

**The Honourable William McCulloch Gollan**  
and another - - - - - *Appellants*

v.

**The Randwick Municipal Council** - - - - - *Respondent*

FROM

**THE SUPREME COURT OF NEW SOUTH WALES**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 11TH OCTOBER, 1960**

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*Present at the Hearing:*

VISCOUNT SIMONDS.

LORD REID.

LORD RADCLIFFE.

LORD TUCKER.

LORD MORRIS OF BORTH-Y-GEST.

[*Delivered by LORD RADCLIFFE*]

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The appellants are the owners of some land at Randwick, near Sydney, New South Wales, which is used as a racecourse and known as Randwick Race Course. They are trustees of this property, the major portion of which was the subject of a Deed of Grant of 15 June, 1863, whereby the land was vested by the Crown in their predecessors in fee simple, subject to a pepper-corn quit rent, upon the trusts and subject to the conditions, reservations and provisos mentioned in the Deed. The remaining portion was granted in the year 1935 by a supplementary Deed, the terms of which were for all relevant purposes the same as those of the Deed of 1863.

The effect of the 1863 Deed can be summarised as follows:—

(a) The Trustees were to allow the land, in their discretion, to be used for a number of specified purposes, firstly as a race course for horse racing, secondly as a training ground for training race horses and for the erection of appropriate buildings, thirdly as a cricket ground, fourthly for rifle shooting, fifthly for any other public amusement or purpose that the Governor of the State might declare.

(b) The Trustees were empowered to grant to the Australian Jockey Club or any other club or association formed for the above-mentioned recreational purposes the exclusive use and occupation of the lands for any period up to seven years.

(c) There was a reservation to the Crown of the right to resume any part of the lands that might be required for public roads or ways and of the right to take stone, gravel and timber, as well as of a general right to resume any part of the land for public purposes.

(d) Finally, there was a proviso that if the land or any part of it should be used for any purpose other than such as was allowed by the foregoing trusts, the trusts should cease and the land should be forfeited and revert to the Crown.

The lands in question are now and always have been in lease to the Australian Jockey Club, the original power of leasing up to seven years

having been extended to 21 years by the terms of an Act of 1873 entitled the "Australian Jockey Club Act".

The appellants then are the owners of this land in fee simple subject to a number of restrictive trusts, conditions and provisos which cannot but materially affect its value. They have no power of selling their land free from any of the restrictions which bind them and it must therefore be taken that, if they did in some way manage to sell, a purchaser from them would take it subject to the same restrictions. These restrictions arise from a Crown grant which, although made in exercise of the Crown's public right or duty of granting unappropriated land, is treated as being on the same footing as a grant of land *inter partes* made by one citizen to another. The question at issue between the appellants and respondent is whether in ascertaining the "unimproved value" of their land under the New South Wales *Valuation of Land Act* 1916-1951 the valuation should or should not take account of the existence of these restrictions.

The Valuation Act itself prescribes the principle for arriving at "unimproved value". Having declared in s. 5 (1) that "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 on such reasonable terms and conditions as a bona fide seller would require", it enacts in s. 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".

It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly, it is irrelevant that the land may be so settled or encumbered that there is no single person or even combination of persons who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed. Again, the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all (see *Tooheys v. Valuer General* 1925 A.C. 439).

These considerations do not however go far enough to supply the answer to the question upon which this appeal turns and which can be expressed as follows:—Is the fee simple assumed to be sold a "pure" estate in the land without reference to the actual title under which it is held or is it that actual title, with the consequence that there enters into the valuation notice of any restrictions on user and enjoyment by which the title is affected? Either construction would be consistent with the mere words "fee simple" in the statutory formula, for grantees holding title under a conditional grant subject to forfeiture or under restrictive covenants or conditions or, a fortiori, under trusts that limit their powers are none the less owners in fee simple. It does not follow from this that a sale of such a fee simple would be a sale of "the" fee simple of the land within the meaning of the formula: but even if the use of the definite article in this connection has any pregnant significance it is better to defer dealing with that until it has been possible to give a rather fuller account of the scope and purpose of the Valuation of Land Act.

In New South Wales unimproved value or unimproved capital value as a basis of assessment has been a conception associated primarily with rating. The valuable judgment of Sugerman J. in *Sydney City Council v. Valuer General*, 1956, 1 L.G.R.A. 229 identifies the s. 6 formula as first appearing in s. 68 of the Land and Income Tax Assessment Act, 1895. It reappeared in the Local Government Act, 1906, which "first adopted the unimproved capital value as the general basis of rating for both shires and municipalities" (*loc. cit.* p. 233). It is part of the somewhat confusing history of the matter that what is to all intents and

purposes the same phrase was also used in the federal *Land Tax Assessment Act*, 1910-1950. In either case the formula was related to the imposition of an annual rate or tax charged on land and exacted, generally speaking, from the "owner" as representing all interests in the land.

As was to be expected, the relevance to the statutory valuation of restrictions on use and enjoyment affecting title was soon a matter of legal controversy in rating assessments. The course followed by decisions on the issue in the Courts of New South Wales falls into three separate phases. At first a construction was adopted which accepted the idea of a "pure" fee simple and rejected any reference to restrictions imposed inter partes—see *Armidale Race-Course Trustees v. Armidale Municipal Council* (1923) 6 L.G.R. 151, *Goulston v. Valuer General* (1924) 7 L.G.R. 17.

In 1930 however the case of *Stephen v. Federal Commissioner of Land Tax* 45 C.L.R. 122 reached the High Court of Australia, and it fell to the Court to consider the meaning and effect of the corresponding words in s. 3 of the *Land Tax Assessment Act*, 1910-1950. Its members were equally divided in opinion, Isaacs C.J., and Starke J. disagreeing with the line taken in the *Armidale* case, while Rich and Dixon JJ. thought that the New South Wales decisions had taken the right approach. In the result the questions submitted to the Court, being by way of appeal, were answered in the sense favoured by the Chief Justice's opinion. As the High Court has since, in a later case, unanimously preferred the view of Rich and Dixon JJ. to that which then prevailed, it is sufficient to notice with regard to the *Stephen* decision that the governing reason which moved the Chief Justice and Starke J. was that the idea of the "pure" fee simple would be in itself unjust to the owner of land subject to restrictions and would be contrary to the law as laid down in the Privy Council decision *Corrie v. MacDermott* 1914 A.C. 1056, a case of compensation upon the resumption of land. It will clear the ground if their Lordships say at this point that in their view the principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment; and that they see no general issue of justice or injustice at stake in the selection of the answer to be returned to the question now under review.

The *Stephen* decision, however, changed the current of authority in rating cases in New South Wales. In 1940 trustees holding land subject to user restrictions imposed by virtue of an original grant by the Crown objected to the unimproved value of their land being arrived at on the basis of a sale of an unrestricted estate in fee simple. This objection was upheld by Roper J. in the Land and Valuation Court (*Trustees of Beecroft School of Arts v. Valuer General* 14 L.G.R. 199), the Court treating the question as concluded by *Stephen* and the earlier decision in *Armidale* as no longer capable of application. Two cases in 1953 (*Sydney Exchange Co. v. Valuer General* 19 L.G.R. 111 and *Board of Fire Commissioners v. Valuer General* 19 L.G.R. 115) proceeded on the same basis; and, though there are other reported cases in which a different result was arrived at (e.g., *Metropolitan Golf Proprietary Ltd. v. Valuer General* (1950) 17 L.G.R. 223, *Trustees of Gunnedah School of Arts v. Valuer General* (1952) 18 L.G.R. 134), the ground of distinction is not any departure from the principle of *Stephen* but the circumstance that in neither case did the restrictions relied upon bind the freehold title itself.

It was a second decision of the High Court that once more changed the current of authority in New South Wales. This was the case of *Royal Sydney Golf Club v. Federal Commissioner of Taxation* 91 C.L.R. 610 decided in 1955. The opinion of the Court (Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.), was unanimous and is contained in a single judgment. The direct issue decided was not that involved in the present appeal; on the contrary, the golf club land being for all that appears held in unrestricted fee simple, the point (among others) that arose was whether the unimproved value for the purpose of land



tax assessment should take account of certain restrictions on user imposed by a County Planning Scheme operating under the New South Wales *Local Government Amendment Act of 1951*. It was held that such restrictions must be taken account of in so far as their existence would be likely to affect the sale value of the land.

On the other hand the Court found it necessary to their decision to review the opinions of Isaacs C.J. and Starke J. in the *Stephen* case, the principle of which they found to be "gravely open to question". The conclusion finally arrived at, so far as concerned s. 3 of the *Land Tax Assessment Act*, was expressed in the following words (see p. 623) :—  
 "The interpretation of the Act which seems best to accord with the policy appearing from its provisions and also to flow from its language is that in assessing the unimproved value an estate in fee simple must be taken as the hypothesis unencumbered and subject to no condition restricting the use and enjoyment of the land".

This conclusion is, as it says, based on two main considerations, of which one is the language, common to the *Land Tax Assessment Act* and the *Valuation of Land Act*, in which the definition of unimproved value is expressed. The other consideration arises from the structure or scheme of the *Land Tax Assessment Act* as a whole, from which the Court deduced that "the general policy of the Act was to impose the tax on the owner of the first estate of freehold in possession and to make him liable independently of the rights of any reversioner, mortgagee or holder of security in respect of the unimproved value of the land" (see p. 622). From this it was further deduced that the fee simple whose sale was to be assumed was an unincumbered fee simple: and the inference was drawn that, just as the fee simple must be taken as being free from encumbrances which operated to confer upon some other person or persons an estate or interest in the land, for the reason that the scheme did not allow for the taxing of the holders of those other estates or interests, so conditions or reservations which might affect the value of the estate, even if operating only in the interests of the public, must similarly be treated as irrelevant to the valuation required.

This decision was treated in New South Wales as restoring the interpretation of "unimproved value" under the *Valuation of Land Act* that prevailed before the *Stephen* case. In 1956 Sugerman J., in the Land and Valuation Court, applied it to an area of land in Sydney held by the City Council under Crown dedication upon trust to secure its use as a public park; see *Sydney City Council v. Valuer General* 1956 1 L.G.R.A. p. 229. In the case now under appeal the Supreme Court approved his decision and accordingly returned the answer "No" to the first question in the Case Stated to them, "whether in valuing the said lands under ss. 5 and 6 of the *Valuation of Land Act*, 1916-1951, the trusts restriction, conditions and provisoes contained in the said grant and in the said Act of 1873 or any of them should be taken into consideration".

The "said Act of 1873" is a reference to the Australian Jockey Club Act, 1873, previously mentioned. Its existence and terms played a part in the arguments because the contention was raised on behalf of the appellants that, since the Act recited in its preamble the provisions of the Crown grant of 1863 and in particular those imposing restrictions on use and alienation, the restrictions became thereby part of the general statutory law of the State and, as such, as much to be taken account of in the valuation as the planning restrictions accepted by the High Court in the *Royal Sydney Golf Club* case supra as to be admitted on the ground that the planning scheme was "a law operating over an area of country within the State—chosen independently of all questions of title and ownership" (see p. 624).

The Supreme Court rejected this contention on two separate grounds. The Act of 1873, they said, did not create the restriction: all it did was to recognise the restriction already created. It would follow from

this that the source of the obligation and conditions binding the trustee holders was not the Act of the legislature but the original Crown grant which constituted their title. Their Lordships have no doubt that this view is correct, and it is sufficient to dispose of the point. The Supreme Court also expressed the opinion that the 1873 Act, being a private Act of Parliament, could not amount to a "public law" capable of satisfying the High Court's distinction expressed by its words, "There is all the difference between a public law affecting the enjoyment of land and a restriction of title" (see *Royal Sydney Golf Club* supra. p. 624). The appellants now say that it is a mistake to treat the Act as a private Act and that per incuriam the case was wrongly argued on this point by both parties in the Supreme Court. It is unnecessary to go into this, for it does not make any difference whether the Act in question ranks as public or private if the deed of grant and not the Act remains the true source of the restrictions on user.

The second question submitted to the Court was "Whether in valuing the said land as aforesaid the restrictions arising from the said notification by the Minister of Local Government under s. 342 (7) of the *Local Government Act* should be taken into consideration". The restrictions referred to are planning restrictions operating under statutory authority. To this question the Court returned the answer "Yes", being of the opinion that such restrictions fell within the principle laid down by the High Court in the *Royal Sydney Golf Club* case. The respondent has not preferred any cross-appeal on this answer, and their Lordships have not therefore to express any view as to the validity of the distinction that has been drawn between restrictions on user imposed on title by Crown grant and restrictions on user imposed on land by the operation of a local planning scheme.

The outcome of the appeal before the Board therefore is to be determined by nothing more than the answer to be given to the two inter-related questions, Is the view of the High Court in the *Royal Sydney Golf Club* case to be preferred to the view of Isaacs C.J. and Starke J. in the *Stephen* case? and, secondly, does an interpretation placed on s. 3 of the *Land Tax Assessment Act, 1910-1950*, hold good for the corresponding words in s. 6 of the *Valuation of Land Act, 1916-1951*?

The *Land Tax Assessment Act* was designed to impose a single annual tax upon the unimproved value of all lands owned by taxpayers and not exempt from taxation. It was possible therefore to survey its scheme as a whole and to relate the conception of unimproved value to the general intent shown by the scheme. The *Valuation of Land Act* does not serve a purpose similar to this. It is, as its title declares, an Act "to make provision for determining values in respect of certain lands and to provide that statutory rates, taxes, duties and contributions based on land values shall be levied on values so determined". In fact the valuations made under it are required not only for the purposes of rates, but also of such diverse transactions as resumption and exchange of land, advances on mortgage and death and transfer duties. A basis of valuation that may seem reasonable and appropriate for one of these purposes is not necessarily suitable for another. It is not therefore to be assumed without further consideration that, though words that are effectively identical are used to define unimproved value in both these Acts, they are to have the same meaning in their respective contexts.

Yet, even with this caution taken, it would be unreal to ignore the fact that "unimproved value" as a basis of taxation is essentially a rating conception in New South Wales. The *Local Government Act, 1919*, which provides for the making of general, local, special and loan rates, bases them upon the improved or unimproved capital value of "all rateable land" in the area. In the case of the general rate unimproved capital value is the only permitted basis. S. 134 (1) then expressly provides that the unimproved capital value, the improved capital value and the assessed annual value of rateable land is to be the unimproved value, the improved value and the assessed annual value of the land as determined under the

*Valuation of Land Act, 1916.* S. 58 (1) and s. 59 (1) of the latter Act supply a cross reference to this, tying in the unimproved and improved values of land as arrived at by its procedure with the *Local Government Act* assessments. It is apparent therefore that the unimproved values to be ascertained under the *Valuation Act* are values to be employed primarily for a rating scheme. Indeed the category of unimproved value is not required for any other of the various purposes served by the *Valuation Act* except for the somewhat analogous imposts under the *Land and Income Tax Assessment Act* (see s. 58 (1) (b)) and the *Fire Brigades Act, 1909* (see s. 67).

In their Lordships' opinion the considerations that led the High Court in the *Royal Sydney Golf Club* case to treat unimproved value under s. 3 of the *Land Tax Assessment Act* as involving the hypothesis of "a fee simple unencumbered and subject to no conditions" can be applied to unimproved value under s. 6 of the *Valuation of Land Act*, and they agree with the conclusion to which those considerations led them. Prima facie, it appears to their Lordships, "the fee simple of the land" as used in s. 6 does not refer to the actual title vested in the owner at the relevant date but to an absolute or pure title such as constitutes full ownership in the eyes of the law. There is nothing in the rating scheme under the *Valuation of Land Act* and the *Local Government Act* which calls for any different meaning to be given to these words and, as the High Court have shown, there is more than one reason for rejecting the alternative view. That which commends itself to their Lordships as being of particular significance is the fact that the latter Act, having provided for the charging of rates on "all ratable land", contains a long and detailed section, s. 132, which declares all land to be ratable except that comprised in a number of special categories embracing a variety of public purposes. If the conditions or restrictions affecting any particular area of land bring it within one of those categories, then it is expressly exempt by virtue of the statute, but it seems directly contrary to the intent of the Act that, though not within one of the categories, land can yet be effectively withdrawn from ratability or, at least, find its ratable assessment substantially reduced by the operation of some grant or other transaction inter partes imposing restrictions on user.

It might still be necessary to ignore all these considerations if the *Valuation of Land Act* were so constructed as to provide a single basis of valuation of land, whether improved or unimproved, which was to do duty for such various purposes as death duties, resumption and mortgage valuations as well as for rating. For while burdens on individual titles may naturally enough be treated as irrelevant under a general rating scheme, it would hardly be possible to expect that similar treatment was intended to be given when it came to valuing a person's individual interest for any of these other purposes. It was the appellants' argument that the Act was constructed upon just this single basis, and certainly there are phrases and even sections in which it seems to be contemplated that what is provided for is a single scheme of valuation of "land". Their Lordships are satisfied however that a full reading of the Act does not admit of any such construction.

"Improved value" and "unimproved value" are special terms to which is allotted a particular statutory meaning. They will be resorted to only where the taxing or other Act in question requires a valuation to be made with reference to these concepts. As has been pointed out, "unimproved value" is fundamentally a rating concept and, it seems, is resorted to for virtually no other purpose. "Improved value", which is capable of raising a similar question as to the relevance of restrictions on user, does, however, find a place in s. 68, which deals with valuations for resumptions. Even that section, however, contemplates that not only will there be an "improved value" to be referred to but also separate valuations of "the respective estates and interests referred to in such valuation".

It seems that throughout the Act it is intended that valuations of individual estates and interests, which will presumably allow for matters

of title, will be determined and made available side by side with such special categories of valuation as the improved and unimproved value and assessed annual value of the land itself. Thus in s. 16, which lays down the requirements for the initial valuation roll, it is provided that, apart from stating improved and unimproved values, the roll may contain a statement of "the value of the estates and interests of all owners". The owner of any estate or interest is entitled to notice of and to object to any valuation of it, whether or not he is the owner of a freehold estate in possession (s. 29). A similar duality runs through other sections of the Act—see s. 43, s. 65, s. 68, s. 70. The scheme of the Act therefore does not require that the highly artificial conception of unimproved value should be imported into valuations of estates and interests required for other purposes served by the Act.

For these reasons their Lordships are of opinion that the answer returned by the Supreme Court of New South Wales upon Question 1 of the Case Stated is correct. Question 2 is not the subject of appeal. Question 3 was not argued there or here and no answer was returned to it. Question 4 was rightly answered in the negative, having regard to the answer given to Question 1. The Order of the Supreme Court dated 25th October, 1957, must be affirmed and the appeal dismissed. Their Lordships will humbly advise Her Majesty accordingly. The appellants must pay the respondent's costs of the appeal.



**In the Privy Council**

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**THE HONOURABLE WILLIAM MCCULLOCH  
GOLLAN AND ANOTHER**

**v.**

**THE RANDWICK MUNICIPAL COUNCIL**

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**DELIVERED BY LORD RADCLIFFE**

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