Privy Council Appeal No. 22 of 1968

The Broken Hill Proprietary Co. Ltd. and another – *Appellants*

v.

The Valuer General – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH 1969

Present at the Hearing:
LORD HODSON
LORD GUEST
LORD UPJOHN
LORD DONOVAN
LORD DIPLOCK
[*Delivered by* LORD UPJOHN]

This appeal from the Supreme Court of New South Wales Court of Appeal raises a question of importance not only to the parties, but generally upon the construction and ambit of the Valuation of Land Act, 1916–59 of New South Wales to which their Lordships will refer as "the Valuation Act". That Act has been amended since but subsequently to the issues which arise in this case, so that such amendments are immaterial. The matter came before the Supreme Court by way of case stated by The Land and Valuation Court.

The problem that arises can be shortly stated. By an agreement dated 30th May 1960 the first appellant sold to its wholly owned subsidiary the second appellant, land and certain steel works erected thereon within the State of New South Wales. Under the terms of the agreement the consideration for the sale depended upon the unencumbered value of the land the subject of the sale within the meaning of the Stamp Duties Act 1920 as amended. Accordingly when the agreement was lodged for stamping with the Commissioner of Stamp Duties he issued to the appellants a requisition for evidence of value to be supplied: and thereupon the appellants made to the Valuer General an application for a valuation which they stated was required for stamp duty purposes. After a lapse of nearly four years, the Valuer General issued to the appellants a valuation in the sum of $100,000,000, which compares with a value for stamp duty purposes contended for by the appellants of $27,198,656.

The substantial issue between the parties is whether section 5 of the Valuation Act and particularly subsection (2) thereof (a subsection inserted in section 59 of the Act in 1934 and transposed to section 5 in 1951) applies to a valuation for the purposes of stamp duty. That subsection, putting it very shortly, directs that in determining "the improved value" of land the value of certain plant, machines, tools or other appliances which though fixed to the premises may be removed from the premises without structural damage thereto, is not to be included in such valuation. Being steel works there was much plant, machinery, tools and other appliances admittedly falling within the exception made by the subsection. Section 5 of the Valuation Act defines the "improved value" of land and states how it is to be determined. Section 6 defines the

" unimproved value " of land and states how that is to be determined. Thus improvements made thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title are to be treated as if they had not been made. Section 7 provides for ascertainment of the " assessed annual value of land " including any improvements. Each of these methods of valuation contains certain artificial elements.

These three modes of valuation may be conveniently referred to as the " statutory formulae ".

The important question of principle that arises is whether in making a valuation for stamp duty purposes the respondent is empowered only to make a valuation according to one or other of the statutory formulae, or can make a valuation on what may be called ordinary common sense principles, *e.g.*, according to the market value of the property in question.

Their Lordships have heard most careful arguments from counsel on either side for which they are much obliged; but as, in their Lordships' judgment, the answer turns more upon a general consideration of the object and policy of the Valuation Act, and less upon the precise language of individual sections to which their attention was called, they do not propose to embark upon too detailed an examination of these latter. During its long history the Valuation Act has been much amended, and sections transposed, so that no true guidance can be obtained from an examination of other sections; thus for example section 78, strongly relied on by the respondent, fails to give any guidance, for until 1951, a trustee could only obtain a certificate of valuation on one of the statutory formulae. The more important sections of the Valuation Act are as follows: Section 14, which is the key section from the point of view of the appellants, directs that a valuation shall be made as soon as practicable by the respondent of the unimproved, improved, and assessed annual value of all lands with certain exceptions. Such valuation may (the word is permissive), also include the unimproved, the improved, and assessed value of the estates and interests of all owners including the interests of lessors and lessees of any such land. Section 16 provides that a valuation roll shall be prepared for each district and shall set forth particulars with regard to each valuation of land the name and address of the owner, the situation, description and the measurement of the land and the nature of improvements, and state the unimproved, improved, and the assessed annual value of the land. Subsection (2) provides that such roll may (again the word is permissive) also contain a statement, putting it shortly, of the value of the estates and interests of all owners, including the interests of lessors and lessees. Section 20 provides that the holder of an estate in fee simple; the mortgagee in possession; and a lessee who is liable to pay rates may require the Valuer General to make a new valuation of his land or of his estate or interest therein. Section 21 is important because it provides that where there are more owners than one of the freehold of any land, the sum of the values of the interests of the said owners in the land shall not be less than the amount at which the improved value of the land would be estimated if held by one owner in fee simple; and subsection (2) makes corresponding provision where there are leasehold interests. Section 22 provides that the value of the interest of a lessor or lessee in the improved value of land is the capital sum which such interest might be expected to realise if offered for sale. Section 43 provides that if there is any objection the valuation court may make consequential alterations as are necessary for the purpose of fixing the unimproved, improved, and the assessed annual value in respect of the land, and the values of the estates and interests of the owners thereof.

The crucial sections for the purposes of this appeal are the first and last sections in Part VI which their Lordships must set out in full.

"PART VI

USE OF VALUATION ROLLS BY GOVERNMENT DEPARTMENTS

Valuations for stamp and death duties

65. In every case where under the Stamp Duties Act, 1920, the duty payable is dependent upon the value of land or of any estate or interest therein, such duty shall be paid according to the valuation made under this Act as shown in a certificate of valuation.

Valuation of Land. Determination of values at certain dates

70. (1) The valuer-general shall, on application made by any person who has or had an estate or interest in the land at the date at which he requires the valuation made and on payment of the prescribed fee, make a fresh valuation to determine the value of any land at a date before or after the date of the making of the last valuation of such land under this Act.

This subsection shall apply only to applications made for valuations to be used for any of the purposes mentioned in this Part.

(2) Any such new valuation shall be subject to objection in like manner as in the case of other valuations under this Act.

(3) Where such new valuation is made as at a date prior to the date of the valuation entered on the roll it shall not be entered on the roll, but the valuer-general may furnish a certificate thereof."

Section 70 is all important for that is the section under which the respondent claims to be enabled to make a valuation otherwise than in accordance with one of the statutory formulae.

Section 66 provides that the valuations appearing in the valuation rolls shall be used for the purpose of loans and investments on mortgages of land of certain description. Section 67 provides that valuations appearing in the valuation list or roll shall be used for the purposes of the Fire Brigades Act, and section 68 provides that "the valuation under this Act in force" shall be taken as valuations for resumptions.

There can be no doubt as has been held in a number of authorities that the primary object of this Act was to provide a basis for rating, and after much conflict of judicial opinion it is not in dispute that for the purposes of valuing the "improved" and "unimproved" values for rating purposes an artificial hypothesis is to be employed. This is well stated by Sugerman J. in *Sydney City Council v. The Valuer-General* (1956) 1 L.G.R.A. 229 at p. 234:

> "Sections 5 and 6 of the Valuation of Land Act are thus an integral part of a system of rating, whose character, in my opinion, postulates a uniform basis of assessment of rates which are payable by a class of ratepayers whose estates or interests permit of considerable variation *inter se*, that is to say, a basis which has no regard of the quantum or incidents of any particular ratepayer's estate or interest. The system is a system of rating, not upon the value of the ratepayer's estate or interest, but upon the value of the "fee simple of the land", ascertained by a reference to a hypothetical sale thereof defined in terms which make it independent of the personality of any actual owner for the time being."

That was stated in relation to the improved value but it was approved and applied to the unimproved value by their Lordships' Board in *Gollan v. Randrick Municipal Council* [1961] A.C. 82 by Lord Radcliffe at p. 96. But their Lordships are not concerned with rating, and therefore they have to consider the question propounded earlier, namely whether the Valuer General is entitled to make a valuation otherwise than according to one or other of the statutory formulae. There is much to support the argument of the appellants which denies any such entitlement; and there can be no doubt that up to Part VI the general framework of the Valuation Act to which their Lordships have briefly referred, points to the conclusion that the Valuer General is concerned only with valuations according to one or other of the statutory formulae and this is supported by the crossheading

to Part VI. This was also the view of Pike J. in *Alison v. Valuer-General* 6 L.G.R. 25 in a passage which has been set out in full by Mr. Justice Holmes in the Supreme Court. Had the Valuation Act stopped short of Part VI their Lordships can feel little doubt that that must be the proper construction. But Part VI introduced into the Valuation Act matters of valuation which had nothing to do with rating but which were concerned with the valuation of estates in land, which were required for the assessment of stamp duty on sale or more importantly estate duty, or were required in connection with mortgages and so on.

Both sides relied upon section 70 to support their respective views; and Wallace and Holmes JJ. gave powerful reasons for reaching the conclusion that, but for *Gollan's* case, the respondent's valuation, to be entered on the Roll would have to be made according to the statutory formulae: and that the respondent had therefore no power to make a valuation on any other basis. This was supported by a consideration of section 124A of the Stamp Duties Act, 1920.

Section 70 is in their Lordships' opinion ambiguous. This ambiguity is far from resolved by section 10 of the Local Government (Amendment) Act of 1959 which however is some indication, in their Lordships' judgment, that the view of the legislature was that a valuation for death duty purposes might be on a different basis from valuations according to the statutory formulae.

There was much argument before their Lordships on what was described as the "duality of purpose" of the Valuation Act, a phrase presumably borrowed from the judgment of their Lordships' Board in *Gollan's* case. On the one hand it was said that such duality was represented by a valuation according to the statutory formulae where relevant and a non-statutory valuation for Part VI purposes; on the other hand it was said that the duality of purpose was represented simply by the valuation of the land valued as an artificial unencumbered fee simple for rating purposes on the one hand, and the estates and interests therein on the other. Their Lordships agree with Walsh J. in the Supreme Court that the latter duality can hardly be considered a distinction relevant for the purposes of the Case stated. What has greatly impressed their Lordships (apart from authority to which their Lordships will presently refer) is the grave injustice (not always to the subject) that will arise if the general valuation principles applicable to rating are applied also to stamp duty, estate duty and other matters. First, if the rating principles of valuation are to be applied, it is quite plain that great injustice would be done if some estate or interest in property is to be valued as though it was an absolute unencumbered fee simple, whereas in law it may be subject to easements, restrictive covenants and so forth. Such a basis of valuation would produce grossly unjust results which the legislature could never have intended or be presumed to have enacted save by clear words; there are none such in the Valuation Act.

It was argued that the answer to this was that when valuing, under section 5, estates and interests subject to an easement or restrictions as to user, the beneficial owner of the easement or the restriction will be included as such in a valuation made under sections 14 and 16 of the Act. Literally that is true, but in a Valuation Act this is an entirely artificial conception. The owner of an estate subject to an easement or restriction has his estate devalued by that amount. In a valuation statute it is quite contrary to all practice to treat the owner of the easement or the person entitled to the restriction as beneficially interested in that estate; the person beneficially entitled to the easement adds that to the value of his adjoining estate although no doubt in law he has an interest in the servient estate.

Secondly, on the appellants' construction, section 21 would (as they concede) require the estate or interest of some part owner or lessor or lessee to have his interest upgraded beyond its true value, it being common knowledge that if A and B are part owners of an estate, whether in common possession or whether in reversion they will not of course

obtain for their respective estates that which an owner of the whole would obtain for it. This would be another unfair anomaly.

It seems clear to their Lordships that in applying the statutory formulae to cases of stamp duty, estate duty, and so on, grave injustice may be done, sometimes to the Crown, sometimes to the person requiring the valuation. Their Lordships would be reluctant to come to this conclusion; and notwithstanding the contrary observations of the judges of the Supreme Court they do not think that the terms of the Valuation Act compel them to do so. Part VI as it seems to their Lordships is imposing upon the respondent for the first time in the Act the task of valuing estates and interests in land for purposes where the rating concept would be inappropriate and they would be reluctant to conclude that the respondent was, by statute, limited to a valuation upon one or other of the three statutory formulae. Happily for their Lordships this matter was considered in *Gollan's* case to which reference has already been made. *Gollan's* case was concerned with a rating appeal and finally decided, as their Lordships have already mentioned, that the law was correctly stated in *Royal Sydney Golf Club v. Federal Commissioner of Taxation* 91 C.L.R. 610 that for rating purposes the fee simple must be treated as a fee simple unencumbered and subject to no conditions (although planning restrictions had to be taken into account) and *Stephen v. Federal Commissioner of Land Tax* 45 C.L.R. 122 was disapproved. The precise question turned in fact upon the unimproved value of the land. Their Lordships, therefore, are of opinion that speaking quite technically that case is not a direct authority and the observations of Lord Radcliffe are strictly *obiter* with regard to the present case; but the reasoning of their Lordships' Board in that case was so fundamental to their decision and so applicable to the present case that their Lordships are of opinion that it was entirely in consonance with proper practice for the Supreme Court to follow that decision, although they advanced strong reasons for stating that apart from it, they would have reached a contrary conclusion. Lord Radcliffe after considering the earlier conflicting decisions as to whether for the purposes of the statutory formulae the artificial hypothesis of the fee simple unencumbered and subject to no condition was the proper basis continued at p. 101: "It might still be necessary to ignore all these considerations if the Valuation of Land Act were so constructed as to provide a single basis of valuation of land, whether improved or unimproved, which was to do duty for such various purposes as death duties, resumption and mortgage valuations as well as for rating. For while burdens on individual titles may naturally enough be treated as irrelevant under a general rating scheme, it would hardly be possible to expect that similar treatment was intended to be given when it came to valuing a person's individual interest for any of these other purposes." Later on p. 102 his Lordship said "It seems that throughout the Act it is intended that valuations of individual estates and interest, which will presumably allow for matters of title, will be determined and made available side by side with such special categories of valuation as the improved and unimproved value and assessed annual value of the land itself. Thus, in section 16, which lays down the requirements for the initial valuation roll, it is provided that, apart from stating improved and unimproved values, the roll may contain a statement of 'the value of the estates and interests of all owners'." A little later he continued "The scheme of the Act, therefore, does not require that the highly artificial conception of unimproved value should be imported into valuations of estates and interests required for other purposes served by the Act."

Their Lordships entirely agree with the observations of Lord Radcliffe. As they have already pointed out a valuation which had to be on one of the three statutory formulae would impose great hardship and unfairness in valuations for purposes other than rating purposes; and not necessarily always upon the owner of the estate in question. This case is indeed an excellent example.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

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In the Privy Council

THE BROKEN HILL PROPRIETARY CO. LTD. AND ANOTHER

v.

THE VALUER GENERAL

DELIVERED BY

LORD UPJOHN

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