Privy Council Appeal No. 22 of 1972

Western Stores Limited – – – – – – *Appellant*

v.

The Council of the City of Orange – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY 1973

Present at the Hearing :
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD KILBRANDON
LORD SALMON

[*Delivered by* LORD WILBERFORCE]

This appeal requires a decision as to the validity of a Town Improvement Local Rate imposed by the respondent Council on a portion of the area of the municipality for the year 1969. Two questions are involved: first, a question of general principle as to the scope of the power to levy a Town Improvement Local Rate conferred by s. 121 (2) of the Local Government Act 1919, as amended (" the Act "); secondly, the question whether such power as the Council has was validly exercised in respect of the year 1969.

Power to make and levy local rates is contained in Division 2 of Part VII of the Act. This commences with section 117, which provides that rates levied by a Council may be of four kinds, namely general rates, special rates, local rates and loan rates. General rates and special rates must be made and levied on all ratable land in the Council's area: local rates, on the other hand, may be made and levied on a portion only of such land. Local rates are provided for in two sections, 121 and 122. Section 121, so far as material, provides 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.

. . . .

(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."

Section 122 contains a procedure, by way of requisition and a poll, enabling a local rate to be made and levied in respect of all ratable land in a particular ward or riding.

Section 121 (2) is a provision which is certainly difficult to understand. Hardie J. described it as " cryptic ": the Court of Appeal found it limited and ill-drawn. Does it confer a substantive rate-making power, additional to the power conferred by subs. (1), or is it purely ancillary to the latter, providing a label for a rate to be made thereunder? What is the significance of the relative clause—is it explanatory or power-conferring? What is meant by the words " under the provisions of this section ": do these have the effect of incorporating the provisions of subs. (1) into subs. (2), or of incorporating some of them; or do they have the effect of adding what is stated in subs. (2) to the provisions of subs. (1)?

In relation to the present appeal, the main submission of the Council is that subs. (2) confers an independent self-contained rate-making power, and the Court of Appeal has so held. The appellant company contends that the effect of the words " under the provisions of this section " is to impose, as conditions of a valid exercise of any action under subs. (2), all those stated in subs. (1): these are (*a*) that the rate must be made for the purposes stated in the initial part of subs. (1), (*b*) that the Council must form an opinion that the work or service, for or in relation to which the rate is made, would be of special benefit to the town improvement district as defined. It should be added that the Council presents an alternative argument that, in any event, if an opinion as to special benefit is required on the part of the Council, such an opinion was in fact, and validly, formed by the Council in the present case.

The subject matter of s. 121 is the making and levying of local rates. Local rates are, by nature, rates which may be imposed upon a part, or portion, only of the area of the rating authority. They discriminate, and are designed to discriminate, between a portion of the area of the municipality or shire and the rest of the area. It follows from this that the area, in respect of which the local rate is to be imposed, must be capable of precise definition. Each of the two subsections recognises this, and attempts to deal with the requirement: the same prerequisite is recognised in s. 122 which specifies a " particular ward or riding " as the area in which the procedure provided for is to operate.

S. 121 (1) states that the relevant portion of the area is to be defined " as prescribed "—an expression normally used where the definition is to be made by subsidiary legislation. This has been done by O.5 r. 28½ made under this section, which has assumed various forms; broadly it provides for definition by reference to certain ascertainable areas—such as wards or ridings, or alternatively by metes and bounds. The precise method of definition actually prescribed from time to time cannot in their Lordships' opinion bear upon the interpretation of

s. 121 (1) itself, but it would not be improper to assume that, when the word " prescribed " was enacted, some such method of definition would be employed.

Subsection (2) uses the words " define part of the area "—the definition in question is to be made by notice in the Gazette. Reading this together with subs. (1), it appears likely that Parliament had in mind a special method of definition appropriate for the levying of a particular species of local rate, *viz.* a Town Improvement Local Rate, and that the enactment of this method was by way of supplement to subs. (1). This supports the argument that subs. (2) is subsidiary or supplementary to subs. (1).

There are, in addition to this, substantial arguments against reading subs. (2) as conferring an independent substantive rate-making power. There is in the subsection no explicit statement of the purposes for which a rate may be levied under it. It may be possible, as the Court of Appeal has done, to deduce this from the words " town " and " improvement " but, even accepting this, there is left open the important question whether the test of validity is an objective one, *i.e.* what will in fact improve the district, or whether, as in subs. (1), it is the opinion of the Council that is to decide. Subs. (2), if read as totally independent of subs. (1), cannot answer this question. There is also left open the question whether the rate-making power is only for the purpose of defraying the expenses of carrying out an improvement, or whether it extends to the other purposes mentioned at the beginning of subs. (1), *i.e.* for servicing loans, departmental or external: again, this cannot be answered by subs. (2) alone. All of this points towards a process of reading in the conditions of subs. (1) into subs. (2), or, as it can also be put, reading the special case contemplated by subs. (2) into the general dispositions of subs. (1). When it is seen that the rival contention, which the appellant puts forward, is that nothing from subs. (1) is to be read into subs. (2) but the discretion conferred upon the Council to choose between the unimproved capital value and the improved capital value, their Lordships are left in no doubt where the advantage lies: they must and do conclude that the conditions of subs. (1) are to be read into any power conferred by subs. (2).

The next step is to ascertain the consequences of this interpretation. The Council having defined a Town Improvement District must proceed to form an opinion, but of what? In cases where it proceeds under subs. (1), the opinion must be that the work or service would be " of special benefit " to the portion defined. The opinion which is to be formed if the Council acts under subs. (2) is analogous but not identical: it is at this point, in their Lordships' opinion, that the references to " town improvement " become significant. The district being defined as a Town Improvement District and the rate being described as a Town Improvement Local Rate, the type of special benefit to be provided must necessarily be a benefit by way of improvement to the selected district, a conception of a more general character than the more concrete and localised benefit which is to be secured if action is taken under subs. (1).

At this point it is relevant to refer to certain decisions on the meaning of " special benefit ".

In *Hebburn Ltd. v. Kearsley Shire Council* (1955) 11 L.G.R.A. 116, the Council had defined a Town Improvement District and levied a rate for expenditure which, it was claimed, did not benefit the plaintiff's land. For the Council it was argued that s. 121 (2) conferred an independent rate-making power and that it was not necessary for the Council to form an opinion as to special benefit to the Town Improvement District.

McLelland J. rejected this argument, holding that the words " under the provisions of this section " require the formation of an opinion by the Council of special benefit to the Town Improvement District—meaning by this the whole of the area included in the Town Improvement District. These latter words were however related to the question whether there was benefit to the lands of the plaintiff which had been added to the district after definition and which was bushland. They should not be taken as support for a wider argument that in every case all land within the district must be specially benefitted.

A more complicated set of facts had to be considered by Else-Mitchell J. in *Alan E. Tucker Pty. Ltd. and Others v. Orange City Council* (90 W.N. (Pt. I) 477).

That case was concerned with the validity of a local rate made in 1969 by the respondent Council under s. 121 (1) of the Act. The area involved was, as in the present case, the central business area of the City of Orange, but the portion there in question was smaller, and omitted certain parcels. The rate was held invalid on the grounds (*a*) that there was " such an absence of similar or common benefit from the several categories of works and services that there can be no basis upon which the Council could reasonably form the opinion that all the land in the defined area would be likely to derive special benefit from each and every one of the proposed works and services " and also (*b*) that the Council had pursued a foreign purpose and was influenced by extraneous considerations. In support of ground (*a*) Else-Mitchell J. said that he could not find any basis upon which a Council acting reasonably could reach the conclusion " that every parcel of land in the defined area would derive a special benefit, that is, a benefit over and above some common or general benefit, from each of the works and services ".

These observations were the subject of some criticism in the present case: they were said to reflect too narrow and strict a view of special benefit as these words are used in s. 121 (1). As to this their Lordships would make two observations. First, his Honour's remarks must be read in context which was one of a large number, or conglomeration, of works and services, said to be in respect of the same area, but of which it could be said that some did not benefit parts of the area—for example since they had already been provided. His Honour clearly accepted that whether any part of an area receives benefit from a work or services may be a question of degree as to which it is the opinion of the Council that is decisive. Secondly, the judgment on that case must now be read in the light of the subsequent High Court judgments in *Council of the City of Parramatta v. Pestell* an unofficial text of which is available to their Lordships. These judgments emphasise the correlation which must exist between the area to be benefitted and the area to be rated.

> " A council must therefore form an opinion whether any and what portion of its area would be specially benefitted by the execution of what is proposed. This opinion determines the land that may be rated. There is thus a correspondence, dependent upon the opinion of the council, between (1) the land to which the execution of the work will be of special benefit and (2) the land to be rated." *per* Menzies J.

The judgments of Gibbs J. and Stephen J. are to a similar effect. Barwick C.J., while inclined to doubt whether the correspondence was a two-way, or symmetrical, correspondence, does not appear to differ from the proposition stated. What is essential, and this is common to

Tucker's case and *Pestell's* case, is a correlation in the opinion of the Council between the portion benefitted and the portion rated, a correlation which, as appears from both cases, is to be judged according to the nature of the benefit alleged. In their Lordships' opinion it must follow from this principle that where the portion to be specially rated is a Town Improvement District, and the rate imposed is a Town Improvement Local Rate, the opinion to be formed by the Council, if the rate is to be valid, is an opinion that the works and services contemplated would bring about that species of benefit which consists of an improvement of the District. Improvement being a word of some generality, the Council must have some latitude in the formation of its opinion, but it must still, in an appropriate case, be open to the Courts to find that there was no reasonable basis on which such an opinion could be formed. Their Lordships find much in the judgment of Moffitt J. in the Court of Appeal which reflects this line of reasoning, though his Honour reaches his conclusion by a route which their Lordships cannot follow, *viz.* by holding that s. 121 (2) confers an independent substantive rate-making power.

Thus he says—

> " In the proper exercise of the power to define the area the Council would need to select that town area which it 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 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."

and

> " 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."

Their Lordships will now consider whether grounds exist in the present case for a finding by the Council that special benefit in the form of improvement of the District would be brought about by the expenditure.

The estimates before the Council in December 1969, when the rate was decided upon, were for three items:

1.	Principal and interest on loans raised by Council for or towards provision of public parking areas	$15,410·00
2.	Kerb and gutter and footpath improvements in McNamara Street and Byng Street ...	$3,309·00
3.	Preliminary expenses in connection with proposed women's rest centre and child-minding centre in Anson Street	$1,557·00
		$20,276·00

The attack on item No. 3 was weak: it is indeed difficult to construct an argument why such a facility in the City's main shopping area should not be considered to be an improvement for the benefit of the District. Their Lordships find no difficulty in rejecting such criticism as was made.

Item No. 2 was attacked on the ground that kerb, gutter and footpath improvements at parts of two streets could not be considered as improvements to the District. There is force in this. But evidence was given before Hardie J. to the effect that the work was not initial work nor maintenance work but part of a reconstruction programme directed to the improvement of the streets in the District. Hardie J. accepted this and the Court of Appeal agreed. Their Lordships are not prepared to take a contrary view.

It was also objected that expenditure on these items had been incurred before the definition of the Town Improvement District. However it had been incurred in the same rating year and there seems to be nothing to prevent it being charged to Town Improvement once the District has been defined.

As regards item No. 1 the objection taken was that the capital expenditure on these car parks had been incurred before 1969; for the Anson Street Car Park by 1963, for the Anson-Sale Street Car Park by 1967, for the Little Summer Street Car Park by 1964–5. (The latter was not actually in use.) This is so, but does not, in their Lordships' opinion, disentitle the Council at a later time from forming an opinion that a Town Improvement District having been defined, the expenditure in acquiring these parks should be treated as improvement expenditure on the district and financed as such. A further objection was based on the fact that the Council had treated maintenance expenditure in respect of two of these same parks as an appropriate subject for a local rate under s. 121 (1) leviable on contiguous premises. It was said to be inconsistent with this to treat the capital expenditure in acquiring the parks as a suitable subject for a Town Improvement District Rate leviable on properties within the District. But on the interpretation which their Lordships give to the rate-making power in a Town Improvement District, this does not follow. It was perfectly open to the Council to form an opinion that this capital expenditure should rank as Town Improvement expenditure, but at the same time to charge the maintenance expenses on contiguous premises. It should be added that the validity of the latter charge though initially denied in these proceedings was not contested before the Board.

Their Lordships are of opinion that this group of objections fails.

There remains an allegation that the Council, in defining the District and levying this particular Town Improvement Local Rate, was actuated by extraneous considerations. The appellant company was quite explicit as to the nature of these. As the result of a revaluation made by the Valuer-General in November 1968, the unimproved capital value of the business area in the City of Orange had been increased by about 13% on average while the corresponding increase for the residential area was 176%. The Council's rate-making policy was, it was said, designed to correct an imbalance between the two areas. In 1969, the Council had sought to do this by imposing a "service area local rate" upon the central business area, acting under s. 121 (1) of the Act. This rate was designed to cover expenditure of $173,194·00. It was this rate which was struck down in *Tucker's* case for the reasons (*inter alia*) that the Council, in making it, had been influenced by extraneous considerations *viz.* the purpose to alter the incidence of the rating burden. The decision in *Tucker's* case was given on 31st October 1969 and immediately

thereafter the Council after conferring with officials in Sydney decided to define—with some differences—the area affected by *Tucker's* case as a Town Improvement District and to levy the Town Improvement Local Rate. The aggregate amount sought to be levied in 1969 and, according to the report of the Acting City Engineer, over a later period came to $172,963·00 *i.e.* almost the same as the $173,194·00 above-mentioned. This showed, it was submitted, that the Council was still influenced by the same extraneous considerations as had been held in *Tucker's* case to invalidate the Service Area Local Rate.

Their Lordships entirely accept, and indeed emphasise, the necessity for rate-making bodies to do so strictly and directly for the purposes for which the particular rate is authorised to be made. They affirm the proposition that the Courts have the power, indeed the duty, to strike down a rate if it is shown that it has not been made for those purposes, but upon extraneous considerations. But whether such extraneous considerations have operated is a question to be decided on evidence, written or oral. Upon such evidence, consisting *inter alia* of records of the Council's proceedings and the testimony of its Town Clerk, Hardie J. decided that the objectors' attack, based on the alleged admission of extraneous considerations, failed. This decision was endorsed by the Court of Appeal. Their Lordships cannot take a different view on an issue of this character.

They will humbly advise Her Majesty that the appeal be dismissed. The appellant Company must pay the costs of the appeal.

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In the Privy Council

WESTERN STORES LIMITED

v.

THE COUNCIL OF THE CITY OF ORANGE

DELIVERED BY
LORD WILBERFORCE

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1973