Privy Council Appeal No. 16 of 1972

The Commissioner for Railways, the Council of the City of Sydney and Wynyard Holdings Limited – – *Appellants*

v.

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

FROM

THE COURT OF APPEAL OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JANUARY 1973

Present at the Hearing:

LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD KILBRANDON
LORD SALMON

[*Delivered by* LORD WILBERFORCE]

This is an appeal from the Court of Appeal of New South Wales which on 2nd July 1971 answered certain questions of law submitted by way of case stated by the Land and Valuation Court pursuant to s. 17 of the Land and Valuation Court Act 1921–1965 (N.S.W.). The answers given were, in certain respects, adverse to the interests of the Commissioner for Railways (" the Commissioner ") and of the Council of the City of Sydney (" the Council "), who accordingly appear as appellants before the Board. The third appellant Wynyard Holdings Ltd. (" the Company ") also appears as appellant, though its main interest lies in supporting the judgment of the Court of Appeal, since it seeks revision of some of the answers given. The Valuer-General supports the decision of the Court of Appeal.

The subject of the appeal is the valuation for rating purposes of a substantial property in the centre of Sydney, the main part of which lies between Carrington Street and George Street, and which now contains the office block known as Wynyard House and the Menzies Hotel. It forms part of a large site which has been progressively developed over nearly 50 years. For the purposes of this case it is sufficient to mention that, in connection with the construction of the Wynyard Railway Station and the underground railway system, a large area of land between George Street and York Street, including what is now Wynyard Park, Carrington Street and Wynyard Lane, was excavated before 1932 to a depth of 40 feet or more. After the completion of the railway works, the surface

was made good; Wynyard Park was made into a public garden, York Street and Carrington Street were restored as public highways and, later, Wynyard Lane, which lies between and parallel to Carrington Street and George Street, was restored for use as a street. The Commissioner had statutory powers under the Transport (Division of Functions) Act 1932 to construct buildings under the Lane and not less than 20 feet above it. The Commissioner in fact constructed, adjacent to the railway station, concourses and areas for letting as shops; he also made passageways leading to George Street so as to provide access to the Station.

There have been a number of leases granted by the Commissioner, as owner of the subject lands. One such lease was granted in 1927 of the area between Carrington Street and York Street excluding the passageways between George Street and the Station, and also excluding the surface of Wynyard Lane and a space 20 feet above it. A further lease was granted in 1941 for the construction of a hotel and was the subject of an appeal to this Board (Commissioner for Railways *v.* Avrom Investments Pty. Limited [1959] 1 W.L.R. 389). This lease became vested in what is now the appellant company.

The current lease, which is critical for the present proceedings, was granted on 19th December 1961, the lease of 1941 being surrendered. By this lease the Commissioner demised to the Company for 98 years from 1st December 1961 property described under the six following headings. (The difference of title under which portions were held is not material to this appeal.)

1. (*a*) A parcel of land under the Real Property Act 1900 containing 16½ perches fronting Carrington Street.

(*b*) A parcel of land under common law title containing 1 rood 1¼ perches fronting Carrington Street.

These two parcels make up a block between Carrington Street and Wynyard Lane.

2. A parcel of land under common law title containing 1 rood 9½ perches fronting George Street. This parcel is a block between George Street and Wynyard Lane.

3. A parcel of land under common law title comprising Wynyard Lane between the prolongation of the northern and southern boundary of the land referred to in (2) excepting thereout a stratum of land 20 feet wide and 20 feet high above the surface of the lane.

4. Two parcels of land under common law title containing 286 square feet and 280 square feet respectively under the eastern footpath of Carrington Street adjoining the land referred to under 1 (*b*) above (referred to in this case as parcels " E " and " F " respectively).

5. 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 described by reference to a plan, and adjoining the land referred to under 1 (*b*) above (referred to in this case as parcel " G ").

There were contained in the lease a number of important exceptions and reservations. The exceptions included (*a*) the surface of Wynyard Lane and a space extending from the surface upwards for 20 feet as mentioned above, (*b*) the passageways from Wynyard Railway Station to George Street and Hunter Street as described and measured in detail on plans annexed, (*c*) part of the lower basement under the lands referred

to under (2) and (3) above, (*d*) a number of small spaces and areas above and below former ground level being the sites of a lift well, air ducts and incidental plant.

The reservations included the right for the Commissioner to construct, maintain and use these areas and spaces for a lift well, air ducts and plant, and various rights of access and passage over specified areas. The Company was granted the right for itself, its lessees and sublessees and invitees, to use the passageways and the lift for the transport of goods to the demised premises.

There was a supplemental lease of a small area granted in 1963 which will be referred to later.

The Company proceeded to build upon the site an office block and residential hotel. The office block, now called Wynyard House, occupies the George Street frontage and extends back to Wynyard Lane, being built over and around the excepted passageways to Wynyard Station. The hotel was built on the Carrington Street frontage and extends to and over Wynyard Lane into parts of the office block. A new passageway was constructed from Carrington Street to George Street above Wynyard Lane and was made into an arcade. A number of shops, hotel facilities and bars were constructed with frontages to the excepted passageways which, in effect, are shopping arcades. The area under Wynyard Park ("G") was made into a car parking area with vehicular access from Wynyard Lane and access by lift to the hotel. The small areas "E" and "F" will be referred to later. By October 1962 Wynyard House was substantially completed and the Menzies Hotel was built up to the top of the functions floor. It was to have, and now has, a number of floors above it of residential accommodation.

It is now necessary to mention, briefly, the course of the valuation proceedings—these are fully set out in the Case Stated and need only be summarised in this judgment.

In October 1962 the Valuer-General made two valuations, the subject matter of which was the entirety of the demised property, numbered respectively 710 and 4173. The explanation of there being two valuations was that No. 710 was a valuation supplemental to the previous valuation list while No. 4173 was a new sextennial valuation. They were, relevantly, in the same form. They notified the unimproved value ($2,500,000) the improved value ($8,000,000) the assessed annual value ($400,000) and the rating and taxing basis ($1,300,000). In a heading space each valuation contained the word "strata" or "stratum". Under "Area or Dimensions" appeared figures corresponding with the leased property as a whole together with the words "except thereout various strata; together with various strata under Carrington Street and Wynyard Park with Appt. R.O.W.s." (*i.e.* rights of way) "Subject to R.O.W.s"

Notice of these valuations was given to the Commissioner and the Company; the Company lodged objections claiming that the values were too high and that the situation, description and dimensions of the subject property were not correctly stated. Upon this, the Valuer-General on 12th September 1967 notified that he had altered the values and description and dimensions as set out in the notice. The unimproved value was fixed at $1,100,000, the other figures being also reduced, and the description was set out under three headings (i) Strata—George Street Building "Wynyard House" (ii) Strata—Carrington Street Building "Menzies Hotel" (including strata above and below Wynyard Lane) (iii) Strata—Under Wynyard Park and Carrington Street. Under each heading there was set out a reference to each floor in the relevant building with its area in square feet but no vertical dimensions. The total area of the

listed strata came to 225,234 square feet. It is common ground, and vital to appreciate, *that in arriving at the stated area for the strata of each floor there were included only those portions of the floor vertically above or below which there intruded at some level one or other of the exceptions from the demise mentioned above.* These spaces are referred to in the judgment as " hatched areas ". This meant that, after the " strata " had been abstracted, there were left a number of irregularly shaped three dimensional volumes, twelve in number scattered through the leased property, into which at no level did any space excepted from the lease obtrude: these have been described as " land islands ". The total floor area of these islands has been calculated at 126,636 square feet. This area was not included in the valuation: nor was there included the air space above the second floor of the Menzies Hotel. The division of each floor into an area of stratum and part of a land island produces units which are artificial, incapable of separate occupation and unmarketable since many of their services such as lift wells, stairs, toilets or plumbing facilities are either indiscriminately severed by a notional line, or are placed outside the unit boundaries. These boundaries do not correspond with any feature actually dividing any improvements from any others. The problems of valuation so created are, in the words of the judge, highly complex, abstruse and at points almost impossible to resolve. They are however said to be the consequence of the valuation method directed by the Valuation of Land Act 1916, particularly as amended in 1961, and, if that is so, this will not be the first time that valuers have been faced with intractable difficulties. The judge considered that the nature and extent of these difficulties constituted an argument against the adoption of the method described and in favour of a simpler and more direct method of valuation.

By various steps, which need not be particularised, objections by the Commissioner and by the Council to this amended valuation were referred to a Valuation Board of Review and in due course to the Land Valuation Court. It is not disputed that the Council and the Commissioner have standing to object to the valuation: the Commissioner's interest arises mainly from a provision in the lease which fixed the rent payable by the Company, after an initial period, by reference to the unimproved capital valuation of the freehold of the demised premises under the Valuation of Land Act 1916. Thereafter the Land and Valuation Court (Else-Mitchell J.) fixed the unimproved capital value as at October 1962 at $3,304,770. At the Company's request he stated a case raising thirteen questions for the decision of the Supreme Court. The latter in its Court of Appeal Division, ruled that as to certain of the questions the decision of Else-Mitchell J. was erroneous. From their ruling the present appeal has been brought to this Board.

The principal legislation as to rating in New South Wales is contained in the Local Government Act 1919, and the Valuation of Land Act 1916. Many sections of both statutes have been referred to in argument and their Lordships have endeavoured to consider them as a whole. There are certain sections which need to be set out in order to make this judgment intelligible.

In the Local Government Act 1919, s. 118 (1) requires the council of a municipality or shire to make and levy a general rate on the unimproved capital value of all ratable land in its area. This value is " the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require, assuming that the improvements, if any, thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title had not been made." (Schedule Three, section 2 (1).)

Some types of rates may be levied upon the improved capital value or the assessed annual value of land; these are not directly relevant to the present appeal but it must be borne in mind that, in relation to any particular unit of valuation, the Valuer-General may have to assess all of these three values.

It is laid down by s. 132 of the Local Government Act 1919 that all land shall be ratable with certain specified exceptions including land vested in the Crown—which includes the Commissioner. However land vested in the Commissioner becomes ratable if leased to any person for private purposes (*ibid.* s. 132 (2A)). In such a case the rates are chargeable on the lessee. Thus, upon and by virtue of the lease of 19th December 1961, all the land demised by the lease became ratable in the hands of the Company.

The Valuation of Land Act 1916 is the Statute which in New South Wales applies for the general determination of the unimproved value, the improved value and the assessed annual value of land. It established the office of Valuer-General and had the purpose of creating in him a single authority charged with the duty of valuing land whose valuations should be accepted and applied by all rating and taxing authorities in the State. The Valuer-General is obliged, under Part V of this Act, to supply these authorities with valuation lists and, from time to time, supplementary valuation lists. Amongst other things, determination by the Valuer-General of the unimproved value of any land is a determination for the purposes of the Local Government Act 1919.

Before the amendments made in 1961, the Valuation of Land Act 1916 provided for the determination of the improved value, the unimproved value and the assessed annual value of land in ss. 5, 6 and 7 respectively. The definition of unimproved value in s. 6 was the same as that contained in the Local Government Act 1919 Schedule 3 section 2 (1) already cited. There were provisions requiring one valuation to be made of adjoining parcels owned by the same person and leased to one person, and separate valuation of parcels not adjoining or separately owned or separately let (ss. 26, 27). The Act contained procedural provisions with regard to objections against valuations which will be later referred to.

In 1961 some important amendments were made; before setting them out it is necessary to refer to the case of *Commissioner for Railways v. Valuer-General* (1962 S.R. (N.S.W.) 28 (commonly known as the *Lawrence Dry Cleaners* case)) which led, or contributed, to the passing of the amendments. The Courts there were concerned with another portion of the large excavated site between York Street and George Street. The Commissioner, having excavated to a depth of 43 feet, built a building with two floors within the excavation and further floors above it. In this lower portion a space of 375.76 square feet was leased to Lawrence Dry Cleaners which adjoined escalators and stairways up and down which train passengers passed and which fronted the area leading to the railway platforms. It was decided by the Supreme Court that it was impossible to assess the unimproved value of this space since it was an improvement, or part of an improvement which, under the statutory hypothesis contained in s. 6 of the Valuation of Land Act 1916, had to be assumed not to exist. As was said by Owen J. (then a member of the Supreme Court):

> "The thing to be valued was itself an improvement, being part of a larger improvement, and there cannot, to my mind, be an unimproved value of that which is itself an improvement or part of an improvement." (1. c. p.31.)

This decision was given on 3rd May 1961. On 11th December 1961 assent was given to Act No. 66 which inserted several new sections into the Valuation of Land Act 1916.

S. 7B (1) was as follows:

> "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;
>
> (*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
>
> (*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 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."

In s. 4, there was inserted a definition of 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, whether some of the dimensions of the space or layer are unlimited or whether all the dimensions are limited; but refers only to a stratum ratable or taxable under any Act; and 'strata' is the plural of stratum."

There were also inserted by s. 7A and s. 7C provisions for arriving at the improved value and the assessed annual value of strata. A number of consequential amendments, adding references to strata, were made throughout the Act. Also on 11th December 1961 assent was given to Act No. 67 which introduced other amendments. The most significant of these was one adding to s. 6, which contained the definition of unimproved value already referred to, the following words—

> "For the purposes of this subsection 'improvements' in relation to land shall not include site improvements."

The effect of this (*inter alia*) appears to be that in assessing the unimproved value of land which has been excavated and on which a building has been erected, the assumption must be made that the building had not been erected but not that the excavation had not been made.

It is on the construction and scope of these 1961 amendments, particularly of those relating to strata, that the present appeal depends.

It is now necessary, briefly, to refer to the contentions of the parties.

The main contention of the Commissioner is that the first task of the Valuer-General is to decide upon the subject matter to be valued. The basis upon which the Valuation of Land Act proceeds is that valuation is to be made of a parcel of land. In determining what is a parcel of land for the purposes of the Act regard must be had to various recognised

criteria. In the first place there are physical characteristics, *i.e.* geographical, functional and structural unity—or diversity. In the second place there are characteristics which derive from the process of valuation. The Act requires the Valuer-General to attach to each parcel an unimproved, improved and assessed annual value. This involves that each parcel must be marketable and tenantable. Moreover the machinery for recovery of unpaid rates involves the imposition of a charge on the land rated and, if necessary, enforcement of this charge by sale. Therefore, the parcel for rating purposes must be capable of realisation in this way. If a stratum is to be a unit of valuation, it must, as sections 7A, 7B and 7C show, be separately marketable and separately tenantable.

By these criteria, only the property as a whole, *i.e.* the whole of of the subject matter of the lease of 19th December 1961, so the Commissioner argues, fulfils the requirements. It was the lease by the Commissioner which made the subject matter of the lease ratable. It is separately occupiable and tenantable and marketable. On the other hand neither the individual strata to be found in the property (*i.e* the spaces at each separate level) nor the property regarded (if it can be so regarded) as a single stratum satisfy the criteria at all. The hatched areas are not separately marketable because of the arbitrary manner in which they are sliced off from the rest of the property: this is *a fortiori* the case if attempt is made to assign them an improved value in view of their notional separation (already referred to) from their services and the artificial character of their boundaries. The twelve land islands would in addition have to be separately valued, if indeed any value could be assigned to them. All these indications show that the only correct, and also the only practicable, method of valuation is of the whole leased property as non-stratum land.

In addition to this main submission the Commissioner put forward a number of subsidiary arguments, which it is not necessary to state at this stage. However it is material to mention that, in the alternative, he contended that if areas "E", "F" and "G" were to be valued as strata, the rest of the demised property, *i.e.* the principal portion of it lying between George Street and Carrington Street, should be valued as non-stratum land as suggested above.

The Council submitted a similar argument. The demise, in their submission, was of the entirety of specified parcels of the land, subject to exceptions. The exceptions, by introducing in parts horizontal boundaries, did not alter the character of what was demised nor prevent it being valued as land. Land with fixed horizontal boundaries was recognised as a proper subject of valuation in New South Wales before 1961: the amendments of that year did not alter this. In any case no part of the premises between George Street and Carrington Street corresponds with the definition of stratum since the spaces claimed to be strata are not defined or definable by reference to improvements or otherwise. The Council adopted the Commissioner's argument with regard to spaces "E", "F" and "G".

The contrary arguments took two different forms.

The argument for the Company was, essentially, that nothing could be valued as land except land "in the strict sense" which was said to be land defined only by vertical boundaries, or, as it was expressed, land "*usque ad coelum et ad inferos*". There is a complete dichotomy in the Valuation of Land Act 1916 between land in this sense and strata, being something less than land *usque ad coelum et ad inferos*. Each type of parcel has to be valued in accordance with its own code (*i.e.* series

of sections in the Act) and according to the relevant assumptions: these are quite different in the two cases. It was therefore correct, and indeed obligatory, to value the whole of the premises as strata. In any event spaces " E ", " F " and " G " must be valued as strata. The Company additionally took the point, by way of appeal, that the Land and Valuation Court had no jurisdiction to substitute one method of valuation for another, *i.e.* to value as land what had been valued by the Valuer-General as strata, or *vice versa*. The most that the Court could do, if it found that the wrong method of valuation had been adopted, was to quash or cancel the valuation.

The Valuer-General did not adopt this latter submission; indeed he repudiated it. He, together with the appellants, submitted that the Land and Valuation Court had the jurisdiction referred to. On the main issue, he did not adopt the argument for the Company (that " land " in the relevant valuation sections means " land *usque ad coelum et ad inferos* "). His main argument was that, in acordance with the law as established by the *Lawrence Dry Cleaners* case, it was impossible to value as " land " pursuant to s. 6 of the Valuation of Land Act 1916, any part of the subject matter (except possibly the " land islands ") because the whole, or every part, was definable by reference to improvements. Valuation as non-stratum land, in his submission, is only possible of a parcel having a recognisable connection with the surface; otherwise it must be valued as stratum, in accordance with the special provisions applicable to strata.

The logical starting point for the evaluation of these arguments appears to be the meaning of " land " in the Valuation of Land Act 1916 and the relation of this to the definition of stratum. The question to which an answer is required is whether there is a complete dichotomy between " land " and " stratum " and if so what this dichotomy is.

There is no definition of " land " in either the Valuation of Land Act 1916 or in the Local Government Act 1919, nor is the partial definition contained in the Interpretation Act 1897 s. 21 (*e*) of assistance in the present context. This states that, in the absence of contrary intention, land " shall include messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the estate or interest therein ". Beyond providing a general indication that " land " is to be given a widely inclusive meaning, this does not answer the question how, in the context of this legislation, layers, *i.e.* spaces defined by horizontal boundaries, are to be treated. It is in relation to this question that the Latin tag " *usque ad coelum et ad inferos* " has been introduced and given a prominent place in argument.

It is well known that this brocard cannot be traced in the Digest or elsewhere in Roman Law. The first recognised appearance is in the 13th century gloss of the Bolognese Accursius upon Digest VIII. 2.1. It appears there in the form " *cuius est solum eius esse debet usque ad coelum* " (cf. in the law of Scotland Stair's Institutions II. 7.7). In the form of a maxim, it only has authority at common law in so far as it has been adopted by decisions, or equivalent authority. The earliest recognition appears to be recorded in *Bury v. Pope* Cro. Eliz. 118 where reference is made to its use Temp. Ed. I in the form " *cuius est solum eius est summitas usque ad coelum* ", but the context of this statement in the reign of Edward I has not been identified. Coke Litt. 4a contains an uncritical adoption of this maxim, supported by some references (incorrect) to Year Books. He is followed by Blackstone: " Land hath also, in its legal signification, an indefinite extent upward as well as downward. *Cuius est solum eius est usque ad coelum* . . . therefore

no man may erect any building or the like to overhang another's land . . . So that the word 'land' is not only the face of the earth but everything under it or over it." Commentaries II c. 2. p. 18.

There are a number of examples of its use in judgments of the 19th century, by which time mineral values had drawn attention to downwards extent as well as, or more than, extent upwards. But its use, whether with reference to mineral rights, or trespass in the airspace by projections, animals or wires, is imprecise and it is mainly serviceable as dispensing with analysis (cf. *Pickering v. Rudd* (1815) 4 *Camp.* 219, *Ellis v. Loftus Iron Company* (1874) L.R. 10 C.P. 10). In none of these cases is there an authoritative pronouncement that "land" means the whole of the space from the centre of the earth to the heavens: so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the common law mind. At most the maxim is used as a statement, imprecise enough, of the extent of the rights, *prima facie*, of owners of land: Bowen L. J. was concerned with these rights when, in a case dealing with rights of support, he said "*prima facie* the owner of the land has everything under the sky down to the centre of the earth" (*Pountney v. Clayton* (1883) 11 Q.B.D. 820, 838). Two cases may have some bearing upon the present in so far as they relate to layers. In *Electric Telegraph Co. v. Overseers of Salford* (1855) 11 Exch. 181 it was decided—with reference to the English test of ratability, viz. occupation—that the Company owning telegraph wires was in occupation of the air space through which the wires passed. Martin B. said "The simple question is whether the facts stated show that the Company has the exclusive occupation of what the law calls land" and concluded that it had (1. c. p. 188). So a layer horizontally defined, above the surface, was held to be land and capable of being rated. In *Corbett v. Hill* (1870) L.R. 9 Eq. 671 the plaintiff, who owned a room projecting over the defendant's land, was held to own only "such a portion . . . carved out of the freehold as is included between the ceiling of the room at the top and the floor at the bottom". The defendant was held to own everything below and above. This is a clear recognition of ownership of a layer or, as it would now be called in New South Wales, a stratum. The same conception is reflected in the High Court judgments in *Borough of Glebe v. Lukey* (*Australian Gaslight Company*) (1904) 1 C.L.R. 158, and in *North Shore Gas Company Ltd. v. Commissioner of Stamp Duties* (N.S.W.) *per* Dixon J. (1940) 63 C.L.R. 52, 70.

These authorities suggest that in the rating and valuation legislation of New South Wales, before references to strata were introduced, "land" had an indefinite significance: it did not have to be infinite in vertical extent and it was not limited to the surface, or, more importantly, to spaces having a direct connection with the surface. Moreover it seems clear that this view of the matter was accepted by the courts in New South Wales in valuation cases before 1961. There is the experienced authority of Else-Mitchell J. in the Land and Valuation Court in this case that "consistently with authority and the long practice of the Land and Valuation Court [provisions in the Act] have led to valuations being made of parts of or interests in land less than the entirety *usque ad coelum et ad inferos*". In *Perpetual Trustee Co. Ltd.* v. *The Valuer-General* (1927) 8 L.G.R. (N.S.W.) 135 it was held that, after a valuation had been made of a mine below the surface, a separate valuation could be made of the surface itself. The definition of "Mine" (Local Government Act 1919 s. 4) treats a mine as land: so that both the layer below the surface and the surface itself were separately regarded as parcels of land which could be valued. As regards space above the surface, a similar legal situation was held, or at least assumed, to exist in three cases: *Resumed Properties*

Department v. Sydney Municipal Council (1937) 13 L.R.G. (N.S.W.) 170, *Y.M.C.A. v. Sydney City Council* (1954) 20 L.G.R. (N.S.W.) 35, *Boy Scouts' Association v. Sydney City Council* (1959) 4 L.G.R.A. 260.

In the first of these cases the question arose as to the determination of the unimproved capital value of the third floor of a six floor building and it was held that this parcel was capable of being so valued. The judgment of Roper J. contained these passages:

> " In my opinion it is established that ' land ' may be defined by horizontal as well as vertical boundaries, and that an estate in fee simple may exist in respect of land so defined when it is held by a private person (see Co. Lit. 48 (*b*) . . . [and other authorities]). The idea of division by horizontal boundaries has been frequently applied in the interpretation of taxing Acts where the tax is based on the occupation of land . . . In my opinion the word ' land ' as defined in the Interpretation Act 1897 s. 21 (*e*) and as used in the Sydney Corporation Act 1932 is capable of including a parcel of land defined by horizontal as well as by vertical boundaries " (1. c. p. 172).

It was pointed out in later cases, and also by Roper J. himself, that there might be difficulties in ascertaining the value in question, but neither the *Lawrence Dry Cleaners* case nor the Court of Appeal in the present litigation has repudiated the principle there stated. In their Lordships' opinion it was part of the law and practice in New South Wales, before 1961, that, for valuation purposes, " land " could include a layer defined by horizontal boundaries above or below the surface. This involves the corollary that for the valuation of land as land there was no necessity for it to extend " *usque ad coelum et ad inferos* ".

Their Lordships do not read the *Lawrence Dry Cleaners* case as deciding anything to the contrary: what it did decide was that it was impossible in the light of the statutory hypothesis to value the particular parcel with which the case was concerned. Neither can their Lordships extract a contrary conclusion from two other cases relied on by the Company. The first is *Re Lehrer* (1961) 61 S.R. (N.S.W.) 365, a case concerned with a subdivision within the meaning of s. 4 of the Local Government Act 1919. The decision was that an upper floor, though possibly falling within the Interpretation Act s. 21 (*e*) definition, was not land for the purpose of the special definition of subdivision contained in the Local Government Act. Their Lordships read such observations of Jacobs J. as to the meaning of land at common law in the light of the problem, different from the present, which he had to consider.

The second is *Hurstville Super Centre Ltd. v. Valuer-General* (1965) 11 L.G.R.A. 389, (1966) 67 S.R. (N.S.W.) 110. This case dealt (*inter alia*) with the meaning of the words in s. 4 of the Valuation of Land Act 1916 (as amended), " defined or definable by reference to improvements or otherwise " and required no decision on the question whether " land " means exclusively land " *usque ad coelum et ad inferos* ". To the extent that certain passages in the judgments (based, in part, upon Counsel's admissions in particular *per* Jacobs J.A. at p.126 under question " G ") may suggest a general proposition to this effect, their Lordships could not agree with them.

The next step is to consider the effect of the introduction into the Valuation of Land Act 1916 of the definition of " stratum " (quoted above) and the code for the valuation of strata contained in ss. 7A, 7B and 7C. Two points are to be noticed about the definition. First, a stratum is defined as a part of land: it follows that other parts of land

which are not "stratum" as defined, are themselves land. Yet these parts may well not extend "*usque ad coelum et ad inferos*". Secondly, the definition only includes as strata particular types of horizontal layers or spaces, viz. those defined or definable by reference to improvements or otherwise. Therefore other horizontal layers or spaces, if they are to be capable of valuation, must be valued as land. They were capable of valuation as land before 1961 and there appears no reason why they should cease to be so capable after 1961. But if they are so capable, this shows that it is not necessary (after 1961 as before) that land, to be valued, must extend *usque ad coelum et ad inferos*. The amendments of 1961 introduced a dichotomy, it is true. But this is not between land *usque ad coelum et ad inferos* on the one hand and land which is stratum on the other, but between land which is stratum (as defined) and all other land. Their Lordships consider that this reasoning must lead to the rejection of the main argument put forward by the Company.

Their Lordships now turn to the argument for the Valuer-General. This may be summarised as being that it is not possible to value as land under s. 6 of the Valuation of Land Act 1916 any parcel or space which has not a discernible association with the surface. This is said to follow from the *Lawrence Dry Cleaners* case. As has been stated, the actual decision in that case was that it was not possible to determine the unimproved capital value of what was itself nothing but an improvement, namely a space, below the surface, being part of a building. The passage in the judgments most relied on to support the argument is the following:

> "The floor space in question is part of the building; it has no existence or reality except as part of the building; it is incapable of being related, except possibly in association with the parts of the building above and below it, to any identifiable part of the natural surface of the land. There is an area of floor space, but not an area of land capable as such of independent valuation. That space is part of a building; the building is an improvement, and as the statutory assumption expressed in the definition negatives the very existence of the building, it is impossible to ascribe an unimproved value to the whole building as a structure. The same line of reasoning leads to the conclusion that it is impossible to attribute an unimproved value to part of the building" (1. c. p. 38 *per* Hardie J.).

Their Lordships do not find it necessary to question the decision in the *Lawrence Dry Cleaners* case. Whatever the difficulties in its reasoning or conclusion, it was decided by eminent judges and, as a decision, has not been attacked in the present case or elsewhere. But their Lordships cannot find that it is relevant to the task of the Valuer-General in the present case having regard to the presently operative provisions of the Valuation of Land Act 1916.

The actual question, to recapitulate, is whether this decision, or anything laid down by the Supreme Court, prevents the Valuer-General from valuing as land the subject matter which he is called upon to value. In their Lordships' opinion it does not.

(1) If the Valuer-General seeks to apply s. 6, there is no obstacle, assuming the correctness of the *Lawrence Dry Cleaners* decision, to his doing so. Making the statutory assumptions (*i.e.* that the improvements on the site, other than site improvements, had not been made), he has to consider whether this site, with all its potentialities, can be valued. The *Lawrence Dry Cleaners* case presents no obstacle to any such valuation. There is no question here of the subject of valuation being

caused to vanish by application of the statutory hypothesis—there is a defined site with frontages to existing streets, excavated, but with certain passageways and other reservations upon it. This is clearly an entity capable of valuation.

(2) Neither the *Lawrence Dry Cleaners* decision nor the passage quoted from the judgment of Hardie J. warrants the proposition that nothing can be valued as land which has not a discernible association with the surface. That is not the basis of the judgment, and the argument of Hardie J. is directed to a different point—namely whether the subject of valuation has an existence except as an improvement. If the proposition were correct, it would mean that, before 1961, it was impossible to value under s. 6 a layer of land lying under the surface. But as already shown this was not the law in New South Wales.

Their Lordships therefore do not accept either the contention of the Company that land can only be valued under s. 6 if of unlimited vertical extent, or that of the Valuer-General, that it can only be so valued if it has a discernible association with the surface. They are of opinion that nothing in the Act, or in the *Lawrence Dry Cleaners* case so far as applicable, prevents the Valuer-General from valuing the site between Carrington Street and George Street as land. There remains only the question whether the Valuer-General should so value it.

It is not argued, and rightly so, that the Valuer-General has a discretion or choice whether to value as land under s. 6, or as stratum under s. 7B: both sides agree that in any one case there is only one correct method of valuation. However, it is not correct, as at one time contended by the Commissioner, to say that the first task of the Valuer-General is to select the unit of valuation. This is not his task: it is to value the datum in accordance with the relevant statutory code. When presented or faced with a subject for valuation, he must first decide whether this consists of one or more parcels: in so doing he must have regard to the geographical, functional and structural unity or otherwise of the subject matter: he must apply, if relevant, ss. 26–27A of the Valuation of Land Act 1916. Having carried out this process, he must consider whether the datum is to be valued as land, in accordance with s. 6 (or ss. 5 or 7 if relevant), or whether the special provisions applicable to strata apply. In their Lordships' view there is no priority between these two considerations, *i.e.* he does not consider first whether the subject is stratum and, only if it is not, proceed to value as land, or *vice versa.* He has the two codes: he considers them both; he applies that which is relevant. The fact that the subject matter may contain within it one or more strata, is not a reason against applying s. 6. It is a wrong process to excise the strata, and value them, leaving a valuable or non-valuable residue to be dealt with as best it may be. The definition of a stratum applies to a stratum ratable or taxable under any Act, and before a stratum can be separately valued from the rest of a larger building or site, the conditions must exist for a separate valuation of it as such. No such conditions exist in the present case: the whole site with its improvements qualifies as land; it contains in it a number of strata, but there is no warrant for fragmenting the whole—a whole geographically, functionally and structurally—into strata and a residue of land. Their Lordships agree with the Land and Valuation Court that the main part of the premises, between Carrington Street and George Street, is to be valued as land.

There are then the small parcels "E" and "F" and the larger parcel "G", which the Land and Valuation Court held should be valued as strata. As to "E" and "F" their Lordships have no doubt. Space

" E " has a floor space of 286 sq. ft; it is at the lower basement level: it was found by the judge to be inconvenient of access so that it could have a value only for the storage or housing of plant, for which it was in fact used. It should clearly be treated as part of the main property. Space " F " is at the Hunter Street passageway level and has a floor space of 280 sq. ft. It has access over an area of 47 sq. ft, which was included in a supplemental lease from the Commissioner to the Company dated 22nd April 1963. It is used in part as an arcade shop and in part as a toilet. Again, for geographical and functional reasons, this should be regarded as part of the main property. Space " G " is more considerable and more debatable. It has an area of 15,786 sq. ft. It lies below Carrington Street and Wynyard Park and has a height varying from 12 ft. to 16 ft. There is access to it from Wynyard Lane by a ramp and from the Menzies Hotel by lift. It is used as a car park for hotel patrons and also for the general public. The judge found that it had a special value for the Menzies Hotel, but, as stated, valued it as stratum. Their Lordships would respect any finding of fact as to the character of this space or its relationship to the rest of the property which the learned judge had made, but they do not understand that his decision is based on any such finding. Their Lordships therefore consider that they are free to give effect to their own view which is that this space too is an integral part of the whole complex. It was included in the original demise and was clearly taken in order to complete the facilities of the hotel. One of the standard of the Menzies Hotel would normally, if not necessarily, contain a car park, which is none the less a functional part of it if it is also open to the public. If it had been situated in the basement below the main block, it would be difficult to argue for its separate valuation. The fact that it is laterally separate should not in their Lordships' judgment call for the application of a different principle. The conclusion is that all three spaces should be valued as part of the main block demised to the Company.

There remains the question of the jurisdiction of the Land and Valuation Court, This matter was fully dealt with in the judgment of Asprey J. in the Court of Appeal, and since their Lordships agree with his judgment on this point they will deal only briefly with it. The process of valuation required by the Act involves in the first place determination of the character of the subject matter to be valued—land, or strata, and the use of the correct applicable formula. Under s. 39 (6), if the court decides that any valuation is erroneous, it shall order the valuation to be altered accordingly. If it does so, the Valuer-General must make consequential alterations (on the valuation list). Provided therefore that the Land and Valuation Court can entertain an objection that the wrong basis of valuation has been adopted, there is clear jurisdiction to alter it. The permissible grounds of objection are stated in s. 34—no others are allowed. One of the permissible grounds taken before the Court was that the descriptions of the lands are not correctly stated. These words are sufficient to enable an objector to contend for a " stratum " basis or a " land " basis instead of that in fact adopted. A further circumstance, in any event, is that objection was taken, not only to the 1967 valuation, which was on a strata basis, but also to the 1962 valuations: these could be said to be either on a land basis or on a mixed basis: in either event an objection clearly fell under the heading of description.

Their Lordships for these reasons will humbly advise Her Majesty that the appeals of the Commissioner and the Council be allowed and the appeal of the Company dismissed. They do not find it necessary to answer any questions contained in the Case Stated other than questions A and B. These they answer respectively as No and Yes.

As to costs, no order will be made as regards the costs of the Valuer-General. The Company must pay one half of the Commissioner's costs and one half of the Council's costs of the appeal by way of Stated Case to the Court of Appeal, and one half of the Commissioner's costs and one half of the Council's costs of the appeal to their Lordships' Board.

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In the Privy Council

THE COMMISSIONER FOR RAILWAYS, THE COUNCIL OF THE CITY OF SYDNEY AND WYNYARD HOLDINGS LIMITED

v.

THE VALUER-GENERAL

DELIVERED BY
LORD WILBERFORCE

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