applies a factor of X2 noting that in 1966 the Australian Government applied a direction when adopting the decimal system that each pound was worth $2 Australian in forming the view that the value of the subject property was $70 in 1938.

19 Mr Tew has then applied CPI increases to form the view that the current market value of the property of $690,589.96. Based on a rental yield of 4% Mr Tew expresses the view that the weekly rental amount is $531 per week.

**Defendant Evidence**

20 Mr Warren has provided an affidavit dated 2 February 2024. He provides an outline of his family's connection with the property at Lot 105 Flowers Drive Catherine Hill Bay.

21 His grandfather, Robert Walton, worked in the mines around Newcastle. In the 1890's he was offered work in the mine at Catherine Hill Bay. Robert Walton and his wife Mary Jane Walton moved into the cottage at Lot 105 Flowers Drive on land owned by the mine. Mr Warren's father was also a miner. He married the daughter of Robert and Mary Walton, Lilian Walton. Mr Warren believes that he was born in the cottage and attaches a photograph of himself as a baby with his grandmother outside the cottage taken in 1944.

22 Mr Warren's grandfather died in a car accident when Mr Warren was 12 years old. His grandmother continued to live in the cottage paying rent to the mine. Mr Warren would often stay with his grandmother. Mr Warren's father was injured in the mine. On his deathbed he arranged for Mr Warren to obtain work in the mine. Mr Warren believes that he commenced work at the mine in 1969.

23 In 1967 Mr Warren's grandmother passed away. She agreed for Mr Warren to take possession of the cottage. Mr Warren has continued to live in the cottage since that time, working for and paying rent to the coal company. This arrangement was approved by the Mine Manager, Dick Gobert, through the Deputy Manager Morrie Alexander. Mr Warren continued to pay rent although there was no written lease or records kept. Rent was deducted from his payslips.

24 Throughout the period of time that Mr Warren has lived in the cottage he has been responsible for any cost of repairs and maintenance. In the 1970's he installed a modern toilet and hot water system. He replaced the flooring in the 1960's. He recently engaged roofers to fix his roof after heavy hailstorms. He still uses the cast iron stove installed by his grandparents.

25 Mr Warren stopped working with the mines in 2002. He has land in Tenterfield of 900 acres. There is no house on that property only a corrugated iron shed. He has some animals on the property although Mr Warren derives no income from the property. Mr Warren no longer works and does not have any other income than his fortnightly pension. A Centrelink document indicates that Mr Warren received an age pension payment of $499.80 on 24 April 2024. Mr Warren has an account with Newcastle Permanent Building Society with a balance as at 24 April 2024 of $207,209.00.

26 Mr Warren has provided a number of photographs of the residence which show the cottage to be aged and in very basic condition with dated fixtures.

27 Mr Warren has paid $50 per month rent for as long as he can remember. He has attached the stub of a postal money order for $50 dated 6 November 2007. He that he has continually paid rent for more than 50 years.

**Submissions**

28 The Applicant submits that the Court exercising the powers of the Tribunal can rely on the reports provided by Mr Tew and his opinions regarding the market value of the property. The Applicant submits that Mr Tew's reference to a date of 31 August 1938 instead of 31 August 1939 is a matter of inadvertence which should be treated as trivial. The applicant submits that there was no distinction between the term "market value" used in Mr Tews report and "capital value" referred to in section 21(1)(a) of the Act.

29 The Applicant submits that it remains responsible for annual statutory outgoings including rates, insurance and Land Tax, and services including water, sewerage and electricity. The Applicant accepts that it has not incurred any costs in relation to the maintenance or repairs to the property.

30 The Applicant submits that the approach of the Court exercising the powers of the Tribunal should be as described by Walsh JA in Clyne v Wilson & Lewis [1967] 1 NSWR 595 at 607:

*"If the Board is asked to vary the amount which has earlier be determined as the fair rent, it must necessarily look, to the extent that is permitted by the Statute to do so, at changes which have taken place, rather than endeavouring to look in the abstract at such things as the current purchasing power of money or the current ratio of rental earnings to the prices of other commodities."*

31 The Applicant submits that the Court exercising the powers of the Tribunal should accept Mr Tew's reports as an aid in assessing the fair rent for the premises.

32 The Defendant submits when the Court is fixing a rent the Board may only take into account the matters set out in section 21 of the Landlord and Tenant (Amendment) Act 1948. The Defendant is critical of Mr Tew's reports noting that the numerous reference to an incorrect date were not merely matters of oversight and that the use of the term "market value" instead of "capital value". The Defendant also submits that the opinions provided by Mr Tew take into account changes in economic conditions which are expressly precluded by section 21(1E).

33 The Defendant concludes that the Applicant seeks a first determination of fair rent, but has not provided the Board with any of the material that section 21 of the Act requires. On that basis the Defendant submits that the application should be dismissed, or in the alternate the Defendant would not oppose a determination of fair rent at the current rent.

**Consideration**

34 The Landlord and Tenant (Amendment) Act 1948 was introduced with the purpose of retaining rent-fixing machinery formerly contained under the National Security (Landlord and Tenant) Regulations. The National Security Regulations were introduced as part of a range of war-time measures. When those regulations were discontinued on 16 August 1948 and the Landlord and Tenant (Amendment) Bill was introduced to parliament with the purpose of

retaining restraint on rent fixing. In the second reading speech of The Hon R R Downing (Minister for Justice) on 3 August 1948 said:

*"Without embarking upon any attempt to evaluate the causes, the fact is that the supply of accommodation – and I speak of both housing and other accommodation – is not sufficient to meet the demand. Unless a degree of control is continued there would be wholesale eviction of householders, of office users and of tenants in all classes of premises. In the result, rents would spiral, and apart from the serious consequences to the individual, the passing on of increased rent charges in industry and commerce would have a serious and damaging effect upon the prices structure generally."*

35 The Bill largely followed the Commonwealth regulations, in particular, *"it provides that rent payable in respect of premises on 31st August 1939 shall be deemed the pegged rent."* The 31st August 1939 was the day before Germany invaded Poland being the commencement of World War II. The Minister further states:

*"The rental formula – as it might be termed – to be applied by fair rents tribunals is detailed in clause 21 of the bill. It will be noted on examination that the Court, or Board, or Controller has to have regard to the capital value of the premises as at 31st August 1939…"*

36 While the notion of determining "fair rent" might imply notions of assessing what is fair or just between landlord and tenant it is clear that the process of determining fair rent under the Landlord and Tenant (Amendment) Act 1948 requires a strict application of the matters contained in section 20 and 21. The Tribunal is to have regard to the capital value of the property at the prescribed date of 31 August 1939 and consider the matters in section 21 to determine any increase in rent. The Act expressly precludes the Tribunal from having regard to current capital values of the prescribed property.

37 The scope of discretion of Fair Rents Boards was the subject of judicial consideration in Rathborne v Abel (1964) 38 ALJR 293 where the High Court

overturned a decision of the NSW Court of Appeal and held that the Board was not limited in its determination to consideration of the capital value of the premises as at 31 August 1939 but was entitled to take into account the capital value at the date of determination. Legislative amendments were introduced in 1965 seeking to reverse the effect of Rathborne v Abel. Despite those amendments, however, in the subsequent decision of Rathborne v Hamill (1966) 84 WN(Pt 1) 504 the Court of Appeal held that Boards could have regard to factors including the increase in the Sydney basic wage since the prescribed date and the increase in the cost of living. Again, the New South Wales Parliament intervened with further amendments enacting the Landlord and Tenant (Amendment) Act 1966. The object of the amendments was expressed in section 3 to prevent substantial increases in rent and to eliminate "the broad judicial approaches seen in Rathborne v Hamill". The Amending Act, inter alia, inserted section 21(1E) precluding a Fair Rents Board from making any allowance by reason of any change since the prescribed date in economic conditions. The amendments acted retrospectively to assist tenants in 592 cases who had experienced significant rent increases as a result of the decision in Hamill. In Clyne v East (No1) (1967) 68SR(NSW)385 the Court of Appeal noted that *"Parliament had, as a matter of legislative policy, decided to keep rents at a level lower than that which would have been maintained if the formula laid down by the High Court (in Rathborne v Abel) was adopted*". The Court of Appeal confirmed that the amendments had the effect of restoring the practice that had evolved by Fair Rent Boards during the years prior to Rathborne v Abel. The amendments which provided for variation of determinations which applied Rathborne v Abel were held to be valid. In the stated case referred to the Court of Appeal the Magistrate reduced the determined rent of $6.80 per week by the amount of $2.38 effective from 8th August 1966 which removed an allowance for change in economic circumstance.

38 The practice developed by Fair Rents Boards over those years is not readily apparent from the legislative scheme. Section 21 does not provide a strict formula for calculating fair rent. Some insight regarding the approach generally adopted by Fair Rents Boards can be gained from the New South Wales Parliament *Report of the Royal Commission of Inquiry into the Operation and*

*Effect of the Landlord and Tenant (Amendment) Act 1948* which was published in October 1961.

39 The Report outlines the principles adopted in fixing rent at pages 13 to 16. In summary, the Report states that up until 1948 the general practice of Fair Rents Boards adopted what was called a *"formula method"* based on 5 per cent of the Improved Capital Value of the premises as at 31 August 1939 together with fixed allowances for outgoings, depreciation, repairs and maintenance and management fees. Due to the anomalous results of this formula State Deputy Rent Controllers determined a new basis for fixing rent referred to as the *"basic rent plus increased outgoings"*. The Report states:

*"According to this formula, the controlled rent was originally fixed as the sum of –*

- *The fair market rent of the premises as at the 31st August 1939, or the date of erection of the premises (whichever is that later date).*

- *The amount by which outgoings in respect of municipal and water rates and insurance had increased between the date at which the fair market rent was fixed and the date of the determination of rents in question.*

- *The amount by which the proper cost of repairs and maintenance to the lessor had increased between such dates.*

- *The amount by which the management charge, on the basis of 5 per cent of the rent had increased between such dates.*

…

*What was a fair market rent as at the relevant date is established by evidence. Evidence on this matter generally takes the form of evidence as to –*

*(i) the actual rent paid at the relevant date;*

*(ii) the actual rent paid at the relevant date of other comparable premises, and*

*(iii) the Assessed Annual Value established by the Valuer General, plus one-ninth.*

*The Board, in particular cases, obtains from the Valuer General a report as to what in his opinion was a fair market rental at the relevant date."*

40 The Report outlines the approach of the Board in respect to calculating the reasonable allowances for repairs and maintenance. The Board uniformly applied an additional 0.5% on the Improved Capital Value on three occasions during the period of 1952 to 1960 having regard to interest charged upon overdrafts by the Commonwealth Bank of Australia.

41 It is apparent that the methodology adopted by Mr Tew in his initial and supplementary reports are inconsistent with the legislative provisions of sections 20 and 21 of the Act and the historical formula *"basic rent plus increased out-goings"* applied by Boards. In his initial report he attempts to determine a rental value having regard to current market rates. In the supplementary report he attributes a rental value as at 31 August 1938 (albeit a year earlier than the correct prescribed date) and applied an annual average CPI rate of 3.5% per annum.

42 While the Court rejects Mr Tew's methodology and conclusions it remains necessary for the Court to make a determination of Fair Rent. Fair Rent Boards are Boards of inquiry and even where the parties evidence may be inadequate the Board must do the best that it can with the available evidence.

43 The first step in determining Fair Rent is to determine the basic rent as a 31 August 1939. There is no evidence as to what actual rent was paid by Mr Warren's grandparents as at 31 August 1939.

44 There is some limited evidence of rents applicable in the late 1930's provided in Mr Tew's report. They are not closely comparable to the property the subject

of these proceedings. One rental is described as a weekend cottage suggestive of a holiday letting which is likely to be at a rate significantly higher than other residential tenancies and not a controlled rent. Other cottages listed include furnishings which is again likely to give rise to a higher rental rate than an equivalent unfurnished cottage. The rates provided are from holiday destinations of Swansea and Belmont as opposed to Catherine Hill Bay which, during the 1930's was a mining village. The 1961 Report of the Royal Commission of Inquiry notes the 1954 census which disclosed 1,630 unoccupied dwelling within the Shire of Lake Macquarie. The Report attributes the high number to Lake Macquarie being a well-known holiday location.

45 The miner's cottages were owned by the Wallarah Mining Company in 1939. Cottages were exclusively available to company employees and their families. There were no doubt benefits to the mining company to provide rental accommodation to its workers in close proximity to the mines. This is likely to have resulted in rental rates being concessionally based rather than market based. The rental rates for property in neighbouring towns of Belmont, Swansea and Nords Wharf while close by, are not strongly comparable to miner's cottages in Catherine Hill Bay.

46 These factors lead the Court to the view that the basic rent for comparative miner's cottage at Catherine Hill Bay in 1939 would have been lower than the range of rents identified by Mr Tew. The range of rents identified by Mr Tew commence at 1 pound per week. The Court estimates a weekly rent for the property of 5 shillings per week as at 31 August 1939.

47 The third relevant consideration in determining basic rent is the Assessed Annual Value of the property established by the Valuer General, plus one-ninth as at 31 August 1939. The property occupied by Mr Warren comprises an area of 1,475m$^2$. It is part of a parcel of 73,170m$^2$. The cottage is situated upon the 1200 acres of land purchased by Wallarah Coal Company in 1888. The premises has not been subject to an individual assessment by the Valuer General at any time. There is no evidence of the Assessed Annual Value established by the Valuer General which could assist in determining basic rent.

48 Section 21(a) of the Act requires the Board to have regard to the capital value of the prescribed premises. The evidence regarding the capital value of the subject property as at 31 August 1939 is limited, however, the Court is required to do the best that it can on the available information. Mr Tew has provided seven improved residential property values from the late 1930's in the neighbouring township of Swansea the median being 30-35 pounds. Swansea is 9km distance from Catherine Hill Bay. The Court determines that the Improved Capital Value of Mr Warren's property to be 30 pounds as at 31 August 1939.

49 The Court determines that the property would have had a basic rent as at 31 August 1939 of 5 shillings per week and an Improved Capital Value of 30 pounds.

50 The second step of the Board fixing fair rent is to consider whether that basic rent is insufficient having regard to the matters contained in section 21 of the Act.

51 There is no evidence regarding increased lessor outgoings since 1939 rent. The lessor is liable for statutory taxes, rates and insurance, however, there is no material provided regarding how those costs may have increased. The absence of any information is no doubt attributable to the change of ownership of the land and the fact that that property was part of a large parcel of land making apportionment of costs difficult. While there will have been increased costs since 1939 Wallalong has unable to provide any calculation of these costs on a pro rata basis.

52 The lessor has never been liable for any repairs, maintenance or upgrade of the property. Those costs have been wholly borne by Mr Warren.

53 The lessor has never incurred a management agent fee as investment in rental property has never been a primary business activity of the lessor.

54 Fair Rents Boards allowed a general increase in controlled rents under section 21(f) based on increases in interest charged on overdrafts by the Commonwealth Bank. A half percent increase was allowed on the 1939 Improved Capital Value in November 1952, April 1956 and November 1960 totalling 1.5%. It is likely that further increases are warranted after this time although the details of Commonwealth Bank overdraft interests after this time are unavailable.

55 The inability of Wallalong to provide information regarding increased outgoings means that applying the basic rent plus increased outgoings formula there would only be a nominal increase in the basic rent from 1939 of 5 shillings per week.

56 While it is open for the Court to make a fair rent determination on this basis the Court notes that this would be a determination significantly lower than the current rent rates paid by Mr Warren. The Court acknowledges that the pegging of rent to the date of 31 August 1939 is likely to produce an increasing disparity to market rent over time. In addition, the unavailability, due to passage of time, of information relevant to the matters contained in section 21 further exacerbates that disparity.

57 The ability of the Court to apply a legislative rent control mechanism created 80 years ago has been significantly impaired. The scant information on comparative rents in 1939 and the capital value of property at that time has meant that the Court has had to resort to generalised estimates which are, in some respects, little more than “the vibe” of matters. The absence of information on statutory outgoings has resulted in an inaccurate and artificially low fair rent figure.

58 The Applicant commenced these proceedings with the intent of substantially increasing the rent payable by Mr Warren and potentially raising rent to a level which might force him to vacate the premises. The use of a rent control mechanism which had the objective of providing protection for tenants against free market increases was never likely to achieve that aim. The protections

conferred by the Act allow Mr Warren the opportunity to continue to enjoy the "serenity" of his home for his remaining years.

59 The Court has an obligation to make a determination under section 20(1) of the Act. The Court must have regard to section 21(1) factors even where those factors are incapable of being quantified. The Court is satisfied that it should make an allowance in relation to increases in the lessor's liability for statutory rates and services notwithstanding that they have not been capable of quantification. Doing the best that it can the Court makes a determination to fix fair rent at $50.00 per month being the rent currently payable by Mr Warren. The determination takes effect on the date of the filing of this application.

Magistrate Olischlager

Local Court of New South Wales

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