

PC
D.L. G. 6. 32, 1960

IN THE PRIVY COUNCIL

No. 7 of 1960

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME
COURT OF NEW SOUTH WALES

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N

50976

THE HONOURABLE WILLIAM
McCULLOCH GOLLAN and
MAURICE VICTORIAN
POINT ... Appellants

10 - and -

THE RANDWICK MUNICIPAL
COUNCIL ... Respondent

CASE FOR THE APPELLANTS

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1. This is an appeal by leave of the Supreme Court of New South Wales finally granted under the Order in Council of 1909 on the 11th day of February, 1960 from an order dated the 25th day of October 1957 of that Court (Roper C.J. in Eq., Maguire and Hardie J.J.) answering in a manner adverse to the interests of the Appellants certain of the questions of law submitted to that Court by way of stated case by the Land and Valuation Court pursuant to Section 17 of the Land and Valuation Court Act 1921-1955. p.55 pp.42-44 pp. 1-8

2. The questions submitted to the Supreme Court raised in this appeal concern what matters of title should be considered by the Valuer General in valuing certain land under the Valuation of Land Act 1916-1951 and as to whether the basis upon which such valuation should be made should relate to the actual title of the appellants or to a hypothetical title and as to whether pp.7-8

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consideration of the actual title of the appellants would require the Valuer General to assign to such land only a nil or nominal value.

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3. The Appellants in the year 1955 had vested in them (together with one Thomas Lloyd Forster Rutledge now deceased) as Trustees certain land at Randwick near Sydney used as a Racecourse and known as Randwick Racecourse.

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pp.8-13

4. This land was held by them as to the major portion as Trustees upon the trusts and subject to conditions set forth in a Deed of Grant of 1863 from Her Majesty Queen Victoria to their predecessors. As to a small portion this land was held pursuant to a Deed of Grant of 1935 from His Majesty King George V which vested this portion in their predecessors but upon the trusts and subject to the conditions set forth in the Deed of 1863.

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5. By an Act of the legislature of New South Wales entitled the Australian Jockey Club Act 1873 the trusts were recited and certain powers additional to those set forth in the Deed of 1863 were conferred on the Trustees. This Act was amended by the Australian Jockey Club Act No.29 of 1935 and by the Racing (Amendment) Act No. 39 of 1948.

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p.10 11.4-22

6. The trusts and conditions were in substance that the land could only be used for various specifically named recreational purposes, and any other public amusement or purpose which His Excellency the Governor for the time being with the advice of the Executive Council might from time to time declare to be a public amusement or purpose for which such land or any part thereof should or might be used with rights in the Crown to reserve portions for public roads and other public purposes to take stone and other materials for public works and that if the land or any part was used for any purpose not so authorised the land should revert to the Crown. The Trustees were given the power to lease the land or any part thereof to the Australian Jockey Club for any of the authorised purposes.

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p.10 1.29

7. The said lands are for purposes of local rates within the area of the Randwick Municipal Council and under the provisions of the Local Government Act 1919-1954 such local rate is levied upon the unimproved value of the land as fixed under the Valuation of Land Act by the Valuer General, who under such Act is required to assess the improved value, the unimproved value and the assessed annual value.

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8. The Valuation of Land Act provides in Sections 5 and 6 :-

5. The improved value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale or such reasonable terms and conditions as a bona-fide seller would require.

6. 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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9. The Appellants having objected to the unimproved valuation of the said lands assessed by the Valuer General on the ground that it was excessive and should be reduced to nil or to a nominal figure, and the said Council having also objected on the ground that it was too low, the objections came on for hearing before the Land and Valuation Court (Sugerman J.) when so far as this appeal is concerned the rival contentions in point of principle were on the part of the Appellants that all the trusts restrictions and conditions of the Deeds and as recited in the said Act of 1873 should be considered in applying Section 6, with the result it was submitted, the land had only a nil or nominal value, while the Council claimed the title of the Appellants should be assumed to be free of all such restrictions.

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10. The Land and Valuation Court of its own

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pp. 1-8 motion and without deciding such matter of principle thereupon under Section 17 of the Land and Valuation Court Act stated a case for the opinion of the Supreme Court upon four questions of which only the first, third and fourth are in issue in this appeal.

11. The said questions were:-

p.7 1.7 1. Whether, in valuing the said lands under Sections 5 and 6 of the Valuation of Land Act, 1916-1951, the trusts, restrictions, conditions and provisos contained in the said grants and in the said Act of 1873 or any of them, should be taken into consideration, and if so in what manner and to what extent. 10

This question was answered by the Supreme Court, No.

p.7 1.20 3. Whether the valuation required by Sections 5 and 6 of the said Valuation of Land Act to be made by the Valuer General is:- 20

(a) -- on the basis that such lands were held by the objectors for an estate in fee simple which could be alienated but only under circumstances in which the alienee would then hold such lands on the trusts and for the purposes and subject to the restrictions, conditions and provisos set forth in the said grants and in the said Act of 1873; or 30

p.7 1.32 (b) -- on the basis that such lands were held by an owner for an estate in fee simple free from any such trusts, restrictions, conditions or provisos and could accordingly be alienated to an alienee who would hold such lands free from any such trusts, restrictions, conditions and provisos; or 40

p.7 1.39 (c) -- on some other, and if so what, basis.

By reason of its answer to Question (1) the Supreme Court did not answer this question.

4. Whether the Valuer General was bound in law to assign to the said lands only a nil or nominal value. p.7 1.40

The Supreme Court answered this question, No.

12. In a joint judgment the Supreme Court (Roper C.J. in Eq., Maguire and Hardie J.J.) held that regarding the restrictions set out in the Deeds apart from any effect created by the Australian Jockey Club Act of 1873 the decision of Sugerman J. in Sydney City Council v. the Valuer General (1956) 1 L.G.R.A. 229 was correct in applying to Sections 5 and 6 the view of the High Court of Australia as to the phrase "fee simple of the land" in the definitions of improved and unimproved land in the Land Tax Assessment Act 1910-1950, namely that an estate in fee simple should be taken assumed to be free of any condition restricting the use and enjoyment of the land other than such as might flow from a public law affecting the enjoyment of land. pp.35-42 p.36 1.8 p.37 1.26

The Supreme Court further held that the recital of the trusts and restrictions in the Act of 1873 (which is described in the Stated Case and in the judgment as a private Act) did not have the effect of making the restrictions flow from a "public law" and that in any event the Act of 1873 was a private Act and not a "public law". p.2 1.17 p.38 1.41

- 30 The Supreme Court therefore answered Question (1) No, did not answer Question (3) and answered Question (4) no.

13. The Appellants respectfully submit -

- (a) That the phrase "the fee simple of the land" in Sections 5 and 6 of the Valuation of Land Act means not a hypothetical fee simple but the actual fee simple of the subject land with all its restrictions however arising which would be binding upon a Purchaser. In this regard the Appellants submit the judgments of Isaacs C.J. and Starke J. in Stephen v. Federal Commissioner of Taxation 45 C.L.R. 122 at p.134 and pp.137-9 are correct in applying the principle of Corrie v. McDermott 1914 A.C. 1056 and that Royal Sydney Golf Club v. Federal Commissioner of Taxation

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91 C.L.R. 610 was pro tanto wrongly decided, and that City of Sydney v The Valuer General 1 L.G.R.A. 229 was wrongly decided.

- (b) There is no reason on the wording of the Sections why some types of restrictions should be taken into consideration and others not. The better view is that the Valuer General must value the fee simple of the particular land as it exists. See Trustees of Beecroft School of Arts v. The Valuer General 14 L.G.R. 199; Metropolitan Golf Club Pty. Ltd. v. The Valuer General 17 L.G.R. 223; Trustees of Gunnedah School of Arts v The Valuer General 18 L.G.R. 134; Sydney Exchange Co. v The Valuer General 19 L.G.R. 111; and Board of Fire Commissioners v The Valuer General 19 L.G.R. 115. 10 20
- (c) The words "fee simple" merely denote the quantity of the estate in terms of duration, and there is no reason why restrictions of all types should not be considered. One should not under the Sections treat the hypothetical Purchaser as concerning himself with some but not all of the restrictions which would affect him if he bought. 30
- (d) An estate in fee simple does not at all connote an estate free of restrictions.
- (e) It is wrong as Sugerman J. did in City of Sydney v The Valuer General 1 L.G.R.A. 229 to decide the matter on the footing that the sections are part of a rating scheme since the values so fixed are used for other purposes as well, for example, assessment of Death Duties (Valuation of Land Act 1916 Section 65) and resumption purposes (Section 68). 40

14. In resumption cases the Land is valued with all its advantages and disadvantages and restrictions; see Corrie v McDermott 1914 A.C. 1056, and in Tooneys Ltd. v The Valuer General 1925 A.C. 439 at 443 it was said a

valuation for resumption and one under Section 6 of the Valuation of Land Act should be made on the same principle.

10 15. The Appellants in the alternative respectfully submit that if the true view is that only such restrictions are to be regarded as arise under or flow from a public law the restrictions originally set forth in the Deed of 1863 now find their place in the public law of the land (The Australian Jockey Club Act 1873) by their recital in what has been called in the stated case a private Act, but which is in fact a public Act; (Acts Shortening Act 1852 Section 5, and Interpretation Act 1897 Section 2 (1) (3) and Section 13). In this connection the case was per incuriam wrongly argued by both the appellants and the respondent on the footing that the said Act was a Private Act.

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20 16. The Appellants submit that if regard is to be had to the restrictions imposed upon them including in particular their inability to sell the land the proper basis of valuation is to attribute to the land a nil or nominal value. In addition to the cases referred to in paragraph 13 (b) above the Appellants will rely on In re the Hutt Park & Racecourse Pty. Ltd. 37 N.Z.L.R. 246, and Trustees of Queen's College v. the Mayor etc. of Melbourne, 1905 V.L.R. 247.

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17. In the alternative the Appellants submit that even if a nil or nominal value is not to be assigned to the subject land, nevertheless in valuing such land full regard must be paid to the restrictions contained in the said Crown Grant and the provisions of the said Act of 1873 as amended.

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40 18. The Appellants respectfully submit that the order of the Supreme Court of New South Wales in the answers given to Questions (1) and (4) of the case stated, and the refusal to answer Question 3, was wrong and ought to be reversed for the following (amongst other)

R E A S O N S

- (1) BECAUSE Section 6 of the Valuation of Land Act requires an assessment of the value of the fee simple of

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the subject land subject to all restrictions which would bind a purchaser.

- (2) BECAUSE the value fixed by the Valuer General under Section 6 is to be assessed on the same basis whether such is to be used for rating, resumption or death duty purposes, and if it is to be used for either of the last two purposes reason, justice and authority require that restrictions be considered. 10
- (3) BECAUSE the decisions of the Land and Valuation Court in City of Sydney v The Valuer General 1 L.G.R.A. 229, and of the Supreme Court in the present case were wrong, and the decision of the High Court of Australia in Royal Sydney Golf Club v Federal Commissioner of Taxation 91 C.L.R. 610 was wrong in so far as it decided that not all restrictions were to be considered. Alternatively, even if the Royal Sydney Golf Club case was correctly decided in toto, the Full Court of New South Wales wrongly applied the principles stated therein to the facts in the present case which do not justify such application. 20 30
- (4) BECAUSE the judgments of Isaacs C.J. and Starke J. in Stephen v Federal Commissioner of Land Tax 45 C.L.R. 122 were correct.
- (5) BECAUSE the Australian Jockey Club Act of 1873 is a public Act, and the restrictions now flow from the recitals therein set forth, and even if the Valuer General need not have regard to all restrictions he is required to pay regard to those flowing from a public law of the State. 40

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GORDON WALLACE

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RANDWICK
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CASE FOR THE APPELLANTS

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