[HIGH COURT OF AUSTRALIA.]

CHURCH OF ENGLAND PROPERTY TRUST, DIOCESE OF SYDNEY, . } APPELLANT;

PLAINTIFF,

AND

METROPOLITAN MUTUAL PERMANENT BUILDING AND INVESTMENT ASSOCIATION LIMITED . . . . } RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 2, 15.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Landlord and Tenant—Covenant by lessee to pay during the term rates assessed or imposed in respect of demised premises—Water rates—Levied during the term for period extending beyond the term—Payable in advance—Rate notice not served during the term—Liability of tenant—When payment enforceable—"Assessed" or "imposed"—Metropolitan Water, Sewerage, and Drainage Act 1924-1930 (*No.* 50 *of* 1924—*No.* 6 *of* 1930) (*N.S.W.*), *secs.* 87, 89-91, 96, 100*, 101 (1)*, (5)*, *Fourth Schedule.*

A tenant covenanted that he would forthwith during the term of the lease pay all taxes, rates, assessments and impositions that were assessed or imposed upon or in respect of the demised premises. The term of the lease expired on 1st August 1931. In pursuance of its statutory powers the Metropolitan Water, Sewerage and Drainage Board in May 1931 by resolution levied water,

* The *Metropolitan Water, Sewerage, and Drainage Act* 1924-1930, sec. 100, provides that "With regard to rates . . . the provisions contained in the Fourth Schedule to this Act shall have effect." The Fourth Schedule provides (*inter alia*), that "2. Rates shall be levied annually by resolution of the Board, a copy of which resolution shall be published in the *Gazette* . . . 3. Rates shall be levied in the month of May in each year for the twelve months commencing on the first day of July then next. 4. Rates shall be payable annually in advance on the first day of July, or may in a particular case with the approval of the Board be paid by instalments. 5. The owner or occupier of land shall become liable to the payment of rates upon the service by the Board on him of a rate notice in the form prescribed . . . 18. Rates shall, except where otherwise expressly provided, be payable by the

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sewerage and drainage rates, which were payable in advance, in respect of the demised premises for the year commencing 1st July 1931. A copy of the resolution was published in the Government *Gazette* but no notice of the rates was served before the expiration of the lease.

Held, by the whole Court, that the rates were assessed or imposed in respect of the demised premises within the meaning of the covenant; and by *Gavan Duffy* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that as the rates were payable before the expiration of the lease, the tenant was bound by his covenant to pay them.

Quære, *per Evatt* J., whether the tenant's liability was not limited to such part of the rates as was referable to the period between 1st July 1931 and the end of the term.

Per Gavan Duffy C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ.: A rate notice under the *Metropolitan Water, Sewerage, and Drainage Act* 1924-1930 (N.S.W.) operates to create a personal liability in the owner or occupier served, and to impose a charge upon the land in respect of a rate already "levied" and already "payable." If the rate is not voluntarily paid, the Board cannot enforce payment unless notice is served.

Decision of the Supreme Court of New South Wales (Full Court): *Church of England Property Trust, Diocese of Sydney*, v. *Metropolitan Mutual Building and Investment Association Ltd.* (1932) 32 S.R. (N.S.W.) 329, reversed.

APPEAL from the Supreme Court of New South Wales.

The Church of England Property Trust, Diocese of Sydney, brought an action against the Metropolitan Mutual Permanent Building and Investment Association Ltd. to recover the amount of certain taxes, rates, assessments and impositions which it claimed it had been compelled to pay to the Metropolitan Water, Sewerage and Drainage Board owing to the failure of the defendant to do so, and alleged that the liability therefor had been undertaken by the defendant under a covenant in a lease entered into in 1881, by which the plaintiff's predecessors let certain premises to the defendant, for a term of fifty years which expired on 1st August 1931. By the covenant sued upon the

owner of the land in respect of which the rate notice is served . . . 23. Where a ratable person disposes of his estate or interest in the land, he shall nevertheless be a ratable person and liable for the rate to the same extent as if he had not disposed of his estate or interest, provided that the rate notice is served either (*a*) before he disposes of his estate or interest; or (*b*) before a notice of transfer . . . is given. 31. (1) Every rate under this Act . . shall be a charge on the land in respect of which a rate notice is served . . . " Sec. 101 of the Act provides that "(1) Any person may apply for a certificate under this section as to the amount (if any) due or payable to the Board for rates . . . in respect of any land . . . (5) For the purposes of this section, rates . . . shall be deemed to be due or payable notwithstanding that the requisite period after service of any notice may not have expired."

defendant covenanted with the plaintiff that it would forthwith during the said term pay all taxes, rates, assessments and impositions whatsoever, whether parliamentary, municipal or otherwise, which then were, or should at any time or times thereafter be, assessed or imposed upon or in respect of the demised premises, or upon the owner or his lessee or lessees thereof or on any building which should or might be erected thereon. The first plea of the defendant is not material to this report, but in its second plea the defendant alleged that "the taxes rates assessments and impositions in the declaration mentioned were not during the said term assessed or imposed upon or in respect of the said demised premises or upon the owner or the lessee . . . thereof or on the buildings erected thereon but on the contrary were water rates and sewerage rates and drainage rates in respect of the said demised premises levied under and in accordance with the *Metropolitan Water, Sewerage, and Drainage Act* 1924-1930 for the twelve months commencing on the first day of July 1931 in respect whereof no rate notice was served upon any person during the said term." To this the plaintiff demurred on the grounds (1) that the rates in question which had been levied under the Act referred to were taxes, rates, assessments or impositions which during the said term were assessed or imposed within the meaning of the covenant, and (2) that it was immaterial that the notice of such rates was not served during the said term.

In pursuance of the powers conferred upon it, the Metropolitan Water, Sewerage and Drainage Board in May 1931 passed a resolution levying the rates in question, and a copy of such resolution was published in the Government *Gazette*, but no notice of the rates so levied was served before the expiration of the term of the lease.

The Supreme Court held that the levying of the rate merely determined the amount that was required to be paid, and that the liability to pay such rates did not arise until a rate notice had been served in the prescribed form, and gave judgment on the demurrer for the defendant: *Church of England Property Trust, Diocese of Sydney*, v. *Metropolitan Mutual Building and Investment Association Ltd.* (1)).

From this decision the plaintiff now appealed to the High Court.

(1) (1932) 32 S.R. (N.S.W.) 329.

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Loxton K.C. (with him *Mann*), for the appellant. The liability for the rate under the *Metropolitan Water, Sewerage, and Drainage Act* 1924-1930 arises when it is "levied" in the manner indicated by the Act. Such liability is in no way contingent upon the service of a notice of the rate in question. As soon as the rate was struck by the Board's resolution in May 1931, the land became subject to the burden. The Act does not impose an obligation on the Board to give notice of a rate in any particular year. The Act provides that the rate must be struck in May of each year, and that such rate shall become payable on 1st July then next following. Immediately the Board passed the resolution levying the rate, there was an assessment and an imposition within the meaning of the covenant. Although the service of a notice may be essential to create personal liability, it is not essential as regards creating a charge on the land: such a charge is created upon the making of the rate. As to what amounts to an "assessment" and a "rate" respectively, see *Mogg* v. *Clark* (1). For the meaning of "imposed" see *In re Floyd*; *Floyd* v. *J. Lyons & Co.* (2). An imposition is an obligation; "imposed" is used as creating a charge (*Badcock* v. *Hunt* (3)). As the Act specifically states that the rate is payable during July, it is a rate "assessed or imposed upon or in respect of the . . . demised premises" and payable during the "term" within the meaning of the covenant. Effect should be given to the true construction of the covenant irrespective of whether or not hardship is caused to any party thereby (*Wix* v. *Rutson* (4); *Greaves* v. *Whitmarsh, Watson & Co.* (5); *Sweet* v. *Seager* (6)). The object of the covenant was to secure to the landlord the full amount of the rent reserved, free of all deductions whatsoever, disregarding entirely how the liability for such deductions arose. The liability to pay should not depend upon some person beyond the control of the parties; that is, upon whether and when rate notices are served by the Board. The covenant was intended by the parties to include all rates or assessments struck or made in respect of the demised premises during the term of the lease. Effect should be given to the intention of the parties as expressed in the language used by them.

(1) (1885) 16 Q.B.D. 79, at pp. 81, 82.
(2) (1897) 1 Ch. 633.
(3) (1888) 22 Q.B.D. 145.
(4) (1899) 1 Q.B. 474.
(5) (1906) 2 K.B. 340.
(6) (1857) 2 C.B. (N.S.) 119; 140 E.R. 357.

Jordan K.C. (with him *Kitto*), for the respondent. Apart from the opening words the covenant to pay is general and unqualified. The obligation to pay is qualified by the words " during the said term," which is a significant limitation. The covenant is restricted in its operation to such " taxes rates assessments and impositions " as are payable within the term. Unless an obligation to pay comes into existence during the term, it cannot be comprehended to come within the scope of the covenant. Clause 5 of the Fourth Schedule to the Act shows that rates are payable by an owner of land upon service of a rate notice, and clause 23 shows that service of such a notice creates the obligation to pay. See also sub-sec. 5 of sec. 101 of the Act. The words " in respect of " appearing in the covenant refers to cases where only personal liability is created.

Cur. adv. vult.

The following written judgments were delivered :— Aug. 15.

GAVAN DUFFY C.J., RICH, STARKE, DIXON AND MCTIERNAN JJ. The judgment under appeal decided that the burden of water rates, sewerage rates and drainage rates which were levied under the *Metropolitan Water, Sewerage, and Drainage Act* 1924-1930 for the twelve months commencing on 1st July 1931 in respect of premises demised for a term of years expiring on 1st August 1931 fell upon the landlord and not the tenant. The question was decided on demurrer, and, upon the state of the record, it must be taken that in May 1931 a resolution of the Board levying the rates was passed and published in the *Gazette*, but that no notice of the rates was served before the expiration of the term. The lease contained a covenant by the tenant with the landlord that the tenant " should and would forthwith during the said term pay all taxes rates assessments and impositions whatsoever whether parliamentary municipal or otherwise which then were or which should at any time or times thereafter be assessed or imposed upon or in respect of the said demised premises or upon the owner or the lessee or lessees thereof or on any building which should or might be erected thereon." In this covenant the limitation of time contained in the words " during the said term " is attached to the word " pay," and no

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express limitation of time is placed upon the description of outgoing to be paid. No doubt the fact that the covenant was annexed to a term of years would be enough to restrain its operation to burdens with which the land became saddled before the expiration of the lease. But the express restriction of the obligation of payment to the period of the lease necessarily implies that the burdens to which it relates must within that period be susceptible of discharge by payment. Thus the covenant obliges the tenant to pay only those taxes, rates, assessments and impositions which before 1st August 1931 have been so assessed or imposed that they may properly be paid before that date even if something further be necessary before payment can be enforced by legal process.

The tenant's contention that the covenant does not cover rates for the year beginning 1st July 1931 rests upon the circumstances that until a rate notice is served no liability to pay the rate is imposed upon the owner or occupier or any other person, and no charge affects the land (*Metropolitan Water, Sewerage, and Drainage Act* 1924-1930, sec. 100; Fourth Schedule, clauses 5, 18, 31 (1); sec. 101 (5). On the other hand, the Schedule also contains these provisions:—" 2. Rates shall be levied annually by resolution of the Board, a copy of which resolution shall be published in the *Gazette*: The production of the *Gazette*, or the part thereof containing the resolution, shall be evidence of the due levying of a rate. 3. Rates shall be levied in the month of May in each year for the twelve months commencing on the first day of July then next. 4. Rates shall be payable annually in advance on the first day of July, or may in a particular case with the approval of the Board be paid by instalments."

Thus, when the resolution of the Board appears in the *Gazette*, the rate is " levied " and the Board becomes entitled in respect to each parcel of land included in the rate to receive the sum of money apportioned to it. These sums are receivable on 1st July, and are applicable as a subvention to the Board's funds for the ensuing year. This does not mean that an immediate remedy then exists against the land or any person, but that, the land being ratable, a sum certain is apportioned to it which the Board is entitled to reduce into possession as from 1st July. If it is not voluntarily paid, the

Board cannot enforce payment unless notice is served. But the notice operates to create a personal liability in the owner or occupier served and to impose a charge upon the land in respect of a rate already "levied" and already "payable."

For these reasons we think the rate was an assessment or imposition assessed or imposed in respect of the demised premises during the term so that it might properly be paid before the end of the lease. It follows that, in our opinion, it fell within the covenant and constituted a burden which the tenant was bound to discharge.

The appeal should be allowed and judgment should be entered for the plaintiff on the second plea.

EVATT J. The question which is raised for decision by the demurrer to the respondent's second plea is whether the appellant is entitled to recover the amount of water and sewerage and drainage rates in respect of certain demised premises, no rate notice in respect of such rates having been served upon any person during the currency of the lease. The lease between the parties was for a term of fifty years, expiring on August 1st, 1931. The plea admits that the respondent is to be taken as having covenanted that it "should and would forthwith during the said term pay all taxes rates assessments and impositions whatsoever whether parliamentary municipal or otherwise which then were or which should at any time or times thereafter be assessed or imposed upon or in respect of the said demised premises or upon the owner or the lessee or lessees thereof or on any building which should or might be erected thereon."

Despite its argumentative form, it must also be taken as admitted by the plea that the rates for the amount of which the appellant is suing, were duly levied in pursuance of the *Metropolitan Water, Sewerage, and Drainage Act* 1924-1930 in respect of the period of twelve months commencing on July 1st, 1931. The plea fails as such unless the mere absence of service of notice of the rates until after August 1st, 1931 (the end of the term), is sufficient to exclude the rates from the area of obligation covered by the language of the covenant.

For the purpose of conducting its services, the Board may "levy" water, sewerage and drainage rates (sec. 87). Water rates (sec. 89),

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sewerage rates (sec. 90), and drainage rates (sec. 91) are "levied upon land." The basis of rating is determinable under sec. 96. The Fourth Schedule of the Act deals with rates, charges and fees. Under its provisions, rates are levied annually in the month of May for the twelve months commencing on the 1st July then next. Rates are payable annually in advance on July 1st, but may be paid by instalments. The owner or occupier of land "shall become liable to the payment of rates upon the service by the Board on him of a rate notice in the form prescribed" (clause 5). A rate is payable in respect of each separate parcel of land and every rate is to be entered in a rate book.

The lessee's obligation under the covenant is to pay during the term, not only (1) those rates and impositions assessed or imposed "upon . . . the said demised premises," and (2) those assessed or imposed upon the owner or the lessee thereof, but also (3) all "rates assessments and impositions . . . assessed or imposed . . . *in respect of* the said demised premises." The lessee's covenant therefore operates not only in respect of rates charged upon or chargeable against the land itself and in respect of rates chargeable against the owner or lessee, but also in respect of rates imposed "in respect of" the premises.

This last description is answered by the rates duly levied in respect of the demised premises by the Board in May 1931, and it is nothing to the point, either that the procedure of affixing personal liability to owner or occupier had not crystallized in a notice, or that the rates levied did not make the land itself subject to any statutory charge. The covenant assumes that as soon as the appropriate steps are taken, rates and impositions "in respect of" the premises will have to be met by owner or lessee; and it selects as an appropriate time of affixing liability to the lessee, the time of issue or levy of the rates or imposition. It follows that the plea was bad in substance, and the plaintiff's demurrer should have succeeded.

Although the matter is not raised by the pleadings which are before us, a question may arise whether the covenant means to make the lessee liable to pay rates and impositions in respect of a period extending beyond the termination of the lease, or whether his liability is limited to impositions in respect only of the period

of duration of the lease. The covenant is to pay "during the said term" but there is no express limitation of the rates and impositions chargeable against the lessee to those imposed "during the said term." This follows however by implication, and what I have said proceeds upon the basis that the plea admits that the imposition was made, as an imposition, before the expiry of the lease. But it was an imposition in respect of a period of twelve months, during only one of which the lease was to continue in existence. Was it intended that the lessor should obtain the benefit of his lessee's payment of rates in reference to any period of time after the end of the lease?

It may be that, on its true construction, the covenant operates to limit the lessee's liability, in case of rates and impositions expressed to be in respect of a period of time extending beyond the date of termination of the lease, to such part of the rates and impositions as are referable to the remaining period of the lease. This argument is possible, not because the covenant expressly provides for apportionment, for it does not; but because its purpose may be to secure to the landlord a net rental, without deduction for rates and impositions, but to secure it only for the period in respect of which the rental was payable, that is, the period of the term.

As the question I have stated was not fully argued, and does not, strictly speaking, yet arise, I refrain from expressing an opinion upon it. So far as the demurrer is concerned the plaintiff succeeds, and the appeal must be allowed.

Appeal allowed with costs. Judgment of the Supreme Court discharged. Judgment for the plaintiff upon the demurrer. Defendant to pay the costs of the demurrer.

Solicitors for the appellant, *Norton, Smith & Co.*

Solicitor for the respondent, *J. C. Elphinstone.*

J. B.