

IN THE PRIVY COUNCIL

Appeal No. 16 of 1972

ON APPEAL

FROM THE COURT OF APPEAL OF NEW SOUTH WALES  
in Term No. 645 of 1970.

A(3)

B E T W E E N :

THE COMMISSIONER FOR RAILWAYS, (Plaintiffs)  
THE COUNCIL OF THE CITY OF SYDNEY, Appellants  
and WYNYARD HOLDINGS LIMITED

- and -

10 THE VALUER-GENERAL (Defendant)  
Respondent

C A S E FOR THE APPELLANT WYNYARD HOLDINGS LIMITED Record

A. INTRODUCTION

1. On the 25th March 1970 Else Mitchell, J., a Judge of the Land and Valuation Court of New South Wales, pursuant to the requirement in writing of the Appellant Wynyard Holdings Limited (hereinafter called "Wynyard"), stated a case pursuant to Section 17 of the Land and Valuation Court Act, 1921, as amended, for the decision of the Court of Appeal of the Supreme Court of New South Wales upon certain questions of law which had arisen in certain proceedings before him.

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27-43

2. The Court of Appeal answered most of those questions in accordance with the contentions of Wynyard and the Valuer-General, and contrary to the contentions of the Commissioner for Railways (hereinafter called "the Commissioner") and The Council of the City of Sydney (hereinafter called "the Council"). Generally speaking, Wynyard's appeal from the decision of Else Mitchell, J. was successful; indeed, the Court of Appeal ordered that its costs be paid by the Commissioner and the Council. However, certain subsidiary questions were not answered as Wynyard contended. Thus, Wynyard has appealed against those answers. Therefore, although Wynyard is in form an appellant, it is in substance a respondent and upon



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the basic issues which arise for determination in this Appeal it supports the decision of the Court of Appeal.

Pages 27-34

3. The background to and nature of the proceedings before Else Mitchell, J. appear from paragraphs 1 to 22 of the Case Stated. The relevant matters may be summarised as follows :

Pages 77-113

(a) During 1961 Wynyard obtained a 98-year lease from the Commissioner of certain premises in the City of Sydney. There was a supplementary lease entered into in 1963.

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(b) Both the Commissioner and the Council are financially interested in the unimproved capital value of the premises the subject of the lease because the rental under the lease is related to the unimproved capital value, and the rates which are from time to time levied by the Council upon Wynyard are computed on the basis of the unimproved capital value.

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Pages 114-115

(c) During October 1962 the Valuer-General made two valuations in respect of the subject premises assigning to them an unimproved capital value of \$2,500,000.00. One of those valuations was a supplementary valuation and the other, dated a few days later, a valuation issued in the course of a general re-valuation of the area.

(d) One of those valuations described the premises being valued as "Strata" and the other described them as "Stratum". Both valuations contained a rough description of the area of the subject premises.

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Pages 116-121

(e) Wynyard objected to the valuations. Its objection was considered and ultimately dealt with by the Valuer-General pursuant to the provisions of the Valuation of Land Act. The objection was successful. In September 1967 the Valuer-General gave notice that pursuant to the objections he was altering the unimproved capital value to \$1,100,000.00.

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(f) The Commissioner and the Council, being dis-satisfied with the Valuer-General's decision on the objections referred to

10 above, required the Valuer-General to refer the objections to a Valuation Board of Review, and the Valuation Board of Review in turn, at the request of all parties, referred the objections to the Land and Valuation Court pursuant to the provisions of the Valuation of Land Act. The Commissioner also, with the consent of the Valuer-General, lodged his own objections to the original valuations and these objections were also referred first to the Valuation Board of Review and then to the Land and Valuation Court.

4. The Commissioner and the Council were substantially successful before Else Mitchell, J. who, after a lengthy hearing, made an order by which, inter alia, he substituted for the unimproved value of \$1,100,000.00 as determined by the Valuer-General, the sum of \$3,304,770.00.

20 5. It was against that decision that Wynyard appealed to the Court of Appeal, the procedure for appeal provided by the Act being by Case Stated.

#### B. GENERAL NATURE OF THE ISSUES INVOLVED

6. These proceedings raise a number of questions concerning the construction of the Valuation of Land Act 1916 (Amended) of New South Wales.

30 7. The Local Government Act, 1919 (as amended) provides for the rating of land in New South Wales. That Act made the unimproved value of land the value upon which general rates were to be levied, and provided that the Valuation of Land Act, 1916 should be the machinery for ascertaining that value for rating purposes. Various other rating and taxing statutes employ the same machinery. The primary object of the Valuation of Land Act is to provide a basis for rating and taxing (Broken Hill Proprietary Company Limited -v- Valuer-General, 1970 A.C. 627 at 638-9).

8. The central provision of the Valuation of Land Act is section 14 which is in the following terms:

40 "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

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" 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.

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. 10

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

9. Sections 5, 6 and 7 of the Act define the  
terms "improved value", "unimproved value", and  
"assessed annual value". They are in the  
following terms : 20

"5. (1) 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.

(2) In determining the improved value  
of any land being premises  
occupied for trade, business, or 30  
manufacturing purposes, such  
value shall not include the value  
of any plant, machines, tools, or  
other appliances which are not  
fixed to the premises or which  
are only so fixed that they may be  
removed from the premises without  
structural damage thereto.

6. (1) The unimproved value of land is  
the capital sum which the fee- 40  
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.

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(2) Notwithstanding anything in subsection one of this section, in determining the unimproved value of any land it shall be assumed that -

(a) the land may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates; and

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(b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used,

but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that the improvements, if any, other than site improvements, referred to in subsection one of this section had not been made.

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7. (1) The assessed annual value of land is nine-tenths of the fair average annual value of the land, with the improvements (if any) thereon: Provided that such assessed annual value shall not be less than five per centum of the improved value of the land.

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(2) In determining the assessed annual value of any land being premises occupied for trade, business, or manufacturing purposes such value shall not include the value of any

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6.

plant, machines, tools, or other appliances which are not fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto.

- (3) In determining the assessed annual value of any land it shall be assumed that the land, with the improvements, if any, thereon is not subject to the provisions of the Landlord and Tenant (Amendment) Act, 1948." 10

10. As your Lordships' Board had remarked even before the amendments to the Act referred to in paragraph 12 hereof, the valuations required by the Act demanded the making of assumptions that were in practice frequently most artificial. (See, for example, Gollan -v- Randwick Municipal Council, 1961 A.C. 82 at 94.) 20

11. The Valuation of Land Act contains no definition of "land". However, before the amendments of 1961 referred to below the view had been taken that "land" in the Act meant land usque ad coelum et ad inferos. (e.g. Commissioner for Railways and Sydney City Council -v- Valuer General, 1962 S.R. (N.S.W.) 28 at 37 per Hardie, J.)

12. By an Amending Act of 1961 there was introduced into the Valuation of Land Act a number of provisions concerning the valuation of strata. 30

A definition of "stratum" was included in the Act in the following terms :

"Stratum" means a part of land consisting of a space or layer below, on, or above the surface of the land, or partly below and partly above the surface of the land, defined or definable by reference to improvements or otherwise, whether some of the dimensions of the space or layer are unlimited or whether all the dimensions are limited; but refers only to a stratum ratable or taxable under any Act; and "strata" is the plural of stratum. 40

The following Sections were inserted relating to valuations of strata :

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"7A. (1) The improved 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.

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(2) In determining the improved value of any stratum being premises occupied for trade, business, or manufacturing purposes, such value shall not include the value of any plant, machines, tools or other appliances which are not fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto.

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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;

(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, 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

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partly of a building, structure, or work or is portion of a building, structure, or work, such building, structure, or work, to the extent that it is outside the stratum, had been made.

(2) Notwithstanding anything in subsection one of this section, in determining the unimproved value of a stratum it shall be assumed that - 10

(a) the stratum may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates; and

(b) such improvements may be continued or made in the stratum as may be required in order to enable the stratum to continue to be so used. 20

but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the stratum may be used on the assumptions set forth in subsection one of this section. 30

7C. (1) The assessed annual value of a stratum is nine-tenths of the fair average annual value of the stratum, with the improvements (if any) therein: Provided that such assessed annual value shall not be less than five per centum of the improved value of the stratum.

(2) In determining the assessed annual value of any stratum being premises occupied for trade, business, or manufacturing purposes such value shall not include the value of any plant, machines, tools, or other appliances which are not 40



fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto.

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- 10 (3) In determining the assessed annual value of any stratum it shall be assumed that the stratum, with the improvements, if any, therein, is not subject to the provisions of the Landlord and Tenant (Amendment) Act, 1948."

The dichotomy between land and stratum disclosed by these provisions and those recited in paragraph 9 hereof was emphasised and completed by other and parallel amendments which will be later referred to in this Case.

13. These proceedings raised, inter alia, two fundamental questions concerning the construction of the Act as amended by the 1961 Amendments:

- 20 (a) What premises or parts of premises are to be valued as land and what premises or parts of premises are to be valued as strata; in particular, are premises consisting of something less than land usque ad coelum et ad inferos land for the purposes of the Act;
- (b) Can premises which comprise both land usque ad coelum et ad inferos and something less be the subject matter of the one valuation under the Act?

- 30 14. Both of these questions were raised in an acute form in the present case by reason of the physical nature of the premises demised to Wynyard, and the state of those premises (on which buildings were in the course of construction) in October 1962.

Pages 124-129

15. The substantial question at issue between the parties was the method of determining the unimproved value of the area between George and Carrington Streets, demised to Wynyard.

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- 40 The demise included a car parking area and some smaller layers of space beneath Carrington Street and Wynyard Park. Else Mitchell, J. held that these were clearly strata and had to be valued as such under the Act. In relation to the area between George and Carrington Streets, however, the issue was more complicated. Was it all "land"? or all

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"stratum"? Or was it, as Wynyard and the Valuer-General contended, partly land and partly strata?

16. The contention of Wynyard and of the Valuer-General was that so much of the area between George and Carrington Streets as was demised to Wynyard usque ad coelum et ad inferos was land and required to be valued as such, and the balance, which fell within the definition of "strata" in the Act, was strata and required to be valued as such and separately from the "land islands". With this contention the members of the Court of Appeal were unanimously in substantial agreement.

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Pages 44-68

C. THE QUESTIONS AS TO WHETHER THE SUBJECT PROPERTY WAS LAND OR STRATA OR PART LAND AND PART STRATA

17. Else Mitchell, J. held that part of the subject property, that is to say the three areas below Carrington Street and Wynyard Park depicted in the plans which are annexures "E", "F" and "G" to the lease were clearly strata within the meaning of the Act. With this aspect of his Honour's decision Wynyard has no quarrel. It is with respect to that part of the premises located between George and Carrington Streets that His Honour was, so Wynyard submits, and the Court of Appeal held, in error.

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I. WYNYARD'S SUBMISSIONS ON THE CONSTRUCTION OF THE ACT.

18. Both before and since the 1961 amendments to the Act the word "land" as used in the Act meant not only the surface of the ground but also anything on or over or under it usque ad coelum et ad inferos. This is the ordinary sense in which the word is used (Colon Peaks Mining Co. -v- Wollondilly Shire Council, 13 C.L.R. at 455 per O'Connor, J.).

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19. The 1961 amendments to the Act assume that "land" as used in the Act had and has the meaning ascribed to it above. Those amendments were a legislative recognition of that situation and the Courts of New South Wales have so decided. Thus :

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(a) The definition of "stratum" as "a part of land" presupposes that "land" in that

definition bears the meaning contended for. Were it not so, it would be difficult to assign a reason for both the definition and the substantive provisions in which it appears.

- (b) The dichotomy between land and strata which runs throughout the Act since the 1961 amendments reflects this view.
- (c) Section 28 of the Act which relates to the valuation of land partly within one valuation district and partly within another, indicates that the boundaries of land will be vertical and thus both usque coelum et ad inferos.
- (d) In Hurstville Super Centre -v- Valuer-General (1965 83 W.N. Pt. 1 (N.S.W.) 345 at 349), Else Mitchell, J. expressed views concerning the construction of the Act which were entirely inconsistent with the views expressed by him in the present case. His Honour said:

"It is clear that, under the Act prior to the amendments made in 1961, land in the strict sense (usque ad coelum et ad inferos) could be valued only in parcels defined by vertical boundaries....."

- (e) The Court of Appeal of New South Wales, in Hurstville Super Centre Ltd. -v- Valuer-General (67 S.R. (N.S.W.) 110) expressed similar views. Wallace, P. said at p. 122 :

"I accept that 'land' in the definition means usque ad coelum et ad inferos..."

Jacobs, J.A. said at p. 126:

"Mr. Rath for the appellant (Valuer-General) was concerned in conceding that (a certain answer should be answered in a certain way) to submit that the distinction lay between any stratum whether it be below on or above the surface of the land or partly below and partly above the surface of the land on one hand and land from the bowels of the earth to the infinite reaches of the sky on the other hand. I think that this submission is correct....."

Holmes, J.A. said, at p. 128 :

"The amendments made in 1961 were concerned

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with thus eliminating (an) hiatus in the legislation. The necessity to define a stratum of which there could be an unimproved value required that the definition of the term should itself encompass the notion of that which was an improvement and the boundaries of which (in respect of all three dimensions) could themselves be improvements, and at least one dimension had to be an improvement. I say this because if there were no improvements, the result would be that whatever the shape of the surface of the land to be valued, it would still be land usque ad coelum et ad inferos. That is to say, it would be land as that term was already used in the Act and in respect of which valuation provisions existed.

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The definition introduced a new concept, namely, a stratum, which was something less than land usque ad coelum et ad inferos."

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20. It is undoubtedly true that the 1961 amendments were made to the Act as a consequence of the decision in Commissioner for Railways and Sydney City Council -v- Valuer-General (1962 S.R. (N.S.W.) 28). That case, commonly known as The Lawrence Dry Cleaner's Case, involved the question whether the Valuer-General was empowered under the Act to find an unimproved capital value of a space or stratum which was in fact located in land owned by the Commissioner for Railways at Wynyard.

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In that case Counsel for the Commissioner for Railways made two main submissions. First, he submitted that the provisions of the Act directing or authorising the Valuation of lands for rating purposes contemplated and were limited to the valuation of parcels of land defined by vertical boundaries only, Second, he submitted that the assumptions which the Valuer-General was obliged to make in making a valuation under Section 5 was such that it was simply impossible for him, whilst making those assumptions, to ascribe an unimproved capital value to a stratum which had no existence but as an improvement. The Full

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Court of the Supreme Court of New South Wales upheld the second argument, and did not find it necessary to make a decision on the first point. The actual decision of the Court in the case was that the Valuer-General was not entitled to make a separate valuation of the unimproved value of the stratum occupied by the dry cleaning company.

21. It is important to note, however, that the amendments which were made to the Act in 1961 went beyond those necessitated by the decision in that case. Undoubtedly the decision in the case, which was made on the basis of the second main point, necessitated and explains the introduction into the Act of Section 7B. It cannot account, however, for the introduction into the Act of Section 7A (relating to improved value of strata) or Section 7C (relating to assessed annual value of strata). Indeed, those provisions appear to have been inserted in the Act with an eye to the first of the arguments which had been advanced in the case.

22. The word "land" has the same meaning throughout the Act as it has in the definition of "stratum". This conclusion is in accordance with general principles of construction (In re National Savings Bank Association, L.R. 1 Ch. App. 547 per Turner, L.J. at 549-550; Courtauld -v- Leigh, L.R. 4 Ex. 126 at 130; Ministry of Health -v- Fox, 1950 Ch. at 378-9; Slazengers (Australia) Pty. Limited -v- Burnett, 1951 A.C. 13 at 21; Inland Revenue Commissioners -v- Henry Ansbacher & Co., 1963 A.C. 191 at 206-7).

23. The meaning of the word "land" which occurred throughout the Act prior to the 1961 amendments did not change as a consequence of those amendments. In this connection it may be noted that if "land" included strata prior to the 1961 amendments, then it still includes strata since the 1961 amendments unless it can be said that those amendments effected some change in the meaning of the word "land" throughout the Act.

24. The qualities of definition or definability by reference to improvements or otherwise, and ratability and taxability, though undoubtedly essential to strata within Sections 7A, 7B and 7C, cannot be used to found an argument that those Sections only deal with a "special" type of strata, and that other strata are still within the concept

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of "land". By hypothesis the Act is principally concerned with areas that are rateable or taxable, and definition or definability of strata by reference to improvements or otherwise never prevented the making of an improved capital valuation or an assessed annual valuation of strata.

25. The words "or otherwise" in the definition of "stratum" in the Act relate to physical things in the nature of improvements. (Hurstville Super Centre -v- Valuer-General, 67 S.R. (N.S.W.) 110.) 10

26. The assumptions to be made in a valuation under Section 4 of the Act are irreconcilable with the assumptions to be made in the valuation exercise under Section 7B. The unimproved value of land and strata cannot, therefore, be ascertained in one valuation exercise.

27. There appears throughout the Act a dichotomy between land and strata. For example, Section 34 of the Act relates to grounds of objection which may be taken to valuations. The grounds of objection which may be taken in relation to land are different from the grounds of objection which may be taken in relation to strata. Further, there is no ground of objection that something which should have been valued as land was valued as stratum, or vice versa. 20

28. Land and strata cannot be valued together under the Act either in the sense that a composite figure is arrived at for land and strata in one valuation exercise, or in the sense that land and strata are both made the subject of one notice of valuation. 30

29. It is interesting to note that this was the view apparently taken by Else Mitchell, J. in an earlier case than the present (Hurstville Super Centre -v- Valuer-General, 83 W.N. (N.S.W.) Pt. 1 345). In the case which His Honour stated for the opinion of the Court of Appeal in that case (67 S.R. 110) the following question was asked (and answered in the negative) : 40

"G. Was I in error in law in holding that the Act does not authorise the amalgamation of a stratum with land for valuation purposes but treats the

provisions for the valuation of strata  
as a separate code?"

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II. THE DECISION OF ELSE MITCHELL, J.

30. Else Mitchell, J. held that the area in question was "land" within the meaning of the Act and, (having previously held that portion of the subject premises were clearly strata), held that there was no objection to the Valuer-General valuing land and strata together in one valuation.

10 31. His Honour's decision was quite inconsistent, not only with a previous decision of His Honour, but also with a previous decision of the Court of Appeal binding upon His Honour (Hurstville Super Centre -v- Valuer-General, above).

20 32. His Honour at the outset of his Reasons for Judgment criticised "the intractability" of some of the amendments to the Act which were made in 1961, which His Honour described as "ill-conceived", and said that certain of the tasks which valuers and Valuation Tribunals were required to perform under the Act were impracticable.

Page 4

30 33. His Honour, however, felt that he overcame these initial difficulties by concluding that there was no strict dichotomy between land and strata in the Act, and that indeed there is reposed in the Valuer-General a discretion as to whether areas which are within the definition of "stratum" and are also land, should be valued under the provisions relating to land or the provisions relating to strata.

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34. His Honour held that the whole of the subject premises between George and Carrington Streets were capable of being valued as "land".

40 35. His Honour also held that the only sort of stratum which may be valued as such under Sections 7A, 7B and 7C is a stratum which is defined by reference to improvements; that is the strata must be an occupiable space within, upon, or under improvements. This reinforced His Honour's decision to value the part of the subject premises in question as land.

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36. His Honour further held that land and stratum may be valued together where practical considerations commend that course, and accordingly valued the

whole of the demised premises in one valuation as land and stratum.

37. On the hearing of the appeal before the Court of Appeal no party was concerned to support His Honour's conclusion that there was reposed in the Valuer-General some discretion as to whether premises would be valued as land or strata, and, indeed, the Valuer-General was most anxious to reject that suggestion. It may well be, however, that His Honour's conclusion in that regard is the logical consequence of a rejection of the arguments contended for by Wynyard. Unless there is a strict dichotomy throughout the Act between land and strata then it is difficult to see how the Valuer-General is to make a decision as to the method of valuation to be applied to premises which are capable of being regarded as either. The only solution is to give him an absolute discretion in the matter. Bearing in mind, however, the radical difference in the assumptions to be made in the two valuation exercises, and the different results that would be achieved in those cases by adopting one method rather than the other, the result is quite out of accord with the proper methods of construction of a taxing act. However, it is not understood that any attempt will be made to support His Honour's conclusion in this regard.

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III. DECISION OF THE COURT OF APPEAL

38. The questions asked by His Honour relating to this aspect of the matter were answered by the Court of Appeal as follows :

- A. Was I in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street? A. Yes.
- B. Was I in error in valuing as stratum and not as land those portions of the demised premises between Carrington Street and that portion below Carrington Street and Wynyard Park respectively identified as E, F and G in the said lease? (Incidentally, this question was included in the Stated Case at the request of the

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Commissioner.) A. No.

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C. If I was in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street -

(i) should the whole have been valued as stratum;

(ii) should some part and, if so, what part, have been valued as land;

10 (iii) should some part (and, if so, what part) have been valued as stratum?

A. (i) No.

(ii) Yes - the land islands.

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

E. Where land or any interest in land is partly defined by a horizontal boundary -

20 (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

(c) is it obligatory to value as stratum that part which is defined or definable by a horizontal boundary; or

30 (d) has the Valuer-General discretion to value the entirety either under Sections 7A, 7B and 7C or under Sections 5, 6 and 7.

A. Unless it is understood that "defined by a horizontal boundary means by 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 questions should be answered as to (a) and (c) the area so defined must be

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valued, if at all, as stratum under Section 7B. As the relevant assumption in the present case is that the area in question is one which is rateable under the Local Government Act Section 132 and accordingly is required to be valued, it is implicit in the question that some part of the space between the vertical boundaries remains vested in the Crown. Therefore the requirement of valuing the land usque does not arise. As to (b) in view of the answer to (a) and (c) this question does not arise. As to (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 as stratum under Sections 5, 6 and 7, the question should be answered no.

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F. Was I in error in holding that property may not be valued as stratum under Sections 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? A. Yes.

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39. Asprey, J.A., with whom Holmes, J.A. agreed, held that the word "land", throughout the Act, means land usque ad coelum et ad inferos, and that the Act did set up such a dichotomy between land and stratum as was contended for by Wynyard.

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40. Moffitt, J. held that there was certainly a dichotomy between land and stratum as defined in the Act, although His Honour did not find it necessary to decide whether certain types of strata not within the definition of "stratum" within the Act might be included within the meaning of "land".

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41. All of the members of the Court of Appeal held that the premises between George Street

and Carrington Street comprised partly land ("the land islands"), which were demised to Wynyard usque ad coelum et ad inferos and partly strata.

10 42. Their Honours all pointed out that Else Mitchell J.'s interpretation of "stratum" involved reading out of the definition of "stratum" the words "definable" and "or otherwise". If those words were left in the definition and given their effect then clearly the bulk of the premises demised to Wynyard, with the exception of the land islands, being defined or definable by reference to improvements or otherwise, and being ratable or taxable, were "strata" and consequently had to be valued as such or not at all.

20 43. The answers given by the Court of Appeal to the above questions were generally in accordance with those contended for by Wynyard, and Wynyard seeks to support them. Primarily it seeks to do so on the basis of its submissions, set out above, as to the true construction of the Act. Alternatively, however, Wynyard adopts the submissions as to the construction of the Act made by the Valuer-General in relation to this and the succeeding matter, to the extent that such submissions involve the consequence that land cannot be valued together with strata.

30 44. Wynyard also adopts a submission made by the Valuer-General, and rejected by the Court of Appeal, to the effect that His Honour had no power to value the subject premises as land (they having originally been valued by the Valuer-General as strata), and that if His Honour thought that they were properly land within the meaning of the Act he should have valued them at nil.

D. THE QUESTIONS AS TO THE METHODS OF VALUATION TO BE ADOPTED

40 45. As was noted above, His Honour having held that part of the demised premises were strata (the areas below Carrington Street and Wynyard Park shown on plans E, F and G) and part land, proceeded to value them together in one valuation.

His Honour asked the following question :

"D. If part of the demised premises was to be valued as land and part as stratum, was

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I in error in including the entirety of the demised premises in one valuation?"

The Court of Appeal answered that question as follows :

"A. 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 answer, if the question means that the entirety of the land and the stratum are to be valued together as a whole either both under Section 6 or both under Section 7B or one under Section 6 and the other under Section 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."

46. The question was in fact answered in the manner contended for by Wynyard. However, the elaboration of the answer departs in certain respects from the submissions made by Wynyard.

47. As was submitted above, the fact that under the Act land and strata cannot be valued in one valuation exercise, as had been previously held by His Honour and by the Court of Appeal in Hurstville Super Centre -v- Valuer-General (above), follows from :

- (a) the differing and irreconcilable assumptions that are to be made by the Valuer-General in valuing land and valuing strata;
- (b) the dichotomy between land and strata that runs through the Act;
- (c) as a particular instance of the above, the different grounds of objection to valuation that apply in relation to land and strata.

48. Wynyard further submits, in so far as

the question arises in this Appeal, that the provisions of the Act, and in particular the provisions of Part III relating to notices and objections, make it plain that the Act contemplates separate notices of valuation in relation to land and strata valuations.

Record

E. THE QUESTIONS AS TO THE POWERS OF THE LAND AND VALUATION COURT

10 49. It is in relation to the answers given by the Court of Appeal to these questions, Questions G, H and I, that Wynyard is an Appellant.

50. The way in which these questions arose was as follows :

- (a) In the original notices of valuation issued by the Valuer-General the subject premises were described as "strata" and the Valuer-General, as his Counsel informed the Court during argument, plainly intended to value them as such.
- 20 (b) The premises which were the subject of the original valuations of the Valuer-General included certain areas of land usque ad coelum et ad inferos.
- (c) It was contended by Wynyard that, as land and strata cannot be valued together in one valuation, the proper way for the Valuer-General and the Court to deal with the valuations was to excise therefrom so much of the subject premises as were "land" within the meaning of the Act.
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40 At the hearing before Else Mitchell, J. the question was raised whether, if land and stratum could not be valued together, and it was necessary to excise part of the subject premises from the valuations in question, the Court had jurisdiction in these proceedings to declare that the Valuer-General could value himself the part which was not valued by the Court in these proceedings. It was submitted for Wynyard that there was no issue before the Court on that question, but, contrary to that contention, Else Mitchell, J. held that there was such an issue before the Court and that if the question had arisen the Valuer-General could have valued any portion of the subject premises not valued in these proceedings.

Pages 39, 40

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Pages 41-42

51. His Honour asked the following questions in the Stated Case:

- 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 10
  - (b) must the Valuation Board of Review or the Court excise from the valuation either the land or the stratum; or
  - (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? 20
- 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 -
- (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; 30
  - (b) that the Court had jurisdiction in these proceedings to declare whether the Valuer-General could value the other under Section 40(3);
  - (c) that the Valuer-General could value the other under Section 40(3)? 40

The Court of Appeal answered Question H "yes".

Wynyard has no quarrel with that answer. Record  
 However, Questions G and I were answered as follows :

10 G. A. Question G. This question should be answered as to (a) no - the land and the stratum may by way of correction by the Court be valued separately. As to (b) no. As to (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 Section 36L(3) or pursuant to the order of the Court under Section 40(3) as the case may be, can be included in one notice of valuation.

20

I. A. Question I. The Court was not bound to excise from the valuation 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 Section 40(3). The power of the Valuer-General under Section 40(3) is one to make alterations in his records of values consequential upon the alterations to any valuation order to be made by the Court.

30

52. These proceedings originally arose out of certain objections made by Wynyard, pursuant to Sections 29 and 34 of the Act, to the original valuations of the Valuer-General. Subsequently there were objections to those valuations by the Commissioner as well, and all such objections were before the Court. The Valuer-General, pursuant to Section 35, altered his valuation following Wynyard's objection, and gave notice of his altered valuation to interested parties. Pursuant to the provisions of Section 35(2) of the Act the Commissioner and the Council, being dissatisfied with the altered valuations, referred Wynyard's objections to a Valuation Board for hearing and determination.

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53. Consequently the Valuation Board of Review had before it the objections of Wynyard and the objections of the Commissioner. Under Section

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36G of the Act its power was "to hear and determine (those) objections to valuations".  
Section 36K of the Act provides :

"36K. (1) Where upon the hearing of an objection the valuation board is of opinion that the valuation is erroneous, it shall order the valuation to be altered accordingly.

(2) Where the valuation board is of opinion that the valuation should not be altered, it shall disallow the objection thereto."

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54. Pursuant to the provisions of Sections 38 and 39 of the Act the Land and Valuation Court had power to hear and determine the matters which had originally come before the Valuation Board of Review, by way of re-hearing.

Section 39(6) of the Act provides :

"39. (6) If the Valuation Court decides that any valuation is erroneous, it shall order the valuation to be altered accordingly.

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Section 40 is in the following terms :

"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.

30

(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

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assessed annual value in respect of the land or stratum concerned and the values of the estates and interests of the owners thereof."

10 55. The Court of Appeal accepted that the original valuations in question were, and were intended to be, valuations of strata. That is the way in which they were described on the face of them, and it is submitted that Else Mitchell, J. was in error in treating them as something else so as to accommodate them to this ultimate decision.

56. For reasons given above Wynyard submits that land and strata cannot be valued together or in the one notice of valuation.

20 57. It is respectfully submitted that there was simply no issue before Else Mitchell, J. in these proceedings as to the powers of the Valuer-General in the event that a certain decision should be reached. Accordingly, Wynyard submits that Question I (a) should be answered no, and that the other questions under Question I do not arise.

30 58. Neither Else Mitchell, J. nor any of the members of the Court of Appeal gave any reasons in support of the proposition that there was an issue before the Court within Question I(a). There was certainly argument before the Court in relation to these matters, but such argument was conducted under protest by Wynyard, which took the attitude all along that there was no issue in relation to the matter.

59. Asprey, J.A. whose decision on this matter was adopted by the other members of the Court of Appeal, gave the following short reasons for his answer to Question I :

40 "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 Section 40(3). The power of the Valuer-General under Section 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."

60. Presumably His Honour reached his conclusion in relation to Question I at least partly on the

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Pages 53-54

basis of the reasoning which he had earlier expressed in relation to a point taken by the Valuer-General concerning the powers of the Court in relation to the matters covered by Question A.

That reasoning may be summarised as follows:

- (a) The word "valuation" in the Act is not limited to a sum of money, but connotes the determination of a value and involves the ascertainment of the subject matter to be valued, that is to say, land or stratum or land and stratum. The quantum is merely part of the valuation itself. 10
- (b) The power of the Court under Section 39 to "hear and determine" an appeal or reference confers upon the Court power to make all such orders as shall be necessary to dispose finally of the appeal or reference. 20
- (c) A valuation may be "erroneous" within the meaning of Section 39(6) where its subject matter has been wrongly described either by classifying land as stratum or stratum as land. In such a case Section 39(6) requires the Court to "order the valuation to be altered accordingly", that is to say, to make the valuation correct;
- (d) Thereupon, where the valuation has been rectified by the Court's order, under Section 40(3) the Valuer-General is bound to make all such consequential alterations so that his valuation rolls and lists in respect of the land or stratum concerned shall accord with the corrective order of the Court. 30
- (e) In the present instance one of the objections before the Court was that the "description" of the subject matter of each of the valuations was not correctly stated, and this would enable the Court to decide that the valuation was "erroneous" and order it to be altered accordingly, that is to say, correct the description of the subject matter of the valuation and dispose of the matter by valuing the subject matter according to 40

its true description.

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61. It is respectfully submitted that the above process of reasoning is fallacious in the following respects :

- (a) It assumes, contrary to what is submitted above, that land and strata can be valued in the one valuation notice;
- 10 (b) It pays no regard, or insufficient regard, to the circumstance that the grounds of objection specified in Section 34 of the Act do not include a ground that what has been valued as land should have been valued as strata or vice versa.
- (c) On the true construction of Section 34, the word "description" is not wide enough to cover a misapplication of the processes of valuing land to the valuation of strata or vice versa.

62. Wynyard respectfully submits that Questions G and I should be answered as follows :

- 20 G. (a) No.  
(b) Yes.  
(c) Yes.
- I. (a) Yes.  
(b) )  
(c) ) Do not arise.

#### F. QUESTIONS WHICH DO NOT ARISE

30 63. It is understood that questions J, K and L in the Stated Case will not arise for determination in this Appeal. Question M related to a dispute that arose on the hearing between Wynyard and the Valuer-General. The Court of Appeal answered the question in favour of Wynyard, and there has been no appeal from that aspect of the decision.

#### G. CONCLUSION AND REASONS

40 64. Wynyard therefore respectfully submits that the appeals should be dismissed in so far as they relate to the answers given by the Court of Appeal to Questions A, B, C, D (save for the elaboration in the answer thereto), E, F and H for the following amongst other reasons, namely :

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- (a) Under the Valuation of Land Act the word "land" means, throughout the Act, land usque ad coelum et ad inferos;
- (b) Under the said Act the word "stratum" comprehends 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, provided such stratum is ratable or taxable under any Act, and is not limited to an occupiable space within, upon or under improvements; 10
- (c) The Act makes separate and exclusive provision for land on the one hand and strata on the other: they cannot together be the subject of a valuation under the Act;
- (d) The subject premises consisted in the main of strata, but also comprised land within the meaning of the Act; 20
- (e) His Honour the Judge at first instance was in error in holding that the Valuer-General was either bound or entitled to value that part of the subject premises between Carrington Street and George Street as land;
- (f) Alternatively, the Valuer-General having valued the bulk of the premises as strata, His Honour had no power to value the premises as land in these proceedings. 30

65. Wynyard further respectfully submits that its appeal should be allowed in so far as it relates to the answers given by the Court of Appeal to Questions G and I in the Stated Case for the following amongst other reasons:

- (a) Land and strata cannot be valued together;
- (b) The valuations the subject of the proceedings having been strata valuations, the Land and Valuation Court was bound to exercise therefrom such of the subject premises as was land within the meaning of the Valuation of Land Act; 40

29.

- (c) There was no issue before the Court as to the powers of the Valuer-General subsequently to deal with the land so excised.

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M. H. PYERS

A. M. GLEESON

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Appeal No. 16 of 1972

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF  
NEW SOUTH WALES in Term No.  
645 of 1970.

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BETWEEN:

THE COMMISSIONER FOR RAILWAYS,  
THE COUNCIL OF THE CITY OF  
SYDNEY and WYNYARD HOLDINGS  
LIMITED (Plaintiffs) Appellants

- and -

THE VALUER-GENERAL  
(Defendant) Respondent

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C A S E

FOR THE APPELLANT WYNYARD  
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