Privy Council Appeal No. 34 of 1919.

Mick Simmons, Limited - - - - - - - *Appellants*

v.

Thomas Ernest Rofe - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1919.

Present at the Hearing:

VISCOUNT FINLAY.
LORD SUMNER.
LORD PARMOOR.
THE LORD JUSTICE CLERK.
SIR ARTHUR CHANNELL.

[*Delivered by* VISCOUNT FINLAY.]

This case raises an important question on the construction of the Sydney Corporation (Amendment) Act, 1908.

The appeal is brought by a company which has a lease for twenty years of premises in Sydney of which the respondent is the owner. The Act provides for a rate on the unimproved value of land within Sydney, and for the suspension there of the New South Wales Acts imposing taxation in the nature of land tax. Such a rate was made in Sydney, and the appellant company as lessee was compelled to pay it. The appellant company claimed contribution from the respondent as owner and made a deduction from the rent payable to him of amounts equal to one penny in the pound on the unimproved capital value of the premises in respect of the payments which had been made. This took place with regard to a number of such rates during a succession of years. This action was brought by the respondent to recover the amounts of rent so deducted (£650 16s. 8d.). No adjustment of the respective liabilities of lessor and lessee in respect of these rates

had been made by the Commissioners of Taxation, and the action was allowed on the ground that the deductions had been wrongly made, as such adjustment by the Commissioners was a condition precedent to the right to deduct.

The facts were stated in the form of a Special Case. The respondent (the plaintiff in the action) is the owner in fee of certain land in Sydney on which the premises Nos. 720 and 722, George Street, were erected. When the respondent became the owner the premises were in the occupation of a firm carrying on business under the name of Mick Simmons, and this firm, on the 20th September, 1907, agreed with the respondent to take a lease from him of the premises for twenty years, the lessees to pay all rates and taxes except land tax. The business of the lessees was acquired by the appellant company and the lease was granted by the respondent direct to this company on the 21st October, 1910, for twenty years from the 1st September, 1907, and on the terms which had been agreed with the firm. The Municipal Council of Sydney, in accordance with the Sydney Corporation Amendment Act, 1908, duly made and levied a general rate of one penny in the pound on the unimproved capital value of rateable land within the city of Sydney. Such a rate was made in 1909, and in each succeeding year down to 1917. These rates were paid by the lessees, the present appellants, and it is in respect of them that the deductions from the rent were made which the owners now challenge on the ground that there had been no adjustment by the Commissioners of Taxation.

The case depends entirely on the construction of the Sydney Corporation Act of 1908, but in order to make that Act intelligible it is necessary to refer to the antecedent legislation in New South Wales with regard to the taxes upon land which were superseded in Sydney by this Act. This earlier legislation will be found in (*a*) The Land and Income Tax Assessment Act, 1895, 59 Vict. c. 15 (with which must be read the Land Tax Contribution Act, 1900, 64 Vict. No. 46), and (*b*) The Land Tax (Leases) Act, 1902, 2 Edward VII No. 115.

The Land and Income Tax Assessment Act of 1895 by its tenth section imposes a land tax at such rate as should be from time to time declared and enacted to be paid by the owner in respect of land for every pound of the unimproved value thereof as assessed under the Act after deducting the sum of £240. The twelfth section, as amended by the Land Tax Contribution Act, 1900, made provision that, if two or more persons were owners, each should be liable to the Crown for the whole tax, but gave a right to recover by way of contribution from any other person having an estate in the land a sum bearing the same proportion to the tax as the value of the estate of such other person in the unimproved value of the land bore to the whole unimproved value of the land. The term " estate " was defined as including any interest in the land whatsoever, but no one was to be liable to contribution who was not entitled to an estate or interest in possession. By section 67 the " owner " was defined as including

every person who is entitled to any estate of freehold in possession or to the receipt of the rents if the land be let.

Under this legislation the liability to the Crown was thrown upon the " owner," with a right to recover a proportional contribution from any other person who had any estate in the land, which would include the case of a lessee with a beneficial interest in the land under his lease. (*Houison* v. *The Metropolitan, etc., Investment Association* (1899), 20 N.S.W.R., 316.)

In 1902 it was considered desirable to deal specially with the case of land held by a lessee on a long lease. Such a lessee might be considered as himself in the position of an owner, and accordingly provision was made for adjusting in the first instance the liabilities to the Crown of the owner and such a lessee respectively. This was carried out by the Land Tax Leases Act, 1902, which commenced and took effect on the 1st January, 1903. In this Act the term " owner " has the meaning given it in the Act of 1895, which has been already quoted. The Act applied only to land while subject to a lease from the owner which was current at the commencement of the Act and of which not less than thirty years were then unexpired, or subject to a lease from the owner made after such commencement for a term of not less than thirty years (section 2). The Act made provision for levying taxes, which were to be in lieu of land tax or any contribution thereto under the Land and Income Tax Act of 1895, the Land Taxes Act of 1895, or the Land Tax Contribution Act, 1900, and section 4 contained the enactment of such taxes :—

> " A tax at the rate of one penny in the pound on the unimproved value of any land to which this Act applies shall be paid to the Commissioners by the owner and the lessee for a term of not less than thirty years of such land. The Commissioners shall fairly and equitably adjust such tax between such owners and lessees according to their respective interests in the land as unimproved, and such adjustment shall be final and shall not be subject to an appeal in any Court."

This Act therefore imposed a new tax, in lieu of the old, upon land subject to a lease having thirty years or more to run. The " owner " and the lessee were to be assessed to the new tax each for the amount fixed by the Commissioners in their adjustment. It was not a case of liability on the part of the owner with a right to contribution, but of original liability to the Crown for a certain proportion only of the tax.

The decision in the present case turns entirely upon the provisions of the Sydney Corporation Amendment Act, 1908, which amended the Sydney Corporation Act, 1902, described as the principal Act. The statutes before 1908 to which reference has so far been made are of importance only in so far as their provisions are incorporated in or may affect the construction to be given to the Act of 1908. That Act is one of a series of enactments in New South Wales in which the Legislature pursued the policy of replacing the land tax and tax in lieu thereof by rates to be levied in the various shires and municipalities in New South Wales upon the unimproved capital value of all rateable property within the shire or municipality.

The first of these enactments was the Local Government (Shires) Act, 1905, which provided for the division of the State, exclusive of municipalities, into shires to be administered by elective Councils. Each Council was required to make a levy in each year of a general rate upon the unimproved capital value of all rateable land in each shire, on the imposition of which rate the Governor was required to suspend the operation of the Land Tax Acts in the shire by Proclamation; and in 1906, by the Local Government Extension Act of that year, the provisions of section 33 of the Shires Act were applied to municipalities other than Sydney, but with certain modifications. Reference may be made on the subject of this legislation to the judgment in the High Court of Australia given in *Solomon* v. *The New South Wales Sports Club, Limited* (19, C.L.R. 698).

In 1908 this process of substitution was applied to Sydney by the Sydney Corporation Amendment Act, 1908. The following provisions of this Act are material: By section 3 the term "owner" is to have the same meaning as was given to it by the Land and Income Tax Assessment Act of 1895 above quoted. Section 4 provides that the Council shall in 1909 and for every succeeding year make a general rate of not less than one penny in the pound upon the unimproved capital value of all rateable property in the City, such rate to be in addition to any rate under the principal Act or any other rate under this Act, and not to exceed a certain maximum. Section 5 provides that the Governor shall forthwith on the imposition of such rate on the unimproved capital value proclaim that the operation of the enactments mentioned in schedule 3 to the Local Government Act, 1906, is suspended, and that the operation of these enactments shall thereupon be suspended in the city. The enactments referred to as mentioned in schedule 3 to the Act of 1906 include certain Acts to which reference has already been made in this judgment, namely, the Land and Income Tax Assessment Act of 1895 so far as it relates to land values taxation, the Land Tax Contribution Act of 1900, and the Land Tax (Leases) Act of 1902. The 6th, 7th, 8th and 9th sections provide for a valuation of the unimproved capital value of all rateable property in the city. The section on the construction of which the result of this appeal must depend is section 11, and it is necessary to cite it *in extenso*.

> "11. (1) The amount of any rate under this Part shall be paid to the Council by the owner of the property in respect of which the rate is levied, unless the property is vested in and under a lease from the Council granted for a term of not less than thirty years, in which case the amount of any such rate shall be paid by the lessee from the Council or the person for the time being receiving or entitled to receive the rack rents of the property.
>
> "(2) Provided that where a lessee of rateable property has before the first day of November, one thousand nine hundred and eight, agreed with the owner, or with the mesne lessee from whom he immediately holds, to pay municipal or local government taxes, whether under those designations or under any words of description which would include municipal or local government taxes, the owner and all the lessees, including mesne lessees, shall, notwithstanding such agreement and during the currency of such

agreement, be respectively liable, as between themselves, for so much of the rate under this Part as is equal to the amount of the land tax, or tax in lieu of land tax, on the land which they respectively would have been liable to pay under the Acts mentioned in Schedule Three to the Local Government Act, 1906, if the operation of the said Acts had not been suspended, based on the valuation of the unimproved capital value under this Part. The adjustment of the Commissioners of Taxation under the fourth section of the Land Tax (Leases) Act, 1902, shall be made on the application of any person interested in such agreement, and shall be on the basis of such valuation, and of a land tax or tax in lieu of land tax, without exemptions, and after the first adjustment, there shall be a readjustment by the Commissioners at every subsequent period of valuation. Such adjustment may be made, notwithstanding the suspension of the operation of the said Act, and shall be final and shall not be subject to appeal in any Court.

" Any person interested in any such agreement as aforesaid may notify the Council of the terms of such agreement. Where such notification has been received by the Council, such Council shall (notwithstanding the provisions of subsection one of this section) first proceed for the recovery of the whole of any rates due under this Part from the lessee who is the last lessee within the knowledge of the Council bound by any such agreement. Unless the council be notified as aforesaid before the making of any rates, the Council may recover the whole of the rates from such lessor.

" Failing in any legal proceedings against any person as aforesaid the Council shall next so proceed against the lessor from whom such person immediately holds; and, failing in any such proceedings against a lessor who is a mesne lessee, the Council shall next so proceed against the lessor from whom he immediately holds; and so on.

" Any lessee who has paid, or any mesne lessee who has paid or suffered the deduction as hereinafter provided of any such rates may recover as a debt from, or deduct from any moneys due to, the lessor from whom he immediately holds, the proportionate amount of rates determined as aforesaid by the said Commissioners to be the portion payable in respect of the property rated by all the persons under whom he derives title; and any lessor who has made any payment to the Council or to his immediate lessor in respect of such rates may recover as a debt from any lessee under him such portion thereof as such lessee is liable for under his agreement, and the terms of this subsection.

" The Council, the Commissioners aforesaid, and any authorised servant of either of them, may demand the production within a reasonable time of any agreement as aforesaid from any owner, lessee, or person having the custody of such agreement, or require any person in occupation of land, or in receipt of the rent of land, to answer any question for the purposes of this subsection. If such owner, lessee, or person refuses or neglects on demand as aforesaid to produce any such agreement, or if any person when duly required refuses to answer any question for the purposes of this subsection, or wilfully makes a false answer thereto, he shall be liable to a penalty not exceeding fifty pounds. A certificate of such adjustment aforesaid purporting to be signed by the said Commissioners, or their secretary, or registrar, shall be *primâ facie* evidence of such adjustment. In this subsection the word ' lessor ' includes his successors in title."

The respondents contend that the effect of this section is that the deductions in the present case were improperly made from the rent by the lessees (the appellants), on the ground that there had been no adjustment by the Commissioners and that on the construction of the clause such an adjustment is a condition

precedent to deduction, and only amounts allowed by the Commissioners could be deducted. The Supreme Court of New South Wales so decided.

The wording of the clause is in parts obscure and requires careful consideration.

The first subsection throws the payment of the new rate upon the owner, with an exception for the case of lessees from the Council for a term of not less than thirty years—an exception which is for the purposes of the present case immaterial.

The second subsection is in the nature of a proviso upon the first and provides for the case of a lessee who has agreed with the owner to pay municipal taxes. It would obviously be a hardship if the effect of such an agreement were to throw upon the lessee the whole of the new rate which by this Act has replaced the land tax and tax in lieu of land tax. At the same time it was considered not unreasonable that such a lessee should as to so much of the new rate as is equal to the amount of the old land tax or tax in lieu of it bear the share which would have fallen upon him under the suspended Acts while they were in operation. A lessee in the position of the appellant lessee would have been liable, had there been no proviso, to pay the whole of the new rate under this Act, inasmuch as the exception of land tax from his agreement to bear rates would not apply to this rate (*Solomon* v. *The New South Wales Sports Club, Limited, supra*). The proviso relieves him in respect of the specified amount of the rate from paying under such an agreement more than he would have paid under the Land Tax Acts towards the land tax or tax in lieu thereof for which it is substituted. Such a lessee, if for a term under thirty years, would have been liable to pay to the lessor a proportion by way of contribution towards the land tax according to the value of his estate in the land (*see* the Land and Income Tax Assessment Act, 1895, section 12, and *Houison's Case, supra*), while if for a term of thirty years or over, he would have been made liable directly to the Crown for a proportion under an adjustment by virtue of the Act of 1902. The effect of the proviso in the second subsection of this clause is to keep the lessee as regards the rate, in cases where he has agreed to bear municipal rates, substantially in the same position as that in which he was with regard to the land tax or tax in lieu of land tax while the suspended enactments were in force.

So far the construction of the subsection is pretty clear, but it goes on to provide machinery for carrying out this enactment in practice, and it is with regard to this machinery that the difficulty in the present case arises. The subsection enacts :—

> " The adjustment of the Commissioners of Taxation under the fourth section of the Land Tax (Leases) Act, 1902, shall be made on the application of any person interested in such agreement, and shall be on the basis of such valuation and of a land tax or tax in lieu of land tax, without exemptions, and after the first adjustment there shall be an adjustment by the Commissioners at every subsequent period of valuation. Such adjustment may be made notwithstanding the suspension of the operation of the said Act and shall be final, and shall not be subject to appeal in any Court."

It was urged on behalf of the appellants that an adjustment under the fourth section of the Act of 1902 could have no reference to the present case where the lease is for less than thirty years, and point is given to this argument by the provision that such an adjustment may be made notwithstanding the suspension of the operation of the Act.

On the other hand, the adjustment is to be made "on the application of any person interested in such agreement"—words which would cover any agreement by a lessee of whatsoever term to pay municipal or local government taxes. The intention of the enactment was apparently to provide machinery for ascertaining the liability in all the cases which fall within the initial words of the subsection. Further, as Pring, J., pointed out in his judgment, in the provisions as to adjustment reference is made to the land tax as well as to the tax in lieu of land tax, while the Act of 1902 applies merely to tax in lieu of land tax. On these grounds it was urged on behalf of the respondent that the words should be read as a mere adoption of the machinery of the Act of 1902, and not as confining its application to the cases dealt with in that Act.

There is certainly great difficulty in reconciling some of the language used with the general scope of the subsection taken as a whole; but in their Lordships' opinion all doubt is removed by the terms of the paragraph last but one in the subsection. That paragraph provides that any lessee who has paid any such rates may recover or deduct as against his lessor "the proportionate amount of rates determined as aforesaid by the said Commissioners to be the portion payable in respect of the property rated by all the persons under whom he derives title," and that any lessor who has paid may recover from any lessee "such portion thereof as such lessee is liable for under his agreement and the terms of this subsection."

This paragraph points unequivocally to an adjustment by the Commissioners as essential to the right to recover or to deduct. The clause must be read as a whole, and it appears to their Lordships that the paragraph last but one supplies the key to the meaning which should be put upon its provisions. The adjustment is really made under the authority of section 11, subsection (2), of the Sydney Act. It is applicable to all the cases with which that subsection deals, and the words providing that it may be made notwithstanding the suspension of the Act of 1902 appear to be wholly unnecessary, and to have been inserted *per incuriam*.

The Special Case, after setting out the facts which have been outlined in this judgment, put four questions for the determination of the Court. The first was whether the whole amount deducted was improperly deducted. The Court below answered this question in the affirmative, taking the view that the deductions had all been improperly made, as there had been no adjustment. This first answer rendered unnecessary any answer to the other questions.

In the opinion of their Lordships, the decision of the Court below was right, and they will humbly recommend to His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

MICK SIMMONS, LIMITED,

v.

THOMAS ERNEST ROPE.

DELIVERED BY VISCOUNT FINLAY.

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