

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lukey and Another v. The Sydney Harbour Trust Commissioners, from the Supreme Court of New South Wales ; delivered the 14th May 1904.

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The Australian Gas Light Company held leases from the Crown of certain wharfs adjoining its own lands in Kent Street, Sydney, expiring on the 31st December 1899, and a like lease of another wharf adjoining its own land at Mortlake, expiring on the 31st December 1900.

Those leases were granted under the Crown Lands Act of 1884, which by Sections 5 and 6 prohibits, amongst other things, the leasing of Crown lands except under and subject to the provisions of the Act, while Sections 89 and 145 with the Regulations made under the last-mentioned section lay down stringent conditions which must be complied with in order to give validity to such leases as those held by the Company.

On the 28th November 1899, while the Kent Street leases were still in force, the Company applied for a renewal of them. And on the 31st January 1900, while the Mortlake lease was still in force, the Company applied for a renewal of

that lease. Nothing is shown to have been done at the time upon either of those applications; but the Company continued in occupation of the wharfs.

On the 21st January 1901 the Under Secretary for Lands wrote to the Company, regarding the Kent Street premises, referring to its "occupation" "of the sites of terminated special leases," and requesting the Company to pay into the Treasury Department a sum of money "being rent at the former rates for the years 1900 and 1901." Payment was made as requested, and a receipt was given headed "suspense account," describing the money as "rent" on the expired leases, and adding the words "Awaiting reference to Lands Department. Leases expired." A like payment was made on the 31st December 1900 in respect of the Mortlake wharf, and a like receipt given.

On the 14th May 1901 the Company's application of the 28th November 1899 for renewed leases of the Kent Street premises was refused by Government on the ground that the power to grant such leases had become vested in the Harbour Trust Commissioners under the Sydney Harbour Trust Act 1900. The Company's application of the 31st January 1900 for a renewed lease of the Mortlake premises does not appear to have been specifically answered, but it is obvious that the legal disability was the same in both cases.

The Sydney Harbour Trust Act 1900, just referred to and relied upon by the Government as having altered the legal position, was passed on the 11th February 1901, and was declared to come into force on the previous 1st November 1900, which day was made the commencement of the Act. That Act constituted a body of Harbour Commissioners. Section 27 vested in them all Crown lands within the boundaries of

the port, "subject to the interest of any persons
 " in such lands existing at the time of the
 " passing of this Act." Section 29 enacts that
 " No lease or licence in force at the commence-
 " ment of this Act of or relating to any Crown
 " land hereby vested in the Commissioners shall
 " be in any manner affected by this Act."

Section 68 directs the Commissioners to collect
 in respect of all vessels berthed "at any wharf
 " . . . vested in the Commissioners or in respect
 " of all goods . . . shipped on or unshipped
 " from any vessel so berthed wharfage and
 " tonnage rates according to the provisions
 " contained in the Wharfage and Tonnage Act
 " of 1880 and Acts amending the same, which
 " Acts are *mutatis mutandis* hereby incorporated
 " . . . subject to the provisions hereinafter
 " mentioned; and all the powers therein con-
 " tained are hereby conferred upon the Commis-
 " sioners." Other provisions followed.

The Wharfage and Tonnage Act of 1880 so
 incorporated is an Act of general application in
 the Colony. It authorized the levy of inward
 and outward wharfage rates, not exceeding those
 in the Schedule, on goods shipped or unshipped
 upon wharfs of two kinds, public wharfs and
 private sufferance wharfs, both of which terms
 are defined; and the Act contains other provisions
 in connection with such wharfs and such
 wharfage rates.

On the 29th May 1901, the Commissioners
 claimed payment by the Company of wharfage
 rates on coal, unshipped at the Kent Street and
 Mortlake wharfs since the 11th February
 1901, the date of the passing of the Sydney
 Harbour Trust Act, 1900. The correspondence
 which followed did not lead to an agreement.
 On the 27th August the Commissioners gave
 notice that unless the Company paid the
 wharfages already due and agreed to pay them

in the future, vessels would not be allowed to berth at the wharfs after the 1st September. And in pursuance of this notice berths were refused to certain vessels.

The present suit was thereupon brought on the 6th September 1901 by the Company and by Gainford (who was interested in the matter by reason of his being under contract to supply coal to the Company) against the Commissioners, claiming an injunction, a declaration against the right of the Commissioners to wharfage, and damages.

A temporary injunction was, in the first instance, granted *ex parte*. This was followed by a motion to continue the injunction, on the hearing of which the case between the parties was fully gone into; and Walker, J., made an order continuing the injunction, thus disposing of the whole suit on the merits. The Full Court, on Appeal, unanimously reversed the decision of the learned Judge, and dissolved the injunction. Against that decision the present appeal has been brought.

The question for decision is whether, as the learned Judges of the Full Court held, the Commissioners had the right to levy wharfage dues upon goods landed at these wharfs, for if they had, everything else follows and the Appeal fails.

In the arguments before their Lordships the case for the Appellants was placed upon two grounds. It was contended, first, that the Commissioners have power to levy wharfage rates only in the cases of public wharfs and private sufferance wharfs; and that, as the wharfs in question are mere private wharfs, not falling within either of those descriptions, Section 68 of the Sydney Harbour Trust Act did not authorise the levy of wharfage upon them. It was argued that, as the wharfage rates granted by that

Section are to be levied according to the provisions of the earlier Wharfage and Tonnage Act which is incorporated, and as that Act granted wharfage only upon two classes of wharfs, the later Act must be similarly restricted. And in support of this, it was pointed out that in Section 32, and perhaps in other places of the later Act, the distinction between private wharfs and others is recognised as still subsisting, and as material for some purposes at least.

Their Lordships agree with the learned Judges of the Full Court in thinking that the language of Section 68 of the Sydney Harbour Trust Act is too clear to admit of such an interpretation. The wharfage rates granted by it are to be levied according to the provisions of the earlier Act, but they are granted in express terms upon any wharf vested in the Commissioners.

It was contended, secondly, that by reason of the payment and receipt of rent in respect of the wharfs for the year 1901, under the circumstances already stated, the Company had at the date of the passing of the Sydney Harbour Trust Act, an interest in the wharfs within the meaning of Section 27, that that interest was valid for the whole year 1901 or in the alternative for a part of it, that it was protected by the words of Section 27, and that it was an interest of such a nature as to preclude the levy of wharfage rates by the Commissioners.

Their Lordships agree with the learned Judges of the Full Court that this position is not tenable. The only interests in the wharfs which the Company ever contemplated acquiring were the leases for which it applied. The money was paid in the hope of acquiring those leases, but with knowledge that the obtaining of them was quite uncertain, for they never could be granted unless all the conditions prescribed by the law should be complied with; and the facts were

clearly shown upon the receipts accepted by the Company. The leases never were granted, there never was any right to claim them which could have been enforced against Government, and with the passing of the Sydney Harbour Trust Act, the possibility of their being granted by Government came to an end. Whether the Company is entitled to claim a return by the Government of any part of the money paid is a question which does not arise in this suit or between these parties. Whether, if the Crown had proceeded against the Company for damages as a trespasser, the Company could have pleaded leave and licence in answer is a question which also does not arise. But it would be difficult to hold that the Company had acquired an interest in the wharfs without in effect holding that they obtained a demise in a manner rendered impossible by the Crown Lands Act.

But supposing it could be held that the Company had an interest in the wharfs, what would the character of that interest be? It could only be some kind of right, complete or incomplete, in the Company to the possession or occupation or use and enjoyment of the wharfs as its private wharfs. And it has been already shown that wharfage rates are to be levied on private wharfs as well as on others. The supposed interest therefore which has been contended for would have been ineffectual for securing the object for which it was invoked.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the costs.
