UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
12 MAR 1960
25 RUSSELL SQUARE
LONDON, W.C.1.

5, 1959

N°38 of 1958

55558 IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

THE COUNCIL OF THE CITY OF NEWCASTLE ... Appellant

\- and -

ROYAL NEWCASTLE HOSPITAL Respondent

C A S E FOR THE A P P E L L A N T

RECORD.

10 1. This is an appeal by special leave granted by Her Majesty in Council from a judgment of the High Court of Australia upholding by a majority (Williams, Webb and Taylor JJ., Fullagar and Kitto JJ. dissenting) a majority decision of the Supreme Court of New South Wales (Roper C.J. in Equity and Maguire J., Owen J. dissenting) by which the Supreme Court dismissed the Appellant's appeal from a judgment of Richardson J. holding that the Respondent was not liable to pay rates
20 in respect of a plot of land owned by the Respondent in the City of Newcastle.

2. The question raised by this appeal is whether the land in question is exempt from rating under the provisions of the Local Government Act, 1919 (N.S.W.). Section 132(1) of that Act is in these terms:-

> 132. (1) All land in a municipality or shire (whether the property of the Crown or not) shall be rateable except ....
>
> 30 (d) land which belongs to any public hospital, public benevolent

institution, or public charity, and is used or occupied by the hospital institution or charity as the case may be for the purposes thereof;

. . . . "

Section 144 of the Act provides that every rate shall except where the Act otherwise expressly provides be paid to the Council by the owner of the land in respect of which the rate is levied.

3. The rates were claimed in respect of the years 1946 to 1952 and they totalled £4,001. 9. 8. There was no dispute at the hearing of the action that if the claim for exemption failed the amount due was £4,001. 9. 8. There was no dispute that the land in question belonged to the Respondent, and that the Respondent was a public hospital. The dispute then and now was whether the land in question was used or occupied by the Respondent, and if it was, whether it was used or occupied by the Respondent for the purposes of a public hospital. 10

4. The land in question comprises some 291 acres and is situated at New Lambton within the area of the City of Newcastle. The following description of the land is taken from the judgment of Owen J. in the Supreme Court of New South Wales:- 20

p.130 l.18

p.131.

"The land in question adjoins other land owned by the Respondent on which it conducts a hospital for the treatment of tuberculosis. The hospital is situated in one of the residential areas of Newcastle, 4 or 5 miles away from the industrial areas of that city. The building and surrounding lawns and gardens occupy an area of approximately 17½ acres fronting a main thoroughfare and facing north-east towards the city. This area is surrounded by a fence. Behind it is a further area of about 18½ acres of bushland owned by the hospital, which has no buildings on it and is not cultivated in any way. This last-mentioned area has always been treated by the appellant council as non-rateable land and no question as to this arises. Behind it again lies the land which is the subject of the present case. It consists of bush in its virgin state, intersected with steep gullies and heavily timbered. It is unfenced and is part of a very much larger area of bushland stretching to the north, to the west and to the south. 30 40

As I understand it, the land was originally resumed and vested in the hospital with a view to setting up on it a rehabilitation centre in which patients on the road to recovery might live and earn a living doing light work and at the same time be under medical supervision. That proposal, however, has not yet begun to be carried out."

5. From this statement it appears that the total
10 area of land at New Rankin belonging to the Respondent comprises some 327 acres, that the hospital buildings, gardens and lawns occupy a fenced-off area of some 17½ acres, that no claim has been made for rates either in respect of this area or in respect of a further area of some 18½ acres of bushland, and that the claim is limited to the unfenced area of 291 acres.

6. The hospital buildings are used for the treatment of patients suffering from tuberculosis.
20 They are built with verandahs facing to the North-East. The prevailing wind is from the North-east. As stated by Owen J., the land in question lies to the rear of the hospital buildings, that is, to the South and to the West. By a proclamation made in 1924 under the Local Government Act, 1919 (N.S.W.), a large area in New Lambton, including the land in question, has been scheduled as a residential district, and it has been prohibited to erect or use buildings upon it for the purpose
30 of certain trades, industries or manufactures.

p.24 ll.20-30

p.20 l.22

pp.169-70

7. The history of the Respondent's acquisitions of land at New Lambton is summarised in the following passages from the judgment of Richardson J.:-

" Two parcels were purchased in the year 1926, first 24 acres 1 rood 13 perches, and second 68 acres 0 roods 12 perches. An additional area of 4 acres 2 roods 32 perches was acquired in the year 1934 but a small portion,
40 1 rood 5½ perches, was transferred to the owner of an adjoining area, leaving 4 acres 1 rood 26½ perches. The total holding was thus brought up to 96 acres 3 roods 11½ perches.

p.119 l.27
p.120.

" It appears that the first purchase of 24 acres 1 rood 13 perches included the buildings known as the Old Croudace Home, and being used for the purposes of the hospital it was immediately exempted from liability for rates.

Following upon the purchase of 68 acres 0 roods 12 perches and further classification by the Hospital the exemption area was increased to 32 acres. When the hospital acquired the 4 acres 1 rood 26½ perches the exempted area was further increased to 36 acres, and for many years this area has been separately valued by the Valuer General. The Hospital paid rates to the Council in respect of the balance of its then holding until the year 1946. 10

" During the Second World War the Commonwealth Government, by arrangement with the Hospital, took over the area as a temporary measure and established an emergency hospital for national purposes.

" The main building belonging to the hospital has been situated within the principal part of the City and for many years up to and including the year 1947 tuberculosis patients were admitted and treated there. In the year 1944, 20 when the Commonwealth Emergency Hospital was no longer required, it was decided by the hospital authorities to extend the buildings and to establish there a chest hospital or sanatorium........ This branch of the hospital has its own medical and nursing staff but the Superintendent of the main hospital is also the Superintendent of this hospital which has been named Rankin Park. In 1944 when it was decided to establish Rankin Park, the 30 hospital purchased an additional 10 acres 3 roods, 5¾ perches and about the same time it commenced negotiations for the acquisition of a further 220 acres 0 roods 35 perches. These two areas are situated immediately at the rear and on each side of the 96 acres 3 roods 11½ perches and run down a succession of gullies in a westerly direction to Marshall Street which is unmade. Eventually, in 1946, the 220 acres, part thereof being crown land and part 40 private property, was appropriated and/or resumed, according to the gazette notice, for the purposes of the Newcastle Hospital. The total area was thus increased to 327 acres 3 roods 12¼ perches."

p.121.1.37

8. At the trial before Richardson J. the Respondent sought to establish its claim to exemption on the ground that it had "used" the land in question for the purposes of a public hospital during the years for which the rate was 50

claimed. It relied upon which it called "tangible" and "intangible use". Richardson J. found that there was no satisfactory evidence of "tangible" or "physical" use, and he rejected the Respondent's claim so far as it was based on such use. His judgment on this point was upheld by all the judges of the Supreme Court on appeal, and does not appear to have been questioned by the Respondent in the High Court of Australia:-

p.122 l.15

pp.123-4.

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" This remaining area of 291 acres is the area the subject of the dispute in this action and is virgin country, covered with trees and bush, unfenced, carrying no buildings, and marked by gulleys and a few rough paths; it is not put to any active use by the hospital, and an attempt to prove that some portion of it was used by patients for the purpose of exercise and recreation rightly failed before the learned trial judge" (per Maguire J.)

p.134 ll.39-47

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9. The Respondent's claim to have made "intangible use" of the land in question appears to have been based on the evidence of witnesses who contended that the Respondent derived certain advantages from its ownership of the land, as summarised in the following passage from the judgment of Kitto J. in the High Court of Australia:-

" In support of the second alternative proposition reliance is placed by the hospital upon evidence given by several witnesses, which tended to show that the 291 acres served four specific purposes in relation to the hospital: first, that it insured the clear atmosphere necessary for the proper treatment of patients; secondly, (which seems to come to the same thing) that it acted as a barrier against the approach of buildings, particularly factories, likely to emit smoke, fumes or dust; thirdly, that it provided quick and serene conditions having psychological advantages to patients suffering from a disease in the treatment of which psychological conditions are important; and, fourthly, that it gave opportunity for future expansion of the hospital and the establishment of allied activities."

p.158 ll.10-26

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10. Richardson J. held in effect that the Respondent did derive these advantages, or some of them, from its ownership of the land in

pp. 126-7

question, that this amounted to an intangible use of the land, that there was a connection between this intangible use and the purposes of the hospital, and therefore that the land in question was being used by the Respondent for the purposes of a public hospital.

11. On appeal Owen J. stated the proposition of fact for which the Respondent contended in these terms :-

p. 131 l.38.

"Fresh, unpolluted air is a necessary element in the treatment of persons suffering from tuberculosis. 10

" The subject land is used by the hospital to produce fresh air and to provide a barrier against the possible approach of residences and other buildings which, if not kept at a distance, might pollute the air which patients and staff must breathe."

He was doubtful upon the facts whether this proposition had been established:- 20

p.132 ll.1-15

" This proposition would carry greater weight to my mind in the present case if the land in question lay between the hospital and the City of Newcastle and not in the opposite direction. The prevailing wind in the locality comes from the North East, that is to say, from the direction of Newcastle and blows away from the hospital across the land. There is nothing to suggest that in the foreseeable future there is any real likelihood of the pollution of air in 30 the West and South West of the hospital or that the hospital would not have got, during the relevant years, the benefits which it claims to have had from this area of land even if it had not been the owner of it."

The learned judge went on to express his view that the derivation of benefit from the ownership of the land was not the test under the Act: the test was use or occupation. He was satisfied that there was no evidence of occupation as that 40 word is used in rating law: something more was needed than mere legal possession.

p.132 ll.36-43

" The Respondent however, submits, that this land was being 'used' by the hospital for the purpose of providing fresh air. It seems to me that it is a misuse of language to say that the land was being 'used'. The patients may

well have derived a benefit from the fact that it was there, but, as I have said, the derivation of benefit is not the test laid down by the Act. I think that the real fact is that the hospital was not using the land."

The learned judge was for allowing the Appellant's appeal.

12. Maguire J. (with whose judgment Roper C.J. in Equity agreed) was for dismissing the appeal. He thought that the evidence established that the retention of a large area of undeveloped land attached to the hospital was necessary for the attainment of the hospital's purpose, and that the hospital, by retaining the land for this purpose, was "using" it, though intangibly.

p.133.
p.136.1.40
p.137.1.45

13. On appeal to the High Court of Australia Williams J. was for dismissing the appeal. He thought it was unnecessary for the Respondent to rely on the word "Used". He was prepared to hold on the authority of Liverpool Corporation -v- Chorley Union Assessment Committee and Withnell Overseers (1913) A.C. 197 (a case which had not been cited in the High Court or in the Supreme Court of New South Wales) that the Respondent was in occupation of the land in question. In the Chorley Case the owner of a waterworks was held to be in rateable occupation of moorlands for the following reasons cited from the speech of Lord Atkinson at page 212:-

p.146 1.49

> "..... I am clearly of opinion that each of the uses to which the appellants have devoted this moorland, the commercial use of collecting for them water which they in their business vend, and its use as a game preserve of the kind described, and certainly those two uses combined, are sufficient to turn their admitted possession of the moor into that beneficial occupation of it which renders them rateable in respect of it."

From the statement of facts at pages 203-6 of the report it further appears that the owners of the land in that case performed physical acts of maintenance and improvement upon the lands there in question.

Williams J. concluded his judgment with these words:-

p.152-
ll.1-6

" It is impossible to say that the respondent occupies the developed but does not occupy the undeveloped part. It occupies the whole. It is all occupied for the same purposes, that is, the purposes of the hospital."

pp.153-4

14. Fullagar J. was for allowing the appeal. He thought that the judgment of Owen J. was right and he agreed entirely with the judgment of Kitto J. In his opinion a fallacy underlay the Respondent's argument. This fallacy lay in the assumption that deriving an advantage from the ownership of land was the same thing as using the land - a fallacy helped out by coining the expression "intangible user" which had no real meaning. The Respondent began with the proposition that he who uses land derives an advantage from it. It then called evidence to prove that an advantage was derived from the ownership of the land in question. The conclusion was then deduced fallaciously that the land in question was being used. As to the Chorley Case, he considered it to stand out in conspicuous contrast with the present case, and to illustrate the kind of thing which it would have been sufficient for the Respondent to prove.

15. Kitto J. was also for allowing the appeal. He considered the meaning of the word "occupied" and referred to the view of the Court of Appeal in Associated Cinema Properties Ltd. -v- Hampstead Borough Council (1944) 1 K.B. 412 at p. 416 that no case could be cited in which occupation had been held to be established without proof of some overt act amounting to user. Something more was needed than mere legal possession.

p.156 l.37

He went on to consider the two alternative ways in which the Respondent's case could be put:-

p.156 l.42

"... first, that the subject land, the 291 acres, should not be considered separately from the rest of the 327 acres, and that what was done on the 17½ acres in the relevant years was in truth a user or occupation of the whole 327 acres: or, secondly, that the subject land was separately used or occupied for the purpose of the hospital in those years."

His reasons for rejecting the first alternative are contained in the following passage from his judgment:-

" That there was in the relevant period both a user and an occupation for the purposes of the hospital of the land which formed the site and curtilage of the hospital buildings, no one could doubt. That the conduct which constituted that user and occupation related at least to the whole of the 17½ acres is equally clear. But did it relate to the whole of the 327 acres so as to establish a user and occupation of that entire area? I think the answer is that an observer of what went on in the years 1946 to 1952 on the respondent hospital's property would be struck at once by the difference in treatment of the 17½ acres on the one hand and of the rest of the land on the other - not only because the whole of the activities that took place were confined to the land within the fence, that land having been developed and being maintained in a condition suitable for those activities, while the land outside the fence was completely neglected. If asked how much of the land the hospital used or occupied, I cannot doubt that the observer's answer would be that it used and occupied the 17½ acres and left the rest completely unused and unoccupied ... He would no doubt assume that it was considered by the hospital authorities expedient that the land outside the fence should be retained, either for future use by the hospital or to prevent its being used by anyone else: but the conclusion that there was a present and positive use or occupation by the hospital of the whole of the land would not be justified by that assumption and would be, I think, plainly contrary to the fact." (p.157 l.25)

The Appellant respectfully submits that the reasoning of Kitto J. upon this point should be preferred to that of Williams J. in the concluding passage of his judgment cited in paragraph 13 of this Case and to the reasoning of Taylor J. in the passage from his judgment cited in paragraph 16 of this Case.

The learned judge began his consideration of the second alternative by summarising the evidence of the Respondent's witnesses about the advantages which it supposedly derived from the ownership of the land. This passage has been cited in paragraph 9 of this Case. The learned judge continued:-

" But evidence of this character, even if given complete credence, means only that by (p.158 l.26)

owning the subject land the hospital derived the negative advantage of being able to exclude any form of development which it might not wish to see in that portion of its neighbourhood, and the positive advantage of being able to make any future use of the land which it might think desirable. It is surely undeniable that a bare holding of land is neither a use nor an occupation of it, and it makes no difference that the reasons which lead the owner to retain the land unused and unoccupied are logically connected with the pursuit of purposes which he is securing by means of a use or occupation of other land. When it is said that the Hospital owned the 291 acres in the relevant years, all has been said that can be said of the relation of the Hospital to that land in those years. And that is not enough to bring the case within s.132(1)(d)."

16. Taylor J. was for dismissing the appeal.

p.163 l.37

" Although the evidence is scanty the picture as I see it is that in 1944 a project was envisaged and that the carrying on of this project required, in the view of those responsible for it, appropriation of land additionally to that already owned by the hospital..... The hospital, itself, was concerned with but a single piece of land devoted to one object and thought to be necessary for carrying out of that object. And nothing appears to suggest to my mind that the whole area did not remain devoted to this purpose during the whole of the relevant period.....

p.164 l.42

" In my opinion where a hospital acquires or sets apart for a project which may properly be described as a purpose of a public hospital, a tract of land which it considers is the minimum requirement for its contemplated project and thereupon proceeds to carry out that project it, thereby, uses the whole of the land."

p.152

17. Webb J. agreed with the judgments of Williams and Taylor JJ. and was for dismissing the appeal.

18. It is respectfully submitted that the appeal should be allowed for the following (among other)

REASONS

(1) BECAUSE the Respondent did not use the land in question, alternatively, did not use it for the purposes of a public hospital.

(2) BECAUSE the Respondent did not occupy the land in question, alternatively, did not occupy it for the purposes of a public hospital.

(3) BECAUSE the judgments of Owen J. in the Supreme Court of New South Wales and of Fullagar and Kitto JJ. in the High Court of Australia were right and should be upheld.

(4) BECAUSE the judgments in favour of the Respondent were wrong and should be reversed.

B. MacKENNA

PETER OLIVER.

No. 38 of 1958

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :-

THE COUNCIL OF THE CITY OF NEWCASTLE	Appellants

\- and -

ROYAL NEWCASTLE HOSPITAL ...	Respondent

C A S E

FOR THE

A P P E L L A N T

KIMBERS,
34, Nicholas Lane,
London, E.C.4.

(c) Because the applications to the Metropolitan Licensing Court mentioned in paragraphs 42 and 43 hereof were an attempt by the Respondent Company to build or to cause to be built upon the demised land or part thereof a building of which the Appellant disapproved.

(d) Because such applications were in breach of the covenants and obligations of the lease between the Appellant and the Respondent Company.

(e) Because the Respondent Company threatened to build or to cause to be built on the demised land or a part thereof a building not in conformity with the respondent Company's covenants in the said lease. 10

(f) Because the Respondent Company threatened to build or to cause to be built on the demised land or part of it a building not in conformity with the contractual arrangements subsisting between the parties and the Appellant's rights arising thereunder.

(g) Because of the reasons hereinbefore set forth particularly in paragraphs 63, 64 and 65 hereof.

(h) Because the judgment of *McLelland J.* was erroneous.

G. E. BARWICK.
HERMANN JENKINS

Sydney: V. C. N. Blight, Government Printer—1958

No. 19 of 1958

In the Privy Council

ON APPEAL

from the Supreme Court of New South Wales in its Equitable Jurisdiction in Suit instituted by Statement of Claim No. 1231 *of* 1956

BETWEEN

THE COMMISSIONER FOR RAILWAYS *Appellant*

AND

AVROM INVESTMENTS PTY. LIMITED AND JOHN BONAVENTURE LIMERICK *Respondents*

AND BY AMENDMENT made the Eleventh day of April 1957 pursuant to leave granted on the Ninth day of April 1957

BETWEEN

THE COMMISSIONER FOR RAILWAYS *Appellant*

AND

AVROM INVESTMENTS PTY. LIMITED, JOHN BONAVENTURE LIMERICK AND JOHN BIRKETT WAKEFIELD . *Respondents*

Case for the Appellant

LIGHT & FULTON,
24 John Street,
London, W.C.1,
Solicitors for the Appellant The Commissioner for Railways