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 RESPONDENT

RECORD

1. This is an appeal by leave of the Supreme Court of New South Wales, Court of Appeal, finally granted under the ORDER IN COUNCIL of 1909 on the fifteenth day of May, 1972 from a decision dated 28th September 1971 of that Court (Asprey J.A., Moffitt J.A. and Taylor A.J.A.) dismissing an appeal by the appellant against a decision of Hardie J. given on 7th May 1970. p.181 pp.157-177 pp.137-151

2. The questions raised by the appeal relate to the validity of a Town Improvement Local Rate imposed by the respondent on certain lands 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 situate approximately 170 miles west of Sydney.

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The City is the largest city between the Sydney metropolitan area, on the coast of New South Wales, and the City of Broken Hill near the western boundary of New South Wales. The City provides services, including retail and other commercial facilities, for the residents of a substantial rural area.

4. At all material times, and since 17th February 1967, there has been a prescribed planning scheme applicable to the City of Orange. This scheme, known as the City of Orange Planning Scheme, controls the use of land within the city by reference to the reservations and zonings therein set out. In particular the scheme designates a section of the city as a General Business Zone.

Separately reproduced Plaintiff's Exhibit 13(A)

5. The General Business Zone is physically bisected by the railway line which crosses the city in an approximately north-south direction. There are a limited number of crossings over the railway line.

6. Early in the year 1969 the respondent Council resolved to impose a local rate, known as a Service Area Local Rate, upon certain land within the city. This rate purported to be made under s.121(1) of the Local Government Act 1919, as amended. Objection was taken to the validity of this rate and on 31st October 1969 the Land and Valuation Court (Else-Mitchell J.) held that the rate was invalid (see Alan E. Tucker Pty. Limited v. Orange City Council 90 W.N. (Pt.1) 477).

pp.230-258

pp.272-286

7. Thereafter, in November 1969, the Council through its deputy Town Clerk sought advice from the Department of Local Government. Enquiries were made by the Town Clerk of another municipal authority, the Liverpool City Council, which imposed a Town Improvement Rate and a report was furnished to the Council at its meeting on 25th November 1969.

pp.309-310

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8. On 4th December 1969 a special meeting of the Council was held. At such meeting the Mayor presented a Mayoral Minute, prepared by him with the assistance of the Town Clerk, which read as follows : pp.286-295

> "Further information is coming to hand which gives a clearer picture of works or services necessary for an upgrading of portion of the area and I anticipate that this fuller information will be available for the above Council meeting for better clarification of the various courses of procedure open to the Council.
>
> I think there is general agreement that within the commercial centre improvement works are necessary, or alternatively, works or services which would be of special benefit to that portion of the area and I have therefore called for a more comprehensive report on these matters.
>
> The Council may resolve to sit as a Committee of the whole to consider these items, and to consider its capacity to perform them or some of them, and later the committee may submit a report to the Council".

9. At the meeting of 4th December 1969 the Council considered, along with the Mayoral Minute, a lengthy report from the acting city engineer detailing certain works regarded as desirable by such engineer. pp.296-302

10. At the special meeting held on 4th December 1969 the Council resolved to define and constitute a Town Improvement District within the city, "for the purpose of effecting improvements to works and services within the proposed district". The Council determined that the defined district should be that portion of the city, lying west of the railway line, which was zoned for General Business purposes. pp.286-295

The Council further resolved to adopt certain

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estimates for such local rate, and to publish in the local newspapers the estimates adopted, a metes and bounds description of the proposed Town Improvement District and notice of the proposal to make and levy an Orange Town Improvement Local Rate for 1969. The estimates adopted at this meeting consisted of three items as follows :

Principal and interest on loans raised by Council for or towards the provision of public parking areas	$15,410.00
Kerb and gutter and footpath improvements in McNamara Street and Byng Street	$ 3,309.00
Preliminary expenses in connection with the proposed women's rest centre and child minding centre in Anson Street	$ 1,557.00

11. Pursuant to the resolution of the Council notification was published in the
pp.311-313 Government Gazette dated 12th December 1969 defining the "Orange Town Improvement District" and appropriate local newspaper advertisements were published on 13th December 1969.

12. The Council held a further special meeting on 24th December 1969 at which it passed a
pp.303-307 resolution reciting the notification of the Town Improvement District, the adoption of estimates of income and expenditure of the Orange Town Improvement Local Fund for the year 1969, the publication of the estimates in the local newspaper on 13th December 1969 and in which it went on to make and levy in and for the year 1969 an Orange Town Improvement Local Rate of .27c in the dollar on the unimproved capital value of the ratable land within the district "for the purpose

of improvements to works and services within and in the opinion of the Council for the special benefit of the Orange Town Improvement District".

13. At the same meeting the Council passed resolutions to impose local rates pursuant to s.121(1) of the Local Government Act in relation to two car parking areas. These rates were the Anson Street Parking Area Local Rate and the Anson-Sale Streets Parking Area Local Rate. In each case the levy was imposed upon small defined areas of land in close proximity to the respective parking areas.

14. Objection was made by a number of objectors to the making and levying of each of these rates. Such objections were heard by Hardie J. in April 1970 and, on 7th May 1970 Hardie J. delivered judgment disallowing each of the objections and held that each of the rates was validly imposed. pp.137-151

15. There were, before his Honour, simultaneously suits in the equitable jurisdiction of the Supreme Court claiming declarations as to the invalidity of the same rates. These suits were dismissed and from such dismissal the various plaintiffs, including the present appellant, appealed to the Supreme Court of New South Wales, Court of Appeal. The appeal was heard by the Court of Appeal in May 1971 and on 28th September 1971 the Court of Appeal delivered judgment dismissing the various appeals brought to it and holding that each of the rates was validly imposed. Moffitt J.A. delivered the leading judgment in the Court of Appeal and Asprey J.A. and Taylor A.J.A. concurred with the judgment of Moffitt J.A. pp.157-177

16. The present appeal challenges the correctness of the decision of the Court of Appeal only insofar as the Town Improvement Local Rate is concerned.

SUBMISSIONS

17. Section 121 of the Local Government Act 1919, as presently amended, provides, in part,

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as follows :

"121 (1) 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 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 of the ratable land added to the area.

(2) 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."

18. In the Courts below it has been contended for the appellant that the inclusion of the words s.121(2) "may be levied under the provisions of this section" meant that the whole of s.121(1) was imported into 121(2) and that therefore it was essential, in respect of each item included in a Town Improvement Local Rate, that the Council form an opinion that the execution of that work would be of special benefit to all of the land within the Town Improvement District. It has been contended that the only point of using sub-section (2) is to avoid the necessity

of redefining the rated area on each occasion that a rate was to be imposed. RECORD

19. This submission has been rejected in the Courts below and, in our respectful submission, correctly. As Moffitt J.A. pointed out the term "Town Improvement District" suggests a permanent and substantial area. If it were necessary, in respect of each item of expenditure, that the item be for the special benefit of the land within the Town Improvement District, and the whole of such land, then it is unlikely that many items of expense could be made the subject of a rate on the preselected district so that the preselection of the district would serve little purpose. p.168 l.29

20. To reject the appellant's construction does not mean that a council is free to impose a rate under s.121(2) without restriction. It is necessary that the defined area be an area which can be appropriately defined as a "town" and the works and services for which the rate is to be levied must be capable of being regarded as being for the "improvement" of that "town". The correct construction of s.121(2) was stated by Moffitt J.A. in his judgment in the following words:

> "The powers of defining an area and of making a rate under s.121(2) although exercisable at different times are complementary. In selecting and defining a 'town improvement district', a council would have in contemplation the effecting of improvements and charging the cost or some of the cost to that district by way of a local rate. In the proper exercise of the power to define the area the council would need to select that town area which could be said as a whole is the subject of proposed improvements. Improvements to be the subject of a rate have to be town improvements made in respect of an area, namely the town improvement district. It follows that the concept of special benefit exists in the sense that improvements made to and within p.170 l.18 to p.171 l.20

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the area will provide benefit to that area as a whole and because they are town improvements the benefit will be one special to the selected area. The selection of the area may be a matter of some difficulty and difference of opinion. A commercial and business area may have lying on its outskirts or even separated from it local business areas which might properly be omitted from the defined area, if, for example, the intended improvement proposals were improvements to the central area with little or no benefit to the excluded areas. The proper exercise of the powers under s.121(2) is fairly to cast the burden, or some of it, in respect of town improvements on the town area which is the area improved. Thus although not imported directly from s.121(1), the concept of special benefit or some equivalent, is to a degree inherent in the definition of the district and the selection of the improvements the subject of a town improvement local rate. As in the case of special benefit, where there may coecist some benefit to other land outside the area rated or to the public generally, so a town improvement may provide benefit to such other land or the public generally. The concept introduced by s.121(2) is such that exercise of the power does not necessarily involve an examination of whether each improvement provides special benefit to every part of the town improvement district. The question for the council to determine is whether the proposed town improvement district defined is the area appropriate to bear the expense of town improvements and whether the improvements the subject of the proposed rate constitute in themselves, or as part of a programme, improvements to and within the district defined."

21. The view accepted in the Courts below, in respect of this matter, was that the provisions of s.121(1) incorporated into s.121(2) were merely those provisions as to the basis upon which the rate might be levied, that is either on the unimproved capital value or on the improved capital value.

22. There is no basis for disputing the definition by the Council of the Town Improvement District. The boundary of the district was selected by reference to the zoning of the land. The Council was of the opinion, which was open to it, that a distinction should be drawn between the land west of the railway line and the land east of the railway line.

23. Each of the items of expenditure included in the Town Improvement Local Rate was a capital work which can be properly regarded as being an "improvement" to the Town Improvement District. It is not to the point that the council, in respect of maintenance expenses of the car parking areas, imposed a local rate under s.121(1) in respect of different land. It was open to the Council to take the view that the acquisition of land for a car parking area was of benefit to the whole of the Town Improvement District although the actual maintenance and operation of each of the two car parking areas presently in service was of a special benefit to a limited number of properties close to such parking areas.

24. It was submitted in the Courts below that the Town Improvement Rate was invalid because it related, in part, to expenditure incurred prior to the date of the rate levy. This submission refers to the kerbing and guttering in McNamara and Byng Streets. However under the Local Government Act rates are imposed by Councils for a specific rating (calendar) year. Thus s.139(1) provides that every rate shall be made and levied for one year commencing on the 1st day of January next preceding the making thereof. Here the kerbing and guttering work was carried out during the

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rating year. It is clear that s.121(1) envisages that a local rate may be validly made for the purpose of repaying monies borrowed in connection with the execution of a work or service and there is no warrant in s.121(2) for limiting works and services validly included within the Town Improvement Local Rate to those not yet effected. It is to be noticed that in Wingecarribee Shire Council v. Reynolds 115 C.L.R. 389 the relevant rate was levied after the works had been completed. It appears from the judgment of Barwick C.J. that the works of water supply were finished in about 1962 but the relevant rate considered by the High Court was one fixed in January 1964. There is no suggestion in any of the judgments in that case that this fact invalidated the levy.

25. It was submitted by the appellant in the Courts below that the kerbing and guttering could not be regarded as an "improvement". The answer given by both Hardie J. and Moffitt J.A., to this submission, was that the kerbing and guttering should not be regarded as a work standing alone but as being part of a programme of such works outlined in a report placed before the Council on 4th December 1969. It is respectfully submitted that this is the correct view and that the programme of kerbing and guttering can properly be regarded as being an "improvement" within s.121(2).

p.148 l.35 to p.150 l.31
p.174 l.5 to p.175 l.28

26. Finally it was submitted by the appellants that the rate was invalid because it was made mala fide or after taking account of extraneous circumstances. The appellant argued that the levying of the rate was merely an attempt to overcome the judgment in the earlier case and was really an attempt to throw upon a section of the City a substantial portion of expenditure which should be borne by the whole area. There is no basis of fact for this submission. The evidence was clear that the Council sought and obtained advice as to the proper course to take both from the Department of Local Government and from its own legal advisers. Further, at the

p.138 l.21 to p.139 l.3

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date it resolved to levy Town Improvement Local Rate the Council had before it the report of a senior officer setting out items of works and services which the Council could properly regard as being improvements within the area it proposed to select as the Town Improvement District. Some reliance has been placed by the appellant upon the fact that the total value of the items included in the engineer's report approximated the amount sought to be recovered by the Council under the Service Area Local Rate. However there is no significance in this circumstance. The engineer's report recommended the carrying out of improvements at a cost of $144,703.00 and it is clear that this work was intended to be effected over a number of years. In the event the Council sought to recover only $28,000 in respect of the Town Improvement Rate for 1969. By contrast the Service Area Local Rate had sought to recover the sum of $173,000.00 in a single year. Comparison of the Service Area Local Rate and the Town Improvement Local Rate indicates that the two rates are different both as to the amounts sought to be recovered, the areas sought to be rated and the items of expenditure included in the estimates.

pp.303-307
pp.296-302
pp.296-302
pp.230-258

27. The respondent respectfully submits that the judgments in the Courts below were correct and that this Appeal should be dismissed for the following, amongst other

R E A S O N S

(1) That s.121(2) of the Local Government Act does not require that the Council form the opinion, in relation to each item of work to be defrayed by the rate, that the execution of that work would be of special benefit to all of the land within the Town Improvement District.

(2) That each of the items of work referred to in the resolution of the Council was an item which the Council was entitled to regard as an "improvement" to the Town Improvement District.

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(3) That there was no reason to conclude that the Council, in resolving to levy the Town Improvement Rate, pursued an ulterior purpose or failed to address its mind to relevant considerations.

(4) That the Town Improvement Local Rate was validly imposed.

T.R. MORLING

M.R. WILCOX

No. 22 of 1972

IN THE PRIVY COUNCIL

O N A P P E A L

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B E T W E E N :

WESTERN STORES LIMITED — Appellant

- and -

THE COUNCIL OF THE CITY OF ORANGE — Respondent

CASE FOR THE RESPONDENT

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