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INSTITUTE OF ADVANCED  
LEGAL STUDIES  
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LONDON W.C.1

JUDGMENT 3, 1973

R

IN THE PRIVY COUNCIL

No. 16 of 1972

ON APPEAL  
FROM THE COURT OF APPEAL OF NEW SOUTH WALES IN ACTION  
NO. 645 OF 1970

In the Supreme  
Court of New  
South Wales  
Court of Appeal

B E T W E E N :

THE COMMISSIONER FOR RAILWAYS THE  
COUNCIL OF THE CITY OF SYDNEY and  
WYNYARD HOLDINGS LIMITED

... Appellants

- and -

10 THE VALUER-GENERAL

... Respondent

CASE FOR THE RESPONDENT THE VALUER-GENERAL

Record

1. This is an appeal from the Order of the Supreme Court of New South Wales Court of Appeal (Asprey, Mason and Moffitt J.J.A.) dated 2nd July, 1971. The decision of the Court of Appeal was given upon a case stated by the Land and Valuation Court (Else-Mitchell, J.) pursuant to the provisions of Section 17 of the Land and Valuation Court Act, 1921.

pp 69-71

pp 27-43

20 2. The case involved the construction and application of what may be called the "stratum" provisions of the Valuation of Land Act, 1916-1965. Section 4 of the Valuation of Land Act defines stratum in the following terms :-

"Stratum means a part of land consisting of a space or layer below, on, or above the surface of the land, or partly below and partly above the surface of the land defined or definable by reference to improvements or otherwise,

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Record  
(contd.)

whether some of the dimensions of the space or layer are unlimited or whether all of the dimensions are limited; but refers only to a stratum rateable or taxable under any Act; and strata is the plural of stratum".

The valuation of strata is governed inter alia by Sections 7A, 7B and 7C of the Act. They are as follows :-

"7A. (1) The improved value of a stratum is the capital sum which the fee-simple of the stratum might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require. 10

(2) In determining the improved value of any stratum being premises occupied for trade, business, or manufacturing purposes, such value shall not include the value of any plant, machines, tools or other appliances which are not fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto. 20

7B. (1) The unimproved value of a stratum is the capital sum which the fee-simple of the stratum might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require assuming -

(a) that the improvements, if any, within the stratum and made or acquired by the owner or his predecessor in title had not been made: Provided that where the stratum is wholly or partly in an excavation it shall be assumed that the excavation of the stratum had been made; 30

(b) that means of access to the stratum may be used, and may continue to be used, as they were being used, or could be used, on the date to which the valuation relates; and 40

(c) that lands outside the stratum, including land of which the stratum forms part, are in the state and condition existing at the date to which the

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valuation relates; and, in particular, without limiting the generality of this assumption, that where the stratum consists partly of a building, structure, or work or is portion of a building, structure, or work, such building, structure, or work, to the extent that it is outside the stratum, had been made. Record (Contd)

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(2) Notwithstanding anything in subsection one of this section, in determining the unimproved value of a stratum it shall be assumed that -

(a) the stratum may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates; and

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(b) such improvements may be continued or made in the stratum as may be required in order to enable the stratum to continue to be so used,

but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the stratum may be used on the assumptions set forth in subsection one of this section.

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7C. (1) The assessed annual value of a stratum is nine-tenths of the fair average annual value of the stratum, with the improvements (if any) therein; Provided that such assessed annual value shall not be less than five per centum of the improved value of the stratum.

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(2) In determining the assessed annual value of any stratum being premises occupied for trade, business, or manufacturing purposes such value shall not include the value of any plant, machines, tools, or other appliances which are not fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto.

(3) In determining the assessed

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annual value of any stratum it shall be assumed that the stratum, with the improvements, if any, therein, is not subject to the provisions of the Landlord and Tenant (Amendment) Act, 1948."

Record  
(contd.)

The above definition and Sections were, by amendment, inserted in the said Act in 1961.

FACTS AND CIRCUMSTANCES IN THE CASE ARE

- pp 77-110      3.      By Memorandum of Lease dated 19th December, 1961 the Commissioner for Railways (hereinafter called "the Commissioner") leased certain premises therein described to Wynyard Holdings Ltd. (hereinafter called the "Company") for a term of 98 years from 1st December, 1961.      10
- pp 111-113      4.      On 22nd April, 1963 a Supplemental Deed of Lease was executed between the Commissioner and the Company whereby the Commissioner demised certain additional premises to the Company from 20th August, 1962 to 30th November, 2059.
- p 114      5.      On 12th October, 1962 by valuation number 710 the Valuer-General made a valuation in respect of the premises comprised in the said Lease and providing a rating and taxing basis under Section 61A of the Valuation of Land Act 1916-1965 as at 1st January, 1956.      20
- p 115      6.      On 16th October, 1962 by valuation number 4173 the Valuer-General made a valuation in respect of the said premises described in paragraph 3 hereof and gave notice thereof to the Commissioner and to the Company.      30
7.      On 5th December, 1962 the Company by its agents Messrs. R.V. Dimond Pty. Limited lodged objections with the Valuer-General to each of the above-mentioned valuations claiming that the values assigned were too high and that the situation, description and dimensions of the stratum were not correctly stated.
- p 116  
p 118      8.      On 12th September, 1967 the Valuer-General allowed the Company's objections to valuation number 710 under Section 35(1) of the said Act and altered such valuation and amended the Valuation Roll and issued notices      40

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altered valuation. Notice thereof was given to the Company and the Commissioner.

Record  
(Contd)

9. On 12th September, 1967 the Valuer-General allowed the Company's objections to valuation Number 4173 under Section 35(1) of the said Act and altered such valuation and amended the Valuation Roll and issued notices of altered valuation. Notice thereof was given to the Company and the Commissioner.

p 120  
p 122

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10. The Supplemental Lease referred to above which purported to commence as from an earlier date added so far as is relevant 47 square feet to the area demised by the Lease referred to in paragraph 3 hereof. Such area was not included in the first notices of valuation but was included in the area of 327 square feet at the Hunter Arcade level included in the amended notices referred to above.

pp 111-113

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11. On 4th October, 1967 the Commissioner being dissatisfied with the Valuer-General's decision on the Company's objections to valuations numbers 710 and 4173 required the Valuer-General to refer such objections to a Valuation Board for hearing and determination pursuant to Section 35(2) of the said Act.

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12. On 17th November, 1967 the Council of the City of Sydney lodged objections with the Valuer-General pursuant to Section 31 of the said Act to the altered valuations made by the Valuer-General referred to in paragraphs 8 and 9 above claiming that those valuations were too low, that the area dimensions or description of the land were not correctly stated, that lands which should have been included in one valuation had been valued separately.

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13. On 6th February, 1968 the Valuer-General pursuant to Section 35(1) of the said Act disallowed the objections of the Council of the City of Sydney referred to above and gave notice accordingly.

14. On 6th February, 1968 the Council of the City of Sydney being dissatisfied with the Valuer-General's decision in its objections referred to above required the Valuer-General to refer such objections to a Valuation Board of Review for hearing and determination pursuant to Section 35(2) of the said Act.

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Record  
(Contd.)

15. On 2nd May, 1968 the Valuation Board of Review at the request of all parties referred all such objections namely the Company's objections referred to in paragraphs 7 and 11 and the Council's objections referred to in paragraphs 12 and 14 to the Land and Valuation Court pursuant to the provisions of Section 36M of the said Act.

16. On 20th February, 1969 the Commissioner with consent of the Valuer-General lodged objections with the Valuer-General to each of the above-mentioned valuations numbers 710 and 4173 objecting for the following reasons :

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(i) That the values assigned in the said valuations were too low;

(ii) That the area dimensions or description of the land were not correctly stated;

(iii) That lands which should be included in one valuation had been valued separately ;

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(iv) That lands which should have been valued separately had been included in one valuation;

(v) That the situation description or dimensions of the stratum were not correctly stated;

(vi) That strata which should be valued separately had been included in one valuation.

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17. On 21st February, 1969 the Valuer-General disallowed the Commissioner's said objections and the Commissioner required the Valuer-General to refer such objections to a Valuation Board of Review for hearing the determination pursuant to Section 35(2) of the said Act. The said objections were referred to the Valuation Board of Review which referred such objections to the Land and Valuation Court pursuant to the provisions of Section 36M of the said Act.

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18. All matters came on for hearing in the Land and Valuation Court and reasons for judgment were announced on 14th May, 1969

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and formal Orders were made on 9th June, 1969  
and 11th June, 1969.

Record  
(Contd.)

10 19. (a) The subject property forms part of a large area of land between George Street and York Street in the City of Sydney which including the site of the present Wynyard Park, Carrington Street and Wynyard Lane was excavated prior to 1932 to a depth of 40 feet or more in order to enable the construction of the Wynyard Railway Station, platforms, concourses, offices, conveniences and access ways to and from George Street and York Street in the course of the construction of the underground railway system for the City of Sydney. After the railway works were completed in 1932 the surface of the land was made good, York Street and Carrington Street were restored to trafficable use and Wynyard Park was converted into a garden area. At a later date the surface of Wynyard Lane which runs parallel to George Street between that Street and Carrington Street, was also restored so as to be capable of use by traffic but Section 25 of the Transport (Division of Functions) Act 1932 authorised the construction by the Commissioner for Railways of buildings under that lane and not less than 20 feet above it so as to give room for the passage of traffic. Beneath the surface and adjacent to the platforms of the railway works the Commissioner for Railways constructed concourses and areas parts of which have been let to commercial tenants as well as being used for accessways and incidental railway purposes, and provided passageways to George Street to enable members of the public to have access to and from the railway station and concourses.

40 (b) The area between Carrington Street and George Street excluding the surface of Wynyard Lane the space 20 feet above it and the passageways giving access between George Street and the railway station had been the subject of a Lease granted by the Commissioner for Railways in 1927 and in 1941 a further Lease was granted of this area for the construction of an hotel. This Lease having become vested in the Company on 19th December 1961 a new Lease of areas of land in the vicinity of Wynyard Railway Station was granted by the Commissioner to the Company and 50 the old Lease of 1941 was surrendered.

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(Contd.)  
pp 77-110  
pp 77-8

(c) The said Lease which is that referred to in paragraph 3 above was for a term of 98 years from 1st December, 1961 and demised the following :

- (i) A parcel of land under the Real Property Act 1900 containing  $16\frac{1}{2}$  perches having a frontage to Carrington Street of 49 feet  $6\frac{1}{2}$  inches and a depth to Wynyard Lane of 90 feet  $8\frac{3}{4}$  inches; 10
- (ii) A parcel of land under the Common Law Title containing 1 rood  $1\frac{1}{2}$  perches having a frontage to Carrington Street of 123 feet 4 and  $\frac{5}{8}$ th inches and a depth to Wynyard Lane of 90 feet 9 and  $\frac{1}{8}$ th inches, and adjoining the land referred to in (i) above;
- (iii) A parcel of land under the Common Law Title containing 1 rood  $9\frac{1}{2}$  perches having a frontage to George Street of 147 feet 9 and  $\frac{1}{8}$ th inches and a depth to Wynyard Lane of 91 feet 5 and  $\frac{5}{8}$ th inches; 20
- (iv) A parcel of land under the Common Law Title comprising Wynyard Lane between the prolongation of the above excepting thereout a stratum of 20 feet wide and 20 feet high of the surface of that lane;
- (v) Two areas of land under Common Law Title containing 286 and 280 square feet respectively under the eastern footpath of Carrington Street adjoining the land referred to in (ii) above. 30
- (vi) An area of land under Common Law Title containing 15,786 square feet under Wynyard Park and Carrington Street above the main concourse of Wynyard Station with a variable height and adjoining the land referred to in (ii) above.

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The demise was subject to certain exceptions and reservations. The exceptions comprised in addition to the surface of Wynyard Lane and the space 20 feet above it the passageways to Wynyard Railway Station from George Street and one to Hunter Street 40



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part of the lower basement of the lands referred to in (iii) and (iv) above and various wall spaces and areas above and below original ground level which represent the sites of lift well some air ducts and incidental plant. The Lease reserved to the Commissioner the right to construct maintain and use these areas and spaces for a lift well and ventilating shafts and for the installation of the necessary plant as well as various incidental rights of access and passage over all the area and also granted to the Company as lessee and its sub-lessees and invitees the right to use the passageways for pedestrian use and the lift at certain times for the transport of goods to specified parts of the demised premises.

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(Contd.)

pp 79-83

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(d) The Company commenced the construction on the subject property of a large office block and a residential hotel the former occupying the George Street frontage back to Wynyard Lane and the latter having a frontage to Carrington Street and extending over Wynyard Lane into parts of the office block; the George Street office block (which is now known as Wynyard House) was built around and over the sloping passageways to Wynyard Railway Station and there was provided a new passageway or arcade from George Street to the Carrington Street frontage above Wynyard Lane; shops of various sorts and some hotel facilities and bars were built with frontages to these passageways so they have become shopping arcades. The residential hotel occupying the Carrington Street frontage (now known as Menzies Hotel) was so designed that vehicular access could be had from Wynyard Lane to the demised area below Wynyard Park and Carrington Street which was fitted out as a parking area to accommodate motor vehicles and to which passenger access could also be had via the lift system in the hotel.

(e) During the month of October, 1962 the construction of Wynyard House had been substantially completed and was ready for occupation but the Menzies Hotel had been built only to the top of the function room which was the floor containing the first level of bedrooms.

20. Upon the hearing of the appeals before the Land and Valuation Court the parties upon a number of questions relating to the construction

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of the Act and its application to the facts made conflicting submissions.

21. Pursuant to the requirements in writing of the Company the Land and Valuation Court pursuant to the provisions of Section 17 of the Land and Valuation Court Act 1921 stated a case for the opinion of the Court of Appeal on certain questions of law.

22. The questions of law so far as they are relevant to this appeal are as follows :-

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p 41.11.16-17  
p 51.11.29-30

A. Was I in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street?

In the Court of Appeal it was submitted by the Company that this should be answered

"Yes"

It was submitted by the Commissioner for Railways and the Council of the City of Sydney that the question should be answered

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"No"

p 51.1 31

And it was submitted by the Respondent Valuer-General that the question should be answered

and "Yes because (a) the whole was not land, (b) even if so, the Court was not at liberty to value it".

The Court of Appeal answered the question in the following way :

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p 51.1 4  
p 69.1 3

"Yes"

SUBMISSIONS

The Respondent submits that the question should be answered

"Yes"

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In the Respondent's submission the learned Judge was in error for two reasons:- Record (Contd.)

Firstly, not all of George to Carrington Streets was land. It is true that the lease as to this area is cast as a lease of land because it purports to demise the land with the exceptions thereout

10 i.e., with parts which never passed; McGrath v. Williams, 12 State Reports (N.S.W.) 477 - rather than cast as a lease of those portions only of the various areas which were to be available to the lessee.

This however is not in our submission decisive.

20 When the whole lease is construed it is clear that the only rights of the lessee are to occupy such parts of the defined building as are not excepted and except for the land islands i.e. areas where at no level was there an exception, all other areas leased were not ad coelum et ad inferos and had no existence except as part of an improvement and being defined or definable by reference to improvements were stratum within the definition.

This would be supported by Sheath v. Valuer-General 10 L.G.R.A. 20.

30 Even with regard for example to the area leased above Wynyard Lane this would have been suspended air space and in accordance with Commissioner of Railways v. Valuer-General 6 L.G.R.A. 237 could not prior to the 1961 amendments have been valued. In 1962 improvements had been erected e.g. the buildings on either side of the land and in part over the land and accordingly the area had become defined or definable by improvements. Even though the leased area over the lane was ad coelum it had become partially defined by improvements and  
40 partially definable by such improvements and therefore could, but could only be, valued as stratum.

In October, 1962 and in fact almost certainly in December 1961 when the lease was granted some of the areas to pass to the lessee

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Record  
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being areas within the excavation and some well above the surface had become enclosed as part of the entire building. Wynyard House in October 1962 was complete and Menzies Hotel up to the roof of the function floor level. Some of these areas were in part isolated from the bottom of the excavation by the basement exception and some had exceptions both above and below them.

Apart from the land islands, which are in a different category, the balance had no substantial existence except as part of or partially bounded by a larger improvement, namely the entire building or the building so far as it had been erected and were accordingly definable by reference to improvements.

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On the basis of these submissions the Company's interest in the Menzies site was stratum but such stratum was not limited to the space occupied by the partially erected building but was a stratum ad coelum.

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The respondent submits therefore that in October 1962 there were areas which could not be valued except as strata and they could only be valued in that way, since there is by reason of the difference assumptions to be made in the valuation of land on the one hand and stratum on the other, a requirement that what falls within stratum must be valued as such.

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There were, it is true, portions, assuming the lease was not restricted by the base and top of the building, where the lessee's rights were land in the fullest sense and at no time even before the building would these have been incapable of valuation. Those were the "land islands". On the other hand, the remainder was not land having no connection with the surface except in association with parts of the building or as part of a larger improvement constituted by the building and therefore, being definable by reference to improvements, were in 1962 stratum.

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The Land and Valuation Court was in error secondly because the issues before it

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did not permit it to value as land.

Record  
(Contd.)

There were before the Court the valuation of 12th October 1962 No. 710 and that of 16th October 1962 No. 4173. Each of these was on its face made by the Valuer-General as being of stratum. There was also before the Court the Valuer-General's altered valuation of 12th September 1967 by which he gave effect to the Company's objections of 5th December 1962 which were that the values were too high (Section 34(2)(a)) and that the situation description and dimensions of the strata were not correctly stated (Section 34(2)(b)). By the altered valuation the Valuer-General excised the "land islands" but the subject matter of the altered valuation was still treated as stratum.

p 114

p 115

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What was referred to the Court included objections that the situation description and dimensions of the stratum were not correct, this being raised by the Company's original objection of 5th December 1962 referred to the Valuation Board pursuant to the requirements of the Commissioner for Railways dated 4th October 1967 and also raised by the Commissioner for Railways' objections of 20th February 1969.

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There were also lodged objections that the area dimensions and description of the land were not correctly stated (Section 34(1)(a)(i)) (See City Council's objection of 17th November 1967 and Commissioner for Railways' objections of 20th February 1969).

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So far as there were objections that the situation description and dimensions of the stratum were not correctly stated this, it is submitted, would only allow the Court to vary the situation description or dimensions of what the Valuer-General had treated as stratum and to fix the valuation as stratum of that enlarged or reduced subject matter. For example, if the Court determined all was land rather than stratum the only order to give effect to these objections would be to reduce the dimensions of the stratum to nil and the valuation to nil.

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Record  
(Contd.)

The Court's power is limited to the making of such order as gives effect to the upholding or dismissal of a permissible objection (See A.G. Robertson Limited v. Valuer-General 18 L.G.R. 261 at 261/2; Langford v. Western Lands Commissioner 4 L.G.R.A. 46 at 49 and Parramatta City Council v. Valuer-General 10 L.G.R.A. 160 at 175/176).

It is submitted accordingly that the Court could not, founded on the presence of objections that the situation etc. of the stratum was not correctly stated, substitute a description of property to be valued as land i.e. under Sections 5, 6 and 7 for a description of property which the Valuer-General had valued as stratum i.e. under Sections 7A, 7B and 7C.

10

So far as the City Council and the Commissioner for Railways had objected that the area dimensions and description of land were not correctly stated the valuations to which the objections were lodged were on their face made as valuations of stratum. An objector can only lodge an objection specified in Section 34 and no other complaint can be raised (See *Ex parte Coffs Harbour Shire Council, re Munro and re Allen* 76 W.N. (N.S.W.) 103 at 106/107). Since there is no authorised ground that what has been valued as land should have been valued as stratum or vice versa the Section must, it is submitted, be read as permitting, to a valuation purporting to be of land only the grounds of objection in Section 34(1) and to a valuation purporting to be of stratum only the grounds in Section 34(2). If this be correct, the Court could not in reliance upon the objections stated in the ground in Section 34(1)(ai) order a description of land as the subject of the valuation and value it as land.

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p 41.11.18-21

B. Was I in error in valuing as stratum and not as land those portions of the demised premises below Carrington Street and that portion below Carrington Street and Wynyard Park respectively identified as (E), (F) and (G) in the said Lease?

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In the Court of Appeal it was sub-  
mitted by the Company that this question  
should be answered

Record  
(Contd.)

"No, subject to the answer to  
question D".

It was submitted for the Commissioner  
for Railways and the Council of the City of  
Sydney that the question should be answered

"Yes"

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And it was submitted by the respondent  
Valuer-General that the question should be  
answered

"No"

The Court of Appeal decided that the  
question should be answered

p 55 11.5-6  
p 69 14

"No"

#### SUBMISSIONS

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The respondent submits this question  
should be answered "No. These portions E,  
F and G were leased as those pieces of land  
as delineated in Plans "E", "F" and "G" and  
when one looks at Plan "E" one sees the words  
"showing in red stratum of land leased" and  
the sectional elevations show that the leased  
area is the air space between the floor level  
and the ceiling - a part of a larger improve-  
ment which therefore it is submitted must be  
valued as stratum. It is defined by reference  
to improvements namely the ceiling and the  
floor and on the western side by a wall.  
The eastern boundary is not defined by an  
improvement but is definable by reference  
to improvements shown on the plan. The  
northern boundary, even looking at the  
plan above, is defined by reference to  
improvements namely the distance from  
Margaret Street and at the southern boundary  
by the distance from Lisgar House. Similar  
comments may be made as to portion F by  
reference to plan "F" and as to portion  
G by reference to plan "G".

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C. If I was in error in valuing as land  
the whole of the demised premises

p 41 11.22-28

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lying between George Street and  
Carrington Street

- (i) should the whole have been valued  
as stratum;
- (ii) should some part (and if so what  
part) have been valued as land;
- (iii) should some part (and if so what  
part) have been valued as stratum?

In the Court of Appeal it was submitted  
by the Company that the question should be  
answered 10

- (i) "No"
- (ii) "Not by the Court in these proceedings  
although the Valuer-General should  
initially have valued as land that  
part of the demised premises extending  
ad coelum et ad inferos"
- (iii) "Yes, so much of the demised premises  
as did not extend usque ad coelum et  
ad inferos" 20

Any by the Commissioner for Railways and  
the Council of the City of Sydney it was sub-  
mitted

"If the answer to question A is yes, then

- (i) Yes,
- (ii) No,
- (iii) No."

And it was submitted by the respondent  
Valuer-General

- (i) "No because of the land islands" 30
- (ii) "Yes but not by the Court in these  
proceedings nor by the Valuer-General  
under Section 40(3)"
- (iii) "Yes"

p 55 ll.7-9

The Court of Appeal answered the questions  
as follows:

p 69 ll.4-7

- (i) "No"
- (ii) "Yes the land islands"
- (iii) "Yes the balance of the subject matter  
of the valuation" 40



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SUBMISSIONS

Record  
(Contd.)

The respondent submits that the question should be answered as follows :

- (i) "No because of the land islands"  
(ii) The Court of Appeal's answer so far as it went was in accordance with the Valuer-General's submissions made below but the Court of Appeal in their reasons indicated additionally and contrary to the Valuer-General's submissions that the "land islands" could be valued by the Court. The Valuer-General, though respondent, submits that if his second submission on Question A be accepted, then Question C(ii) should be answered "Yes, the land islands but not by the Court"  
(iii) "Yes, all but the land islands".

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- D. If part of the demised premises was to be valued as land and part as stratum was I in error in including the entire area of the demised premises in one valuation?

p 41 11.29-31

In the Court of Appeal it was submitted by the Company that the question should be answered

"Yes"

And it was submitted by the Commissioner for Railways and the Council of the City of Sydney that the question should be answered

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"No"

And it was submitted by the respondent Valuer-General that the question should be answered

"Yes"

The Court of Appeal answered the question in the following way :- "If this question is to be understood as meaning that although that part of the demised premises must be valued as land and part must be valued as stratum the valuation of the entirety is to be represented by a single amount the answer to this question is yes".

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p 55 11.10-20  
p 69 11. 9-19

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SUBMISSIONS

We have submitted the Court could not value any land in this case, but treating the question as broader than that issue we submit that there was no ability to treat some land and some strata even if adjoining and in the one ownership as being together one subject matter for valuation. When in 1961 the concept of stratum was introduced the words "andstratum" or "or stratum" were inserted where appropriate, e.g. Sections 14, 17, 18(2), 19, 27A, 29(1), 29(2), and moreover if one could treat land and strata as one subject matter for valuation there are separate and conflicting sets of assumptions required for land by Section 6 and for stratum by Section 7B.

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There is nothing in the Act which requires or authorises land and stratum to be valued together. In fact there are provisions as to when lands are to be valued together, and, inserted in 1961, provisions as to when strata are to be valued together but in the sense of being one subject matter there are no provisions as to valuation together of land and stratum and the legislature cannot be taken as ever having so intended.

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Again since the grounds of objection are the only permissible ones and there is no ground that land and stratum had been wrongly valued together or wrongly valued separately, no objector could in this respect every challenge the valuation of land and stratum which was made as one subject matter, or, receiving only a single figure as the valuation and therefore having no appreciation of what the Valuer-General had done, could he object that the value assigned to the land component was too high or that the value assigned to the stratum component was too high.

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p 41 11.32-42

E. Where land or any interest in land is partly defined by a horizontal boundary

(a) must the entire property be valued if at all as stratum, or

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

Record  
(Contd.)

- (b) must the entire property if not falling within the definition of stratum be valued under Sections 5, 6 and 7 of the Act, or
- (c) is it obligatory to value as stratum that part which is defined or definable by horizontal boundary, or
- (d) has the Valuer-General discretion to value the entirety under either Section 7A, 7B and 7C or under Sections 5, 6 and 7?

In the Court of Appeal it was submitted by the Company that the question should be answered

- (c) "Yes provided it is defined or definable by reference to improvements or otherwise and is rateable or taxable under any Act"

And it was submitted by the Commissioner for Railways and the Council of the City of Sydney that the question should be answered

- (a) "No"  
(b) "Yes"  
(c) "No"  
(d) "No"

It was submitted by the respondent Valuer-General that the questions should be answered

- (a) "No"  
(b) "No"  
(c) "No because even the part so defined or definable by a horizontal boundary may not be defined or definable by reference to improvements or otherwise and may not be rateable or taxable under any Act."  
(d) "No"

The Court of Appeal said that unless it is understood that "defined by a horizontal boundary" means by such a boundary as is an improvement and that the vertical boundaries are defined or definable by reference to improvements the question did not arise.

p 55 11.21-35  
p 69 11.20-34

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

Record  
(Contd.)

If however this be so understood the question should be answered as to (a) and (c) the area so defined must be valued, if at all, as a stratum under 7B. The Court added that as the relevant assumption in the present case is that the area in question is one which is rateable under the Local Government Act Section 132 and accordingly is required to be valued it is implicit in the question that some part of the space between the vertical boundaries remains vested in the Crown. Therefore the requirement of valuing the land usque does not arise.

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As to (b), in view of the answer to (a) and (c) this question does not arise.

As to (d) on the assumptions referred to in the answers to (a) and (c) this question does not arise.

Inssofar as the general question is raised whether there is a discretion to value a stratum under Sections 5, 6 and 7 the Court was of opinion that the question should be answered "No".

20

#### SUBMISSIONS

If it is proper to read this question with "the understandings" appearing in the Court of Appeal's answer, then the Valuer-General submits the Court of Appeal correctly answered the question.

If, however, such "understandings" are not to be implied and the question arises, then the Valuer-General would repeat his submission below namely :-

30

The presence of a horizontal boundary is not decisive of whether the thing is land or stratum. It is submitted that the Valuer General is required by Section 28 to value a rateable part of land and that part may have a horizontal boundary. Whether he should value it and if so as part of land or stratum depends on further considerations.

40

e.g. (i) if a thing to be valued comprises the surface and 50' above or the surface ad coelum it is to be valued as land at all

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

times i.e. whether a building rests on the surface or not.

Record  
(Contd.)

(ii) from the surface to 50' down or from the surface ad inferos is also part of land and is to be valued as such.

(iii) on the other hand from 50' above the surface to 100' above the surface or from 50' above the surface ad coelum has no relation to the surface and cannot be valued as land (see Commissioner for Railways v. Valuer-General 6 L.G.R.A. 237). Such an area would appear to be rateable under the Local Government Act (see Y.M.C.A. v. Sydney City Council, 2 L.G.R.A. 35 and The Boy Scouts' Association v. Sydney City Council 4 L.G.R.A. 260) but because of the decision in Commissioner for Railways v. Valuer-General no unimproved value could be determined for such an area under the Valuation of Land Act prior to the 1961 amendments. After that date, however, and if it has become definable by reference to improvements it can be valued as stratum if it be rateable. Until physical improvements exist from which the area is defined or definable an air space or an unexcavated earth space unconnected with the surface cannot be valued as a stratum.

Therefore on the above hypotheses the respondent Valuer-General would submit that the answer to question E should be

- (a) "No"
- (b) "No"
- (c) "No because there may be no improvements defining the area or by reference to which the area is definable"
- (d) "No he will value under Sections 5, 6 and 7 so far as these permit him to do so, parts of land where part only is rateable (Section 28) but where these Sections cannot be applied, e.g. an upper room in a building which has no existence otherwise than as part of an improvement and is defined or definable by reference to an improvement he must use Sections 7A, 7B and 7C."

In the Supreme Court of New South Wales Court of Appeal Record (Contd.) p 47 11.1-5

F. Was I in error in holding that property may not be valued as stratum under Section 7A, 7B and 7C of the said Act unless it is defined by reference to improvements, that is in holding that it must be in an occupiable space within upon or under improvements?

In the Court of Appeal the Company submitted that the question should be answered

"Yes"

10

And it was submitted by the Commissioner for Railways and the Council of the City of Sydney that the question should be answered

"No"

And the respondent Valuer-General submitted "Yes" unless His Honour's holding be understood as :-

- (a) containing no implication that to be occupiable the improvements must have been completed in all respects
- (b) not excluding a stratum which is either ad coelum et ad inferos
- (c) referring to an area defined or definable. The Court of Appeal answered the question "Yes".

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p 55 11.35-36  
p 69 1. 35

SUBMISSIONS

The respondent submits His Honour was in error in that his holding restricts a stratum to a space defined in all respects by improvements and would accordingly deny the possibility of a stratum ad coelum et ad inferos and would also appear to restrict a stratum to a space which had been developed by improvements to a stage where it was occupiable. Moreover, if the space has become defined or definable whether ad coelum et ad inferos or otherwise the definition says nothing as to its capacity to be occupied fully or partially or for any purpose.

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p 42 11.6-41

G. If a subject treated by the Valuer-General on the face of the notice of

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

valuation as wholly land or wholly  
stratum be found to be partly land  
and partly stratum

Record  
(Contd.)

- (a) is that valuation capable of correc-  
tion on objection or appeal so as to  
value in one valuation both land and  
stratum if in one ownership and con-  
tiguous, or
- 10 (b) must the Valuation Board of Review or  
the Court excise from a valuation  
either the land or the stratum, or
- (c) is such valuation wholly or partly  
inoperative?

In the Court of Appeal the Company  
submitted that the question should be  
answered

- 20 (b) "Yes, the Board or Court must excise  
the stratum if the Valuer-General  
treated the subject as wholly land  
and must excise the land if the Valuer-  
General treated the subject as wholly  
stratum"

And the Commissioner for Railways and  
the Council of the City of Sydney submitted  
that the question should be answered

- (a) "Yes"  
(b) "No"  
(c) "No"

30 And the respondent Valuer-General  
submitted

- (a) "No, since land and stratum cannot be  
treated as one subject matter nor can  
by summation only a single value be  
given for two such components." See  
submissions on question D.
- 40 (b) "Yes, there must be an excision but  
this can only be done if there be the  
appropriate objection, e.g. to what  
purports to be a land valuation if  
there be objection that the area and  
dimensions of the land are not properly

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal  
  
Record  
(Contd.)

described and this be upheld there can only be excised what the Court or Board has found to be stratum."

- (c) "As far as the respondent understands this question a valuation would not be wholly inoperative because assuming the objections indicated above have been taken the Court if the valuation purported to be of land would reduce the dimensions of the land and itself value the land remaining (if there were also an objection that the value assigned were too high) and if not the Valuer-General would under Section 40(3) make a consequential alteration to fix the value of the land remaining. But the Court could not nor could the Valuer-General under Section 40(3) value the excised area."

10

p 55 1.38  
p 56 1.3

The Court of Appeal answered the question as follows :

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p 69 11.36-38  
p 70 1. 7

As to (a) "No. The land and stratum may by way of correction by the Court be valued separately, but such separate valuations may be included in one notice."

As to (b) "No."

As to (c) "Yes"

#### SUBMISSIONS

The respondent submits that the question should be answered as follows :

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- (a) "No. Land and stratum can never be treated as one subject matter. While the Valuer-General is not an appellant so far as the Court of Appeal in its answer said that the Court could by way of correction value land as land and stratum as stratum, the Valuer-General submits that if his second submission to Question A be accepted this addition to the Court of Appeal answer to Question G(a) should be corrected.

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- (b) "If the Valuer-General's second submission on Question A be accepted the Court of



In the Supreme  
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Court of  
Appeal

Appeal's answer to this part of  
Question G should not stand."

Record  
(Contd.)

(c) "Yes, because on the given hypothesis,  
the Valuer-General had given a single  
value for what the Court has found to  
be partly land and partly stratum.

H. Was I in error in law in proceeding  
upon the basis that as a matter of  
construction the valuation referred  
to the Court in these proceedings were  
valuations of land?

p 42 ll.15-17

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In the Court of Appeal it was submitted  
by the Company that the question should be  
answered

"Yes"

And by the Commissioner for Railways  
and the Council of the City of Sydney

"No"

And by the respondent Valuer-General

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"Yes"

The Court of Appeal held that the  
question should be answered

p 56 ll. 4-5  
p 70 ll.8-9

"Yes"

#### SUBMISSIONS

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The respondent submits this question  
should be answered "Yes". The notices of  
valuation are headed "strata". The area  
and description merely sets out the subject  
of the valuation but does not categorise it  
as land. It is clear we submit from the  
word "strata" on the notice that the view  
taken (rightly or wrongly) was that the area  
George to Carrington Streets was strata under  
the Act because of the exceptions out of the  
leased area and the fact that apart from the  
land islands the leased premises existed only  
as part of or dependent upon buildings.

It is clear that although the Valuer-  
General overlooked the land islands he was

In the Supreme Court of New South Wales  
 Court of Appeal I. purporting to exercise his powers under Sections 7A, 7B and 7C and Section 27A(2).

Record (Contd.)  
 p 42 ll.18-30

If the property the subject of the abovementioned valuations 710 and 4173 included both land and stratum and the Court had to excise from the said valuations either the land or the stratum valued was I in error in holding

- (a) That there was an issue before the Court as to whether if the Court could in these proceedings value only the land or the stratum the Valuer-General could value the other under Section 40(3) of the said Act. 10
- (b) that the Court had jurisdiction in these proceedings to declare that the Valuer-General could value the other under Section 40(3).
- (c) that the Valuer-General could value the other under Section 40(3)? 20

In the Court of Appeal it was submitted by the Company that the questions should be answered

- (a) "Yes"

And it was submitted by the Commissioner for Railways and the Council of the City of Sydney that the questions should be answered

- (a) "No"  
 (b) "No"  
 (c) "No"

30

And by the respondent Valuer-General, that for reasons previously advanced, when something is excised the Court cannot value it and the Valuer-General cannot value it under Section 40(3). It did not matter therefore whether or not there was an issue of law.

p 56 ll. 6-11  
 p 70 ll.10-16

The Court of Appeal was of opinion that the Land and Valuation Court was not bound to excise from the valuation land or stratum but was bound to value the land as land and the

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In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

stratum as stratum. The Valuer-General has not an independent power of valuation under Section 40(3). The power of the Valuer-General under Section 40(3) is one to make alterations in his records of values consequential upon the alterations to any valuation ordered to be made by the Court.

Record  
(Contd.)

### SUBMISSIONS

10           The respondent submits that if his second submission on Question A be accepted then the answer of the Court of Appeal should be corrected, and on this hypothesis the question as to (a) and (b) should be answered

(a)       "Yes. The only issues were those raised by the grounds of objection."

20           (b)       "Yes. Again the only jurisdiction of the Court was to give effect to such objections as it upheld."

and in any event the Valuer-General submits as to

(c)       "Yes. The powers of the Valuer-General under that sub-section are restricted to fixing a value for what the Court has determined was the true extent of that type of property he had previously valued.

30           M.       Was I in error in law in holding that Section 11 of the said Act protects the records of the Valuer-General from production at call or on call as on subpoena duces tecum or on subpoena duces tecum in proceedings before the Land and Valuation Court concerning an objection to the Valuer-General's valuation of a property?

p 43 ll. 5-10

40           It was submitted in the Court of Appeal by the Company that the question should be answered

"Yes"

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

And it was submitted by the Commissioner for Railways and the Council of the City of Sydney that the question should not be answered as being hypothetical because the records in question were in fact produced.

Record  
(Contd.)

And it was submitted by the respondent Valuer-General that the question should be answered

"Yes"

<p>p 56 l. 24</p> <p>p 57 l. 4</p> <p>p 70 11.20-39</p>	<p>The Court of Appeal said that it would appear that this question was directed to a situation in which the records of an officer in the Valuer-General's Department relating to his method of arriving at a valuation of the demised premises were requested to be produced to the Court and subject to the Court's discretion inspected by the party calling for the document. Assuming that the records in question were relevant to the matters in issue before the Court and that the documents requiring that the records be produced to the Court contained no material relating to any lands or premises other than the demised premises and also assuming that the records contained in the document were not prepared for the purpose of the subject litigation either on foot or in contemplation or compiled for the purpose of obtaining a legal opinion from a solicitor or counsel advising the Valuer-General then upon these assumptions and subject to such a claim of privilege as the Crown might be able to sustain the Court saw no objection to the Land and Valuation Court permitting the Valuer-General's records produced to the Court on subpoena duces tecum or as on subpoena duces tecum being inspected by the parties to the litigation. In those circumstances Section 11 did not operate to prevent the Land and Valuation Court ordering the production of the records in question and the inspection of the same by the parties to the litigation.</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p>
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SUBMISSIONS

The respondent submits that this question should be answered

"Yes"

In the Supreme  
Court of New  
South Wales  
Court of  
Appeal

REASONS

Record  
(Contd.)

The respondent Valuer-General submits that the questions should be answered in accordance with and for the reasons contained in his submissions indicated above, and that the appeal should be dismissed with costs.

FORBES OFFICER Q.C.

A.C. SAUNDERS.

IN THE PRIVY COUNCIL            No.16 of 1972

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ON APPEAL FROM  
THE COURT OF APPEAL OF NEW SOUTH WALES  
IN ACTION NO.645 OF 1970

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B E T W E E N

THE COMMISSIONER FOR RAILWAYS THE  
COUNCIL OF THE CITY OF SYDNEY and  
WYNYARD HOLDINGS LIMITED

Appellants

- and -

THE VALUER-GENERAL

Respondent

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CASE FOR THE RESPONDENT THE  
VALUER-GENERAL

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