

No. 16 of 1972

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL IN TERM No. 645 of 1970

A. (1)

B E T W E E N:

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

Appellants

AND

THE VALUER--GENERAL

Respondent

CASE FOR THE COUNCIL OF THE CITY OF SYDNEY

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Introduction

1. This is an appeal by leave of the Supreme Court of New South Wales, Court of Appeal, finally granted under the ORDER in Council of 1909 on the sixth day of December, 1971, from an order dated 2nd July, 1971, of that Court (Asprey, Holmes and Moffitt JJ.A.) answering in a manner partially adverse to the interests of the appellant Council certain questions of law submitted to that Court by way of a case stated by the Land and Valuation Court pursuant to s.17 of the Land and Valuation Court Act 1921, as amended.

2. The questions submitted to the Supreme Court raised in this appeal concern the proper construction of certain provisions of the Valuation of Land Act, 1916, as amended, particularly those relating to the making of unimproved valuations of land and strata.

3. In this case, the Council of the City of Sydney is referred to as "the Council", The Commissioner for Railways as "the Commissioner", and Wynyard Holdings Limited as "the Company".

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UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
25 RUSSELL SQUARE
LONDON W.C.1

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History

4. The land which is the subject of this appeal forms part of a large area of land between George Street and York Street in the City of Sydney including the present Wynyard Park, Carrington Street, and Wynyard Lane, which was excavated prior to 1932 to a depth of about 40 feet in order to enable the construction of Wynward Railway Station with access ways to and from George Street and York Street in the course of the construction of the underground railway system for the city. 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. Subsequently 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 the Commissioner was authorised by legislation to construct buildings under that lane and not less than 20 feet above it so as to leave room for the passage of traffic. Beneath the surface of the land and adjacent to the platforms and other railway works the Commissioner constructed concourses and areas parts of which have been let to commercial tenants as well as being used for access ways 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.

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p.110

A plan showing the relative positions of the above mentioned streets and lane is annexure A to the lease referred to hereunder. Wynyard Park is situated to the west and immediately adjacent to Carrington Street. There is also included in the Record a sectional sketch of the premises erected on the subject land as at the date of the hearing of the appeal.

p.125A

p.77

5. On 19th December 1961 a lease of the land which forms the subject of the appeal was granted by the Commissioner to the Company. The lease 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, and being the whole of the land in Certificate of Title Volume 3108 Folio 191. This land is shown uncoloured on plan A annexed to the lease.
- 10 (ii) A parcel of land under common law title containing 1 rood $1\frac{1}{4}$ perches and having a frontage to Carrington Street and adjoining the land in (i) above. The situation of this land is also shown on the said plan A.
- (iii) A parcel of land under common law title containing 1 rood $9\frac{1}{2}$ perches having a frontage to George Street, such land also being shown on the said plan A.
- 20 (iv) A parcel of land under common law title comprising part of Wynyard Lane and situated between the lands referred to in paragraphs (ii) and (iii) excepting thereout a stratum 20 feet wide and 20 feet high above the surface of that lane. The situation of this land also is shown on the said plan A.
- (v) Two areas of land under common law title containing 286 and 280 square feet respectively under the eastern footpath of Carrington Street. The situation of these lands are shown on plans B and F annexed to the lease.
- 30 (vi) An area of land under common law title containing 15786 square feet under Wynward Park and Carrington Street above the main concourse of Wynyard Station with a variable height. The situation of this land is shown on plan G annexed to the lease.

6. The demise was subject to certain exceptions and reservations. These comprised:

- 40 (i) A stratum of land twenty feet wide and twenty feet high having measured horizontal and vertical dimensions as delineated in the longitudinal section and typical cross

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section of Wynyard Lane on plan "A" annexed to the lease.

(ii) The spaces described as "lessor's passageways" delineated in plan by distances and bearings in plan "B" annexed to the lease and in elevation by distances and heights in plan "C" so annexed.

(iii) Three spaces coloured blue and delineated in plan by distances and bearings in plan "J" annexed to the lease (where the blue colour areas are described as those excepted from the basement area) and in elevation by the heights in plan "D1" so annexed. 10

(iv) Various spaces coloured blue and delineated in plan by distances and bearings at various levels in plans "D2" and "D3" annexed to the lease and in elevation by the heights on plan "D1" so annexed.

The lease reserved to the Commissioner the right to construct, maintain and use these areas and spaces for a lift well and other purposes as well as various incidental rights of access and passage over other areas, and also granted to the Company as lessee and its invitees the right to use the passageways and lift. 20

7. 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 (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 Carrington Street frontage above Wynyard Lane. Shops and hotel facilities and bars were built with frontages to these passageways so that they have become shopping arcades. The residential hotel occupying the Carrington Street frontage now known as the Menzies Hotel was so designed that vehicular 30 40

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.

8. During the month of October 1962 the construction of Wynyard House had been substantially completed but the Menzies Hotel had been built only to the top of the Functions Room.

10 9. 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. The supplemental lease added a small area of about 47 square feet to the area demised under the main lease, the additional area being required for access purposes. p.111

20 10. On 12th October 1962 by Valuation no. 710 the Valuer-General made a valuation in respect of the demised premises and provided a rating and taxing basis under s.61A of the Valuation of Land Act 1916 as at 1st January 1956. p.114

11. On 16th October 1962 by Valuation No. 4173 the Valuer-General made a valuation in respect of the demised premises, such valuation being made under s.48 of the Valuation of Land Act.

30 12. The Valuer-General allowed the Company's objections under s.35 (1) of the Valuation of Land Act, altered such valuations, amended the Valuation Roll and issued notices of altered valuations. The altered valuations excluded from the valuations certain areas which for convenience came to be called "land islands" being irregular areas located through the site as to which the lease contained no exclusion or reservation intruding at any level upon such areas and to which areas the lessee therefore had a lease which extended usque ad coelum et ad inferos. The situation of the "land islands" is shown on a plan included in the Record. pp.116-123

40 p.129

13. The Commissioner being dissatisfied with the Valuer-General's decision on the Company's

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objections required the Valuer-General to refer such objections to a Valuation Board for hearing and determination pursuant to s.35 (2) of the Act.

14. The Council lodged objections with the Valuer-General pursuant to s.31 of the Act to the altered valuations claiming that those valuations were too low, that the area, dimensions or descriptions of the land were not correctly stated and that lands which should have been included in the one valuation had been separately valued. 10

15. The Valuer-General pursuant to s.35 (1) of the Act disallowed the Council's objections and the Council being dissatisfied with the Valuer-General's decision on its objections required the Valuer-General to refer such objections to a Valuation Board of Review for hearing and determination pursuant to s.35 (2) of the Act.

16. On 2nd May 1958 the Valuation Board of Review at the request of all parties referred all such objections to the Land and Valuation Court pursuant to the provision of s.36M of the Act. 20

17. On 20th February 1969 the Commissioner, with the consent of the Valuer-General, lodged objections with the Valuer-General to each of the above-mentioned valuations Nos. 710 and 4173 objecting on all grounds open to him under the said Act. The Valuer-General disallowed the Commissioner's objections and such objections were duly referred to a Valuation Board and subsequently to the Land and Valuation Court pursuant to s.36M of the Act. 30

Hearing before Else-Mitchell J.

18. All the objections were heard before Else-Mitchell J. sitting as a judge of the Land and Valuation Court and on 9th June 1969 he made the following order:

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"THAT the valuations numbered 710 and 4173 issued by the Valuer-General on the 12th day of October, 1962, pursuant to Section 61A of

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"the Valuation of Land Act (as amended) be
"and the same are hereby altered as follows:

"(a) by deleting therefrom the reference
" to "Stratum" or "strata";

"(b) by substituting for the description
" the following:

10 " 'Land with a frontage to George Street
" on the east of 147'9", a frontage to
" Carrington Street on the west of
" 172'11", a southern boundary of 202'3"
" and an irregular northern boundary of
" 111' 5³/₈" westerly from George Street
" 24' 10³/₈" northerly along the western
" side of Wynyard Lane and 90' 8³/₄"
" westerly to Carrington Street, together
" with spaces of 286 square feet 280
" square feet and 15,786 square feet
" within walls, floors, and ceilings
" constructed in excavations under
20 " Carrington Street and Wynyard Park
" and as otherwise described on plans
" 'E' 'F' and 'G' annexed to the lease
" from the Commissioner for Railways
" to Wynyard Holdings Limited'
" the sum of \$3,436,872.00"

19. At the hearing before Else-Mitchell J.
evidence was given by a number of valuers of
wide experience who attempted to assign a value
to the demised premises upon different bases.
30 One method was to assign a value as land to the
whole of the area between George Street and
Carrington Street referred to in the said lease
and then to bring into account the deductions
(if any) which should be made from this amount
by reason of the exceptions and reservations
contained in the lease. Another method
adopted by some of the valuers was to assume
the construction within, upon or under the area
demised of shops, commercial premises, hotel and
40 other constructions, to calculate a value for
occupied space on a capitalisation basis and to
relate the total to the cost of construction of
appropriate premises. A third method which was
advanced by the valuer called on behalf of the

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Company, was to value separately as land the "land islands" referred to in paragraph 12 hereof (being those parts of the whole site into which there were no intrusions of stratum at any level) with all their disabilities. This involved the assumption that the buildings erected upon the residue of the premises which would be valued as stratum were already in existence and that there would be constructed within the land islands a building or buildings to link up with those already erected on the strata. The valuation took into account or was based on the cost of building the buildings within the land islands and included special allowances for the difficulty of such construction in linking up the building. That valuer separately valued as stratum on the basis of lettable space the remainder of the area and within the valuation of the stratum took into account amongst other things the cost that would be entailed of building upon areas of peculiar shape and location with the disabilities that were involved in the location of construction equipment, whilst preserving the access to the other parts from the concourses and the access between the railway concourse on the one hand and George and Hunter Streets on the other and while taking into account the additional cost of linking up the improvements to be inserted.

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The demarcation lines between those portions of the demised premises between George and Carrington Streets alleged by the Company to be stratum and the land islands did not correspond with any features physically dividing one part of the improvements from another or providing any physically identifiable criterion marking a separation of ownership or occupation, but indiscriminately passed through structural members, fabric and services of the building.

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p.38 1.31

20. Else-Mitchell J. declined to determine the valuation of the demised premises upon the basis of such a demarcation as adopted by the Company's valuer and found as a fact that it involved elements of impossibility or serious impracticability. He held that the most appropriate method was to value the whole of the demised premises between George Street and

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10 Carrington Street as land usque ad coelum et
ad inferos deducting therefrom such sum (if any)
as represented the reduction in value resulting
from the exceptions and reservations in the lease.
He held, alternatively, that a similar result
would be reached if the demised premises were
valued wholly as stratum. He also held that
even if the demised premises were predominantly
stratum (excluding the land islands) all the
stratum could be valued together and that such
valuation could include also areas of true land
(the land islands) because they were not
separate parcels in any sense and as a practical
matter should be valued along with the strata
surrounding and adjoining them.

p.22 1.17

p.12 1.30

20 21. Else-Mitchell J. held, inter alia, that
land and strata may be included in one valuation
under the said Act where they physically adjoin
or are in the one ownership. He declined to
enter upon any assessment of the value upon the
basis of such a demarcation as adopted by the
company's valuer because of the difficulties
involved.

p.12 1.1

30 22. Else-Mitchell J. held that the subject
matter of the 1962 valuations was land and that
on the proper construction of the notice of
valuation issued by the Valuer-General the
valuations then made were of land
notwithstanding the use thereon of the word
"stratum" or "strata". He further held that
he was entitled to delete from the Valuer-
General's valuations the references to
"stratum" or "strata" therein and to substitute
for the unimproved value of the property the
subject of such valuations one different
unimproved value covering the whole of the
demised premises.

p.21 1.33

The Questions of Law Stated by Else-Mitchell J.
for the Opinion of the Supreme Court

40 23. At the request of the Company Else-Mitchell
J. stated a case for the decision of the Supreme
Court on the following, amongst other, questions
of law:

A. Was I in error in valuing as land the

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- whole of the demised premises lying between George Street and Carrington Street?
- 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?
- C. If I was in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street - 10
- (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?
- D. If part of the demised premises was to be valued as land and part as stratum, was I in error in including the entirety of the demised premises in one valuation? 20
- 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
 - (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 30
 - (c) is it obligatory to value as stratum that part which is defined or definable by a horizontal boundary; or
 - (d) has the Valuer-General discretion to value the entirety either under Sections 7A, 7B and 7C or under Sections 5, 6 and 7? 40

- 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 an occupiable space within, upon or under improvements?
- 10 G. If a subject treated by the Valuer-General on the face of the Notice of Valuation as wholly land or wholly stratum be found to be partly land and partly stratum -
- (a) is that valuation capable of correction on objection or appeal so as to value in one valuation both land and stratum if in one ownership and contiguous; or
- (b) must the Valuation Board of Review or the Court excise from the valuation either the land or the stratum; or
- 20 (c) is such valuation wholly or partly inoperative?
- H. Was I in error in law in proceeding upon the basis that, as a matter of construction, the valuations referred to the Court in these proceedings were valuations of land?
- I. If the property the subject of the above-mentioned 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 -
- 30 (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;
- 40 (b) that the Court had jurisdiction in these proceedings to declare whether

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the Valuer-General could value the other under Section 40 (3);

- (c) that the Valuer-General could value the other under Section 40 (3)?

Certain other questions of law were asked but do not arise for consideration in this appeal.

The Hearing before the Supreme Court

24. The Supreme Court answered the above questions in the following manner:

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Question A. Yes;

Question B. No;

Question C. (i) No;

(ii) Yes - the land islands;

(iii) Yes - the balance of the subject matter of the valuations.

Question D. If this question is to be understood as meaning that, although 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. In amplification of such such answer, if the question means that the entirety of the land and the stratum are to be valued together as a whole either under s.6 or both under s.7B or one under s.6 and the other under s.7B, then the answer is Yes. There is no objection to a notice of valuation containing particulars of a valuation of land and particulars of a valuation of stratum with an appropriate figure being shown as reflecting the amount of each such valuation.

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Question E. Unless it is understood that "defined by horizontal boundary" means such a boundary as is an improvement and that the vertical boundaries are defined or definable by reference to improvements, the questions do not arise. If, however, this be so understood, the question should be answered:

- 10 (a)) The area so defined must be
(c)) valued, if at all, as
stratum under s.7B. As the
relevant assumption in the
present case is that the
area in question is one
which is ratable under the
Local Government Act s.132
and accordingly is required
to be valued, it is implicit
20 in the question that some
part of the space between
the vertical boundary should
remain vested in the Crown.
Therefore the requirement
of valuing the land usque
does not arise.
- (b) In view of the answer to (a)
and (c) this question does
not arise.
- 30 (d) On the assumptions referred to
in the answer to (a) and (c)
this question does not arise.
In so far as the general
question is raised whether
there is a discretion to value
a stratum under ss. 5, 6 and
7, the question should be
answered No.

Question F. Yes.

- 40 Question G. (a) No - the land and the
stratum may by way of
correction by the Court be
valued separately.

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(b) No.

(c) Yes.

A Valuation Board of Review or the Court can value such of the subject matter for valuation as consists of land as land and such of the subject matter as consists of stratum as stratum but the particulars of each such valuation when corrected by the Valuer-General pursuant to the determination of the Valuation Board under s.36L (3) or pursuant to the order of the Court under s.40 (3) as the case may be, can be included in one notice of valuation 10

Question H. Yes

Question I. The Court was not bound to excise from the valuations the land or stratum but was bound to value the land as land and the stratum as stratum. The Valuer-General has not an independent power of valuation under s.40 (3). The power of the Valuer-General under s.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. 20 30

The Court ordered that the costs of the Company of the stated case should be paid by the Council and the Commissioner, and that there should be no order as to the costs of the Valuer-General.

25. Asprey J.A. was of the view that the word "land" when given its ordinary meaning included a layer or stratum, not using the word "stratum" in the special sense of the definition now provided in s.4 (1) of the Act. He was also of the view that "land" in the Act as it now stands bears the same meaning as it did before the 1961 40

p.47 1.3

10 amendments. He held that the word "improvements"
in the definition of "stratum" in s.4 (1) means
"any structure or any other physical feature
which is in or upon the land which in turn
contains the stratum." He said that "the
definition of 'stratum', in my view, gives no
support to the argument that a stratum is
ascertainable by looking at a draftsman's plans
or by such terminology as may be found in a
specification. A stratum comes into existence
when improvements or the like are physically
effected to and upon the subject land."
He also said that "when it is said that land
and stratum are different subject matters for
valuation that does not mean that parts of land
and parts of stratum cannot each be made the
subject of valuations. The expressions "land"
or "stratum" include respectively each part of
land or stratum and the Act expressly contemplates
20 that in the appropriate circumstances such parts
may be valued Hence it seems that the
Act contemplates that any part of that which
regarded as a whole is land usque ad coelum et
ad inferos and is not a stratum as defined in
s.4 (1) shall be valued as land and any part
of that which regarded as a whole is stratum
as defined in s.4 (1) shall be valued as
stratum and that there is no discretion vested
30 in the Valuer-General to value land or parts
of land as stratum or to value stratum or parts
of stratum as land."

p.47 1.24

p.50 1.36

26. His Honour was of the view that Else-
Mitchell J. was in error in valuing the whole
of the subject matter lying between George and
Carrington Streets as land, as this area
included both areas of land and stratum.
However he held that Else-Mitchell J. was
correct in valuing as stratum and not as land
those portions of the demised premises below
40 Carrington Street and Wynyard Park. He was
further of the opinion that it was not
permissible to value the land areas and the
strata areas together so as to arrive at a
single amount in one valuation. He was of the
opinion that the valuation referred to the
Land and Valuation Court for determination had
been made by the Valuer-General upon the basis

p.54 1.18

p.55 1.10

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p.51 1.13

that the whole of the subject matter thereof was solely strata. He held that the subject matter of the valuation in fact included both land and strata and that in those circumstances the Land and Valuation Court could pursuant to s.39 (6) of the Valuation of Land Act value such of the subject matter as consisted of land as land and such of the subject matter as consisted of stratum as stratum. He held that the particulars of each such valuation can be included in one notice of valuation. He further held that the Valuer-General has not an independent power of valuation under s.40 (3) of the Act, his power under that section being limited to the making of alterations in his records of values consequential upon the alterations to any valuation ordered to be made by the Court.

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p.68

27. Holmes J.A. agreed with the reasons of Asprey J.A.

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p.58-67

28. Moffitt J.A. in independent reasons also agreed with the reasons of Asprey J.A.

Submissions

29. Set out hereunder are some of the more relevant provisions of the above Act which will be referred to in this Case.

Section 4 (1) "In this Act, unless inconsistent with the context or subject-matter,-

"'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."

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Section 6 (1) "The unimproved value of land 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.

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

Section 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 -

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(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;

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(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

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(c) that lands outside the stratum, including land of which the stratum forms part,

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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, such building, structure, or work, to the extent that it is outside the stratum, had been made. 10

Section 14.

"A valuation shall as soon as practicable be made by the valuer-general of the unimproved, improved, and assessed annual value of all lands other than lands of the Crown, and of such lands of the Crown as the valuer-general thinks proper to include in such valuation: Provided that lands of the Crown within the Western Division, and not within any shire or municipality, shall not, except at the request of the Western Land Board of New South Wales, be included in a valuation. 20

Such valuation may also include the unimproved, improved, and assessed annual value of the estates and interests of all owners, including the interests of lessors and lessees in any such lands. 30

The provisions of this section shall apply, mutatis mutandis, to and in respect of strata."

Section 26. (1) "Where several parcels of land 40
adjoin, are owned by the same person, are of the same class of tenure, and where no part is leased, they shall be included in one valuation, unless

the valuer-general otherwise directs: Provided that any such parcels of land shall be valued separately if buildings are erected thereon which are obviously adapted to separate occupation.

10 (2) Where several parcels of land adjoin, are owned by the same person, are of the same class of tenure and are all let to one person, they shall be included in one valuation, unless the valuer-general otherwise directs."

Section 27 (1) Where several parcels of land, owned by the same person, are not of the same class of tenure, or are separately let to different persons, they shall be separately valued.

20 (2) Lands which do not adjoin or which are separated by a road, or are separately owned, shall be separately valued: Provided that the valuer-general may include in one valuation lands owned by the same person and of the same class of tenure but separated by a road if worked as one holding for agricultural or pastoral purposes.

30 (3) Where portion of a parcel of land which has been valued is sold, conveyed, or resumed fresh valuations shall be made of the portion sold, conveyed, or resumed and of the portion remaining.

40 (4) Where a part only of a parcel of land is subject to a particular rate, the value of such parcel shall be apportioned so as to show separately the value of that part which is subject to the particular rate.

Section 27A. (1) Where strata owned by the same person and comprised in the

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same buildings, structure, or work are separately let to or occupied by different persons who under any Act are respectively liable to pay any rate or tax to a rating or taxing authority, the strata shall be separately valued.

(2) All other strata comprised in the same building, structure, or work shall be included in one valuation unless the valuer-general otherwise directs. 10

Section 34.

(1) In relation to land the only grounds upon which objection may be taken under this Act are -

(a) that the values assigned are too high or too low;

(al) that the area, dimensions or description of the land are not correctly stated; 20

(b) that the interests held by various persons in the land have not been correctly apportioned;

(c) that the apportionment of the valuations is not correct;

(d) that lands which should be included in one valuation have been valued separately;

(e) that lands which should be valued separately have been included in one valuation; and 30

(f) that the person named in the notice is not the lessee or owner of the land.

(2) In relation to a stratum the only grounds upon which objection may be taken under this Act are -

- (a) that the values assigned are too high or too low;
- (b) that the situation, description or dimensions of the stratum are not correctly stated;
- (c) that strata which should be included in one valuation have been valued separately;
- 10 (d) that strata which should be valued separately have been included in one valuation; and
- (e) that the person named in the notice is not the lessee, occupier, or owner of the stratum."

Section 39. (1) The valuation court shall hear and determine all appeals brought before it under section thirty-eight of this Act and all references to it under section 36M of this Act.

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(2) Any such appeal or reference shall proceed as a new matter and be by way of rehearing.

(3) The appellant, and any person who, being so entitled, appeared before and was heard by the valuation board on the hearing of the objection from whose determination the appeal is brought or in respect of which the reference is made, may appear and be heard before the valuation court personally or by counsel, or solicitor, or by agent authorised in writing

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(4) Any State or Commonwealth Department may appear and be heard before the valuation court by counsel, or solicitor, or by any officer authorised in that behalf

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(5) The registrar of the valuation court shall give notice in accordance with the rules of court of the date fixed for the hearing of an appeal or reference to such persons as may be specified in such rules of court

(6) If the valuation court decides that any valuation is erroneous, it shall order the valuation to be altered accordingly. 10

Section 40. (1) The judge of the valuation court shall enter on a list all decisions given by the valuation court on such appeals and references and shall initial such list.

(2) The registrar of the valuation court shall furnish to the valuer-general a certified copy of such list, and the valuer-general shall amend the roll in accordance with such list. 20

(3) If on the hearing of any appeal or reference under this Part the valuation court orders any valuation to be altered, the valuer-general shall make all such consequential alterations as are necessary for the purpose of fixing the unimproved value, the improved value and the assessed annual value in respect of the land or stratum concerned and the values of the estates and interests of the owners thereof. 30

Question A.

30. The Council submits that Else-Mitchell J. was not in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street. In considering this question it is important to advert to the circumstances which gave rise to the valuation. The land, being Crown land, would not normally fall for valuation. See s.14. However, the lease makes the land ratable in the hands of the 40

the lessee. See Local Government Act, 1919, as amended, s.132 (1) (g) (i). Section 139 (4) (b) of that Act provides that the rates shall be payable to the Council by the holder of the lease. What was required to be valued, therefore, was the land comprised within the lease.

10 31. The lease takes the form of a demise of the
entirety of various parcels of land. The words
in the lease "excepting nevertheless out of this
lease" do not alter the essential nature of the
demise. The subject of the demise was clearly
"land" within the meaning of the Valuation of
Land Act. Interests in land less than the
entirety usque ad coelum et ad inferos could
be valued as "land" prior to the amendments to
the Valuation of Land Act made by Act No. 66 of
1961. See, for example, Resumed Properties
20 Department v. Sydney Municipal Council 13 L.G.R.
170; Y.M.C.A. v. Sydney City Council 20 L.G.R.
35; Boy Scouts' Association, N.S.W. Branch v.
Sydney City Council 4 L.G.R.A. 260; Dover
Street Estate Company Limited v. Cessnock Shire
Council 6 L.G.R. 119 and Perpetual Trustee Co.
Limited v. The Valuer-General 8 L.G.R. 135.
Commissioner for Railways v. The Valuer-General
62 S.R. 28 and Hurstville Super Centre v. The
Valuer-General 67 S.R. 110 are not authorities
to the contrary.

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30 32. That is to say, "land" where used in the
Act prior to 1961 included parcels of land with
fixed horizontal boundaries. Such parcels are
still within the meaning of the word "land" as used
in the Act in its amended form. Clearly "land" must
include interests less than interests usque ad
coelum et ad inferos as otherwise many parcels not
answering the description of stratum in s.4 (1)
would go unvalued, e.g. interests not defined
or definable by reference to improvements, but
40 also not extending ad coelum et ad inferos,
such as would arise upon the demise of the
area below ground level, where the land was
completely unimproved. The insertion in 1961
of the provisions relating to the valuation
of stratum neither changed the meaning of "land"
nor limited the ambit of the interests which
fell within the meaning of that word.

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33. It is further submitted that no part of the demised premises lying between George Street and Carrington Street answers the description of "stratum". To qualify as a stratum, a space or layer must be "defined or definable by reference to improvements". The spaces claimed to be strata are not defined or definable by reference to improvements. Reference to the lease and the plans annexed shows that the alleged strata spaces are not defined as such in any way at all. 10
All that is defined or definable are the dimensions of the reserved and excepted spaces. The only way of determining what is demised above or below the excepted spaces is to refer to the demise of the land itself, not to the improvements. This being so, the spaces cannot be said to be defined or definable by reference to improvements or otherwise, and are hence not strata.

34. The Council further submits that a stratum 20
consists only of a space or layer which is ratable or taxable as such under any Act. The alleged strata in the demise from the Commissioner to the Company are not ratable or taxable as such. They merely form part of the demise of several adjoining parcels of land which together make up one integrated parcel. The rate is payable to the Council by the "holder of the lease" (s.139 (4) (b) of the Local Government Act). It is not 30
the strata which is ratable, but the parcels of land of which they form part. Hence, what falls to be valued is not the fragments (land and strata) of the demised premises, but the one parcel of which those fragments form part. It is true that special provision is made in the Act for separate valuations in some circumstances; e.g. s.27 (1). But such provisions have no application in the present context. No doubt, if it can be said of the demise as a whole that it is a demise of a stratum, then it may be 40
valued as such. But in order to fall within the words in the definition in s.4 (1) "but refers only to a stratum ratable or taxable under any Act" that which falls to be valued, as a separate entity, must be within those words. It cannot be suggested that the alleged strata parcels lying between George Street and Carrington Street correspond in any way with parcels which, in any

10 meaningful sense, can be regarded as ratable parcels. The result of treating such parcels as strata leads to the absurdities of valuation referred to by Else-Mitchell J. in paras. 33, 34 and 35 of the stated case. To use the words of Owen J. in Commissioner for Railways v. Sydney City Council 62 S.R. 28 at 31 - "the legislature could never have contemplated requiring the Valuer-General to make such a valuation."

35. Asprey J.A. said in his judgment:

20 "Although 'stratum' is defined in s.4 (1) "with reference to land, it is a special and "artificial part of land for the purpose of "rating and taxation. Although it fulfills "the requirement of a part of land in the "sense of consisting of a space or layer "below, on, or above the surface of the land "and is defined or definable by reference to "improvements or some other physical feature "on the land, it has no separate existence "for the purpose of rating independent of the "land of which it is part unless under some "statute it is ratable or taxable in itself as "distinct from the land. Unless a stratum "has such an existence for rating and taxing "purposes it is merely an entity of the land "which itself may be the subject of a "valuation for those purposes and it cannot "30 "be separately valued and is therefore not a "separate parcel for rating purposes (see "Local Government Act s.134 (3))."

It is submitted that the above reasoning ought to have led Asprey J.A. to hold that no part of the demised premises lying between George Street and Carrington Street was stratum.

40 36. It is not appropriate to treat that which is in fact one parcel for rating purposes as a number of individual parcels and then to value those parcels separately. The primary object of the Act is to provide a basis for rating - see Broken Hill Proprietary Co. v. Valuer-General (1970) A.C. 627 at 638 - and this object is best achieved by treating the whole subject of the demise lying between George Street and

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Carrington Street as one parcel of land.

37. Even if it be true to say that part of the subject matter of the demise is stratum it is submitted that the only result would be that the subject of the demise was wholly land, part of it also answering the description of "stratum". This would not prevent a valuation being made of the whole subject matter of the demise as "land". It is true that the Act contains separate provisions relating to the valuation of land and the valuation of stratum. But it does not provide that where the subject of valuation is wholly land but also, as to part, stratum, the Valuer-General must not value the entirety as "land". Section 7A, 7B and 7C provide a method for determining the valuation of strata and can be resorted to by the Valuer-General in cases where he cannot make a s. 5, 6 or 7 valuation (cf. Commissioner for Railways v. The Valuer-General 62 S.R. 28). The Act elsewhere gives the Valuer-General power to decide what parcels of land are to be included within the one valuation (ss.36 (1) and (2)) and it is not inconsistent with the policy of the Act that he should have power to value as land that which answers the description of land as well as stratum. There is no inflexible dichotomy between land and stratum in the Act. By definition, stratum is "part of land". There will be cases where that which has to be valued answers the description both of land and of stratum. In such cases the Act does not contain any prohibition on the making of a valuation under s.6 as distinct from s. 7B. It is the absence of such a prohibition, and the consequential availability of the two methods of valuation which led Else-Mitchell J. to reject the argument as to an inflexible dichotomy between land and stratum. In this he was correct.

38. For the above reasons it is submitted that the Supreme Court should have answered Question A: "No".

Question B

39. The Council adopts the submissions of the Commissioner with respect to this question.

Question C.

10 40. This question does not require an answer if the Council's submissions in respect of Question A are correct. If those submissions are incorrect, then the Council concedes that the land islands only should properly have been valued as "land" and the balance of the demised premises lying between George Street and Carrington Street should have been valued as stratum. The answers to Question C would therefore be:

(i) No.

(ii) Yes, the land islands.

(iii) Yes, the balance of the demised premises lying between the two streets.

Question D.

20 41. There is nothing in the Act which prohibits the inclusion of land and strata in one valuation. There are provisions which do prohibit the inclusion in one valuation of certain types of land (see the proviso to s.26 (1) and ss. 27 (1) and 27A (1)). The absence of any statutory prohibition on valuing land and strata together is significant. Such a prohibition should not be implied if it leads to impossibilities or absurdities in the valuation process. The judgment of Else-Mitchell J. makes clear that such impossibilities and absurdities would occur in the present case if land and strata are separately valued. A construction of the Act should be adopted which avoids absurdities or consequences which can never have been intended by the legislature. See Corocraft v. Pan American Airways (1969) 1 All E.R. 82 at 88; Maxwell on Interpretation of Statutes, 12th Edition, p.45 and p.210; Craies on Statute Law, 6th Edition, p.86; and Grey v. Pearson (1857) 6 H.L. Cas. 61 at 106; 10 E.R. 1216 at 1234.

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40 42. The Valuation of Land Act sometimes uses the word "land" to include "stratum". An example of this is seen in s. 16 (1). This is

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the only section of the Act which requires the valuation roll to contain any entries at all, and clearly such roll must include entries relating to stratum. Hence, "land" where used in s.16 (1) comprehends stratum. See also the reference to s.15 to "landowner", a term which must also refer to a stratum owner.

43. The words "part only of a parcel of land" in s. 27 (4) must refer to part only of a parcel of land which consists of a stratum. Otherwise it would be impossible to levy a local rate under s.121 of the Local Government Act on part of a stratum. If "parcel of land" in s.27 (4) refers to part of a stratum, there is no reason for giving to the words "parcels of land" in s.26 (2) a meaning which excludes a stratum. That is to say, where several parcels of land and stratum adjoin, and they are all let to the one person, "they shall be included in one valuation, unless the Valuer-General otherwise directs". Clearly the parcels of land and stratum in the demised premises lying between George Street and Carrington Street adjoin, are owned by the same person (the Commissioner), are of the same class of tenure and are all let to the one person (the Company). If they are required to be included in the one valuation, it is proper to value them together. 10 20

44. Section 34 which sets out the grounds upon which objection may be taken to a valuation, does not provide any warrant for inferring that land and stratum may not be valued together. In a case where land and stratum are valued together and objection is taken to such valuation, the grounds of objection appearing in s.34 (1) (a) and 34 (2) (b) are adequate to afford a right of objection where the complaint is that land and stratum which have been valued together ought not to have been so valued. 30

45. Section 48 refers to valuation lists which are supplied by the Valuer-General to the rating authority. Such lists are copies from the valuation roll (s.51). As the purpose of the list is to enable the taxing authority to levy the rate or tax authorised by the taxing Act (in this case the Local Government Act), it is to be 40

10 expected that the valuation list, and hence the roll, would contain entries coinciding with ratable parcels of land. That is to say, there would be one entry on the valuation roll and on the valuation lists relating to each ratable parcel. If the Supreme Court's judgment is correct, the result would be that there would be numerous valuations of various fragments (the land islands and the stratum parcels) which, taken together, make up the demised premises.

20 46. It is also clear from Part VI of the Act, which deals with the use of valuation rolls by government departments, that a single valuation of land and stratum is contemplated by the Act. For example, if the Company wished to sell its lease, a valuation of the lease for stamp duty purposes would be required under s.65. One valuation of the demised premises would be required, that is, one valuation of the land and stratum. A valuation under s.65 must be requested under s.70 (1). Section 70 (2) gives a right of objection against a valuation made under the section, and this supports the view that s.34 must be read as giving a right of objection against a valuation of land and stratum. Moreover, s. 70 (3) provides that a valuation made under the section is to be entered on the roll. Whilst a valuation under 30 s.70 is made on a market value basis and on the basis of the hypothetical values referred to in ss. 5, 6 and 7 and 7A, 7B and 7C, it would nevertheless be an entry relating to land and stratum in circumstances where the premises which are the subject of the valuation in fact include land and stratum.

40 48. The circumstance that s.6 (1) and s.7B (1) (c) may give rise to conflicting assumptions when valuing land and stratum together is not of itself sufficient to justify the conclusion that land and stratum can never be valued together under any circumstances. It is to be noted that there are no conflicting assumptions in respect of the assessed annual value of land and stratum - see s. 7 and 7C. In relation to the making of unimproved values, the only assumption required by s.6 is that in valuing

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land under that section any improvements on the land are disregarded for the purpose of valuing land under that section. The assumption is not required that the improvements had never come into existence - see Tooheys Limited v. The Valuer-General (1925) A.C. 439 as explained in Tetzner v. Colonial Sugar Refining Co. Limited (1958) A.C. 50 at p.58. That is, the assumption is not required that the improvements are to be disregarded when valuing adjacent strata. Read 10 in this way, s.6 does not give rise to any assumption inconsistent with the assumptions required by s. 7B (1) (c).

49. It is unnecessary for the Council to argue that land and stratum must be valued together in all cases. Both ss. 26 (2) and 27A (2) give to the Valuer-General a discretion to include parcels of land or stratum in separate valuations. The exercise of this discretion would be appealable under s.34 (1) or 34 (2). In an appropriate case the inclusion by the Valuer-General of land and stratum in one valuation could also be made the subject of an objection. 20

50. In Hurstville Super Centre v. The Valuer-General 67 S.R. 110, it was apparently conceded in argument that the Act does not authorise the amalgamation of a stratum with land for valuation purposes - see per Jacobs J.A. at p. 126. No reasons were given by the Court for reaching that conclusion and the case is therefore of little weight on this point. 30

51. Even if the precise language of some sections in the Act gives rise to difficulties of interpretation when valuing land and stratum together this should not be allowed to prevent the making of such a valuation. As was said in Broken Hill Proprietary Co. Limited v. The Valuer-General (1970) A.C. 627 at 637 - "The answer turns more upon a general consideration of the object and policy of the Valuation Act, and less upon the precise language of individual sections.." 40

52. It is therefore submitted that Question D should be answered "No".

Question E

53. The Council's submissions in relation to this question follow consequentially upon the submissions made in respect of Question A. As to Question E (a) no party contended before the Supreme Court that this question should be answered otherwise than "No". The entire property cannot be valued as stratum, if only because of the existence of the land islands which consist of parcels usque ad coelum et ad inferos.

54. As to Question E (b) it is submitted that the property must be valued under s.5, 6 and 7 of the Act if it does not fall within the definition of stratum. The mere fact that the land is partly defined by a horizontal boundary does not prevent it being "land" for the purposes of the Act, and it must be valued as such under ss. 5,6 and 7.

55. As to Question E(c) it is submitted that this question should be answered "No". The mere fact that land is partly defined by a horizontal boundary does not bring it within the definition of "stratum" in s.4. For instance, the land may not be defined or definable by reference to improvements or otherwise. Further, even if the parcel does not answer the description of stratum, for the reasons advanced in answering Question A above it may not be obligatory to arrive at the unimproved value under s.7B where a valuation of it can be made under s.6.

56. As to Question E (d) it is conceded that the Valuer-General would not have any discretion to make a valuation under s.7A, 7B and 7C of land which did not answer the description of stratum. But for the reasons advanced in answering Question A, it is submitted that when valuing a parcel which answers the description both of land and of stratum, there is no prohibition on valuing the parcel under s.6, even though s.7B may be resorted to. In this sense, the Valuer-General does have a discretion to value under ss. 7A, 7B and 7C or under ss. 5, 6 and 7, the exercise of such

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discretion being subject to objection under s.34 (1) or (2).

Question F

57. The wording of this question allows of some uncertainty as to its precise meaning. In using the word "occupiable" His Honour did not intend to convey (as Moffitt J.A. thought) that a stratum may not have one boundary which is limitless. A stratum may be "occupiable" although it extends ad coelum or ad inferos. 10
An owner of a parcel of land which extends usque ad coelum et ad inferos may occupy the whole of it, notwithstanding that he does not physically use the whole of the air space or subterranean areas. In order to qualify as stratum the property must consist of a space or layer which can be defined by reference to improvements. This is not to say that the space or layer must be entirely contained within an improvement, and Else-Mitchell J. did not intend to so hold. 20
This is apparent from his judgment, because he adverted to the possibility of a stratum extending ad coelum.

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It is therefore submitted that this question should be answered "No".

Question G

58. The initial question which arises under Question G is the extent of the powers of the Land and Valuation Court upon the hearing of an objection. That Court is given jurisdiction by s.8 (b) of the Land and Valuation Court Act 1921-1961 "to hear and determine ... (b) objections to or appeals against valuations under the Valuation of Land Act 1916." Section 16 of that Act gives the Court power at any stage of the proceedings to order any amendments to be made which, in the opinion of the Court, are necessary in the interests of justice. By s.39 (1) of the Valuation of Land Act, the Land and Valuation Court is given jurisdiction to "hear and determine" all appeals brought before it under s.38 and all references under s. 36M. 30
In the present case, the matter came before Else-Mitchell J. as a reference under s.36M. 40

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That section provides that a Valuation Board may refer an objection to the Court for hearing as an appeal, and such a reference is deemed to be a "determination" by a Valuation Board, and the matter is then heard by the Land and Valuation Court as an appeal. Section 39 (6) provides that if the Court decides that any valuation is erroneous, "it shall order the valuation to be altered accordingly." Section 10 43 (3) provides that, if on the hearing of any appeal or reference, the Court orders any valuation to be altered, the Valuer-General shall make all such consequential alterations that are necessary for the purpose of fixing the unimproved value... in respect of the land or stratum concerned." The power of the Court under s. 39 (1) to "hear and determine" a reference confers upon the Court power to make all such orders as shall be necessary to 20 dispose finally of the reference. See Green v. Lord Penzance 6 A.C. 657 per Lord Selborne, L.C. at pp. 669-670, and per Lord Blackburn at p.678. A valuation is "erroneous" within the meaning of s.39 (6) where its subject matter has been wrongly described by treating land as stratum or stratum as land. In such a case the Court has power under s.39 (6) to alter the valuation, that is to say, to properly describe the subject of the valuation. Whilst s.34 30 of the Valuation of Land Act does prescribe certain grounds of objection which, if taken, raise the issues which must be determined by the Valuation Court on the appeal or reference, one of the grounds of objection in the present case was that the description of the subject matter of each of the valuations was not correctly stated. This objection enabled the Court to embark upon an enquiry as to the correct description of the land included within 40 the valuations and to make a finding that the description in the valuation was erroneous. This gave rise to a power in the Court to order the valuation to be altered accordingly, that is to say, to correct the description of the subject matter of the valuation and to dispose of the reference finally by valuing the subject matter according to its true description.

It is therefore submitted that Question G

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{a} should have been answered "Yes", Question G
{b} "No", and Question G (c) "No".

Question H.

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59. Else-Mitchell J. was not in error in proceeding upon the basis that the valuations referred to the Court were valuations of land. It appears that he regarded the valuations as being principally of land, but also of three parcels of strata under Carrington Street and Wynyard Park. The description of the land on the face of those valuations is apt to describe the whole area which was the subject of the demise and, as such area is properly described as "land", His Honour was not in error in proceeding upon the basis that the valuations were of land.

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Question I

60. The Council does not challenge the finding of the Supreme Court that the Valuation Court was not bound to excise from the valuations the land or stratum. If the Court had been obliged to excise from the valuations either land or stratum, s.40 (3) of the Valuation of Land Act would have authorised the Valuer-General to make a valuation of the excised land or stratum. The power under s.40 (3) to make "consequential alterations" must include an independent power of valuation because in many cases an objection may relate only to, say, the improved value of land. If, upon the hearing of such an objection against the improved value the Court increases or reduces the improved value, an alteration in the assessed annual value may have to be made. The making of such an alteration would be made under s. 40 (3) and such an alteration would include fixing the other statutory values. When s.40 (3) uses the word "fixing" it refers to the making of the necessary consequential valuations.

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Similarly, if land is excised from a valuation there is a power to fix the value of the excised land. For example, if the Valuer-General includes lots A and B in one valuation, and an objection is made to the inclusion of the two lots in the one valuation and that objection

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succeeds, the Valuer-General could fix a value of the lot excised from the valuation if the court did not itself fix such a value under s.39 (6) when determining that the original valuation was erroneous.

61. The Council respectfully submits that the Order of the Court of Appeal was as to part correct and as to part incorrect and ought to be varied for the following (amongst other)

10

R E A S O N S

(1) BECAUSE the subject matter of the demise by the Commissioner to the Company was of land and not of land and stratum and ought to have been valued as land in accordance with the provisions of s.6 of the Valuation of Land Act.

20

(2) Alternatively to 1 above, because the subject matter of that part of the demised premises which lay between George Street and Carrington Street was land and not of land and stratum and ought to have been valued as land in accordance with the provisions of s.6 of the Valuation of Land Act.

30

(3) BECAUSE, even if some parts of the demised premises were stratum, such stratum was also land and it was open to the Land and Valuation Court to value the entire demised premises as land in accordance with the provisions of s.6 of the Valuation of Land Act.

(4) BECAUSE, even if the subject matter of the demise from the Commissioner to the Company consisted partly of land and partly of stratum, it was permissible to value the land and stratum together and in one valuation.

T. R. MORLING

F. BROPHY

No.16 of 1972

IN THE PRIVY COUNCIL

O N A P P E A L

FROM 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

THE VALUER-GENERAL Respondent

C A S E

FOR THE COUNCIL OF THE CITY OF SYDNEY

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