JUDGMENT 5, 1973

IN THE PRIVY COUNCIL No. 22 of 1972

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

In Term No. of 1970

B E T W E E N :

WESTERN STORES LIMITED Appellant

- and -

THE COUNCIL OF THE CITY OF ORANGE Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal by leave of the Court of Appeal of the Supreme Court of New South Wales granted on the 15th day of May, 1972 pursuant to ORDER IN COUNCIL of 1909 from a decision of that Court given on 28th September, 1971 dismissing an appeal by the present appellant against a decision of Hardie J. given in the Supreme Court of New South Wales in its equitable jurisdiction on 7th May, 1970. p.181 p.176 l.25 p.152 l.23 pp.131 l.24 151 l.14

2. The questions raised by this appeal relate:

(i) To the power of municipal corporations constituted under the Local Government Act, 1919 (as amended) to impose rates on selected portions of the municipality and

(ii) To the validity of such a rate which the respondent purported to make and levy

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p.305 ll. 17-34

under the provisions of Section 121(2) of the Local Government Act, 1919 (as amended) on certain commercial property within the City of Orange for the rating year 1969.

Facts:

3. The City of Orange is an important provincial centre in the State of New South Wales situated approximately 170 miles west of Sydney and is the largest western provincial city between Sydney, on the coast of New South Wales, and the city of Broken Hill near the western boundary of New South Wales.

4. The Municipality of the City of Orange is a compact area approximately 3 miles square and consists of business, industrial and residential areas together with a small non-urban area. The Municipality is totally surrounded by the Shire of Canobolas.

p.10 l.25

p.203 ll. 30-33

5. In November 1968 the Valuer-General completed the sextennial revaluation of all lands in the City of Orange with the result that the unimproved capital value of the business area increased by approximately 13% on average, the unimproved capital value of the residential area increased by approximately 176% on average and the non-urban area by approximately 246% on average. (In 1962 the Valuer-General had valued the lands within the Municipality with the result that the business area had increased considerably and the residential area had increased minimally).

p.270 l.28

p.271 ll. 36-37

6. Early in 1969 the respondent resolved to impose a local rate, referred to as a "service area local rate", upon the central business area of the City of Orange purportedly to finance works and services of special benefit to that area. The rate purported to be made and levied under Section 121(1) of the Local Government Act. The present appellant objected to the validity of this rate and on 31st October, 1969 the Land and

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Valuation Court (Else-Mitchell J.) held that the rate was invalid (inter alia) because the respondent pursued an improper purpose and was influenced by extraneous considerations. The court held that the main and dominant purpose of the respondent was not to provide for the financing of works and services which would be of special benefit to the central business area but to achieve and alter incidence in the rating burden (see Alan E.Tucker Pty. Limited v. Orange City Council 90 W.N. (Pt.1) 477). pp.272-286 l.12 p.284 l.36 et seq p.285 l.33

7. Immediately following such decision, namely in December 1969 the respondent resolved to define and constitute a part of the central business district of the City of Orange as a "town improvement district" for the purpose of effecting improvements to works and services within such district. The area selected by the respondent was that section of the business area lying immediately west of the railway line and so much of the contiguous residential area as was zoned for future commercial usage. The business area lying immediately east of the railway line was excluded from the "town improvement district". p.291 l.15 p.291 l.35

8. Following the resolution referred to in the preceding paragraph the respondent resolved to adopt the following estimates of income and expenditure for the imposition of a local rate:- p.292

Estimates of Expenditure: p.292 ll. 22-43

Principal and interest on loans raised by Council for or towards provision of public parking areas	15,410.00
Kerb and gutter and footpath improvement in McNamara Street and Byng Street	3,309.00

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Preliminary expenses in connection with proposed women's rest centre and child minding centre in Anson Street	1,557.00
	$20,276.00

Estimates of Income:

Orange Town Improvement Local Rate of decimal point two seven cents (0.27c) in $ on Unimproved Capital Value of ratable land within the town improvement district (UCV 7,289,035)	19,680.00
Ex gratia contribution	580.00
	$20,260.00

9. Prior to the passing of the resolution referred to in the preceding paragraph the respondent envisaged the following expenditure in the central business district of the City of Orange :-

p.107 l.8	Kerbing and guttering	41,903.00
p.107 l.24	Drainage	72,500.00
p.107 l.33	Road construction	30,000.00
		$144,403.00

pp.303-307 10. At a special meeting held on 24th December, 1969 the respondent passed a resolution reciting:-

pp.304-305 (i) The notification of the "town improvement district".

(ii) The adoption of the estimates of income and expenditure of the Orange Town Improvement Local Fund for the year 1969

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(iii) The publication of the estimates in a local newspaper on 13th December, 1969.

The respondent then purported to make and levy in and for the year 1969 an Orange Town Improvement Local Rate of .27c in the dollar on the unimproved value of the ratable land within the "town improvement district". The resolution stated that the Rate was levied for the purpose of improvements to works and services within the district which, in the opinion of the respondent, were of special benefit to such district. p.305 l.20 p.305 l.29 p.305 l.30 p.305 l.32

11. The said Town Improvement Local Rate was made and levied to finance expenditure, portion of which had been incurred on unrelated items of work commenced and completed before the resolution purporting to define the "town improvement district" was passed.

12. Objection was taken by a number of objectors to the making and levying of the Town Improvement Local Rate and such objections were heard by Hardie J. in April 1970. On 7th May, 1970 Hardie J. delivered judgment disallowing the objections and upholding the validity of the Rate. p.137 l.23- p.150 l.14

13. A number of the objectors, including the present appellant, appealed to the Supreme Court of New South Wales Court of Appeal. The appeal was heard in the Court of Appeal in May 1971 and on 28th September, 1971 the Court of Appeal delivered judgment dismissing the various appeals and upholding the validity of the Rate. p.152. l.22 p.157

Argument:

14. The respondent purported to make and levy the Town Improvement Local Rate pursuant to Section 121(1) of the Act. So far as is relevant that section provides as follows :- p.305 l.17

"121 (1) (i) For or towards defraying the expenses of executing any work or service or for or towards repaying with interest any advance made by the Minister or p.145 l.28

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debt incurred or loan raised in connection with the execution of any work or service where, in either case, such work or service in the opinion of the Council would be of special benefit to a portion of its area to be defined as prescribed, the council of a municipality or shire may make and levy a local rate on the unimproved capital value or on the improved capital value of ratable land within such portion.

(1A) For or towards meeting any liability transferred to the council of a municipality or shire consequently upon the alteration of the boundaries of the area, the council may make and levy a local rate on the unimproved capital value or on the improved capital value of the ratable land added to the area.

(ii) The council of a municipality or shire may by notice in the Gazette from time to time define part of the area to be known as a "town improvement district" within which a "town improvement local rate" may be levied under the provisions of this section."

15. At the hearing of the suit and before the Court of Appeal the respondent sought to support the rate by arguing that the power both to make and levy the rate was conferred upon it pursuant to the provisions of Section 121(2) of the Act.

16. The Local Government Act, 1919 (as amended) draws a clear distinction between making of the rate and the levying of such rate on the other hand. Section 139(2) provides that "every rate shall -

p.159 l.41 - p.160 l.22

(a) be made by resolution of the council and

(b) be levied by the service of a rate notice".

17. The appellant submits :-

(a) Section 121(2) does not confer an independent power to make a local rate, but only facilitates the levying of such a rate within the defined area; and

(b) That Section 121(1) is the sole source of power for both the making and levying of a local rate in the relevant context.

Alternatively to (a) and (b), the appellant submits :-

(c) That the following words in Section 121(2), namely "may be levied under the provisions of this section", have the effect of incorporating the substantive requirements of Section 121(1) into Section 121(2).

18. The appellant submits that if the power to make the rate is either conferred by Section 121(1) or is governed by the requirements of Section 121(1), then :-

(i) The Council must, as a condition precedent to the validity of the rate, form the opinion that the execution of each and every work or service covered by the rate would be of special benefit to each and every parcel of land within the "town improvement district";

(ii) The rate can only be raised for the purpose of defraying future expenses or repaying the existing liabilities incurred in connection with appropriate works or services; that the rate cannot be raised for the purpose of reimbursing the council the costs of works or services which were commenced, completed and paid for prior to the making of the rate.

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19. It was common ground in the litigation:-

(i) That certain items of expenditure covered by the rate, to wit, kerb and gutter the footpath improvements in
pp.120-121 McNamara Street and Byng Street, did not confer any benefit at all on certain parcels of the land in the "town improvement district";

(ii) That other items of expenditure covered by the rate, to wit, "principal
pp.122-125 and interest on loans raised for public parking areas", conferred varying degrees of benefit, ranging from no benefit up to special benefit, to different parcels ofland in the "town improvement district";

(iii) That the rate as a whole did not confer the same benefit on each and every parcel of the land in the "town improvement district";

(iv) That certain of the items of expenditure,
p.292 ll. 28-29 to wit, "kerb and gutter and footpath improvements in McNamara and Byng Street", had been carried out and paid for out of the Council's General Funds prior to the making of the rate.

20. The respondent sought to avoid the consequences of the matters referred to in the preceding paragraph by arguing :-

(a) That subsection (2) of Section 121 conferred an independent source of
p.134 power to make and levy a rate which power was in no way dependent upon the council forming an opinion that the area to be rated would receive special benefit from the rate and

p.136 (b) That the power conferred by the subsection permitted it to raise a rate

for the purpose of reimbursing itself for the costs of works and services which it had completed and paid for prior to the making of the rate.

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21. The respondent's argument succeeded both before the trial judge and the Court of Appeal. The Court of Appeal (Moffitt J.A.) held that Section 121(2) provided "an important rate making power". The court acknowledged that the section did not expressly define the rating power; that the limitations on the power were "to be inferred from its limited and ill-drawn terms" and these necessarily arose out of the effect to be given to the words "improvement" and "town", the provisions for declaring a "district" and the reference made in Section 121(2) to Section 121(1). p.168 l.43 p.168 l.44 p.168 l.46 p.168 l.48 p.168 l.50

22. It is the appellant's submission that the power conferred on councils pursuant to the provisions of Section 121 is a power to raise revenue by taxation and that the section must be construed in accordance with the well settled rules of construction, namely, that charges and imposts must be imposed by clear and unambiguous language and that the subject is not to be taxed unless the language of the statute clearly empowers the relevant authority to impose liability.

23. In his decision in the Court of first instance, Hardie J. said the reported decisions as to the rate making powers of councils under the Local Government Act tend to favour a generous and liberal approach to the legislation rather than a strict and narrow one and His Honour referred, as authority for this proposition, to Wingecarribee Shire Council v. Reynolds 115 C.L.R. 398 and Fripp v. Municipality of Bankstown 26 C.L.R. 385. The cases referred to by His Honour are not, with respect, authorities for the proposition that Section 121 should be construed in such a manner. These cases decided that where liability for rates depends upon the formation of a particular opinion by the council, that opinion, and the material upon which it is based, are not to be closely p.149 ll. 40-43 p.149 l.44

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scrutinised by the courts. The cases are not authority for the proposition that the taxing or rating sections of the Local Government Act should be construed so as to extend the taxing power of a municipal council beyond the traditional limits of a taxing statute so as to impose discriminatory taxes on rate payers.

p.171 ll. 30-31

24. The Court of Appeal held that the words "may be levied under the provisions of this section" mean that the rate may be levied "upon the unimproved capital value or the improved capital value upon ratable land" within the defined area as provided by subsection (1) and (1A) of Section 121. No reason was given why only that portion of the relevant subsection relating to improved capital values and unimproved capital values should be regarded as incorporated into subsection (2) and the remaining portion of subsection (1) should be ignored.

p.171 ll. 32-35

25. The construction which the Court of Appeal placed on subsection (2) of Section 121 will have the effect of destroying a carefully worked out legislative scheme directed to ensuring that rates must be made and levied on a non-discriminatory basis. In order to achieve this result the legislature provided that land could be rated if either the land was specially benefited by the rate, or if the rate was imposed on the whole municipal area. Unless one of these criteria was fulfilled, there was no power to rate. (The basis for this submission is to be found in the sections of the Act). The council's sole discretionary power in the making and levying of a rate is its power to select either the unimproved capital value or the improved capital value of lands within the municipality as the basis for valuations. The decision of the Court of Appeal has had the effect of destroying the safeguards against discriminatory fiscal imposts hitherto enjoyed by the owners and occupiers of land.

26. On the assumption that the Court of Appeal

was right in holding Section 121(2) confers on a council an independent power to make and levy rates, the Council can only exercise such power in respect of an area which can properly be described as a "town" within the meaning of the subsection. The word "town" is apt to describe an urban area where residential and commercial districts form an integrated whole. It is inappropriate and contrary to the provisions of the Act to describe (as in the instant case) an arbitrarily related area as a "town". To adopt the view, as did the Court of Appeal, that part only of the commercial centre of a provincial city can be legitimately described as a "town" and to segregate that portion for the purpose of making and levying rates from the industrial, residential and other commercial parts is not only to misunderstand the concept of the word "town" where it appears in Section 121(2) but to sanction a discriminatory rate.

27. The appellant respectfully submits that the respondent was not authorised by the Local Government Act, 1919 (as amended) to make and levy the Town Improvement District Local Rate.

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Counsel for Appellant

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CASE FOR THE APPELLANT

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