SUPREME COURT OF QUEENSLAND

CITATION:	*Xstrata Coal Qld P/L & Ors v Council of the Shire of Bowen* [2010] QCA 170
PARTIES:	**XSTRATA COAL QUEENSLAND PTY LTD** ACN 098 156 702 (first applicant/first appellant) **ITOCHU COAL RESOURCES AUSTRALIA PTY LTD** ACN 072 596 733 (second applicant/second appellant) **ICRA NCA PTY LTD** ACN 106 260 584 (third applicant/third appellant) **SUMISHO COAL AUSTRALIA PTY LTD** ACN 061 524 249 (fourth applicant/fourth appellant) **v** **COUNCIL OF THE SHIRE OF BOWEN** (respondent)
FILE NO/S:	Appeal No 14124 of 2009 SC No 8239 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2010
JUDGES:	Chief Justice, Holmes and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The Council's resolution of 27 June 2007 by which it made and levied a general rate of:** **a) 28.79 cents in the dollar on the unimproved value of land within differential rating category 11;** **b) 12.01 cents in the dollar on the unimproved value of rateable land within differential rating category 17;** **c) 54.38 cents in the dollar on the unimproved value of rateable land within differential rating category 19;**

d) 13.676 cents in the dollar on the unimproved value of rateable land within differential rating category 20;

is set aside.

3. The rates notices bearing the following assessment numbers are set aside:

a) 04054-00000-000 dated 15 August 2007;
b) 04058-80000-000 dated 15 August 2007;
c) 04047-50000-000 dated 15 August 2007;
d) 05457-20000-000 dated 15 August 2007;
e) 05458-10000-000 dated 15 August 2007;
f) 05457-20000-000 dated 20 September 2007.

4. The respondent to pay the appellants' costs of and incidental to the appeal, and of the trial.

CATCHWORDS: REAL PROPERTY – RATES AND CHARGES – RATING OF LAND – REVIEW OF DECISIONS – APPEALS – QUEENSLAND – where appellants own and operate coal mines – where respondent Council, by resolution, adopted a revenue policy for 2007-2008 whereby it charged differential general rates in respect of 20 categories of land – where appellants between them owned all the land falling in four of those categories – where respondent issued appellants with rates notices charging the increased rate – where trial judge dismissed appellants' application for judicial review of the resolutions – whether the respondent, in fixing the differential rate with respect to each category, took into account the appellants' personal capacity to pay rates – whether the appellants' capacity to pay was an irrelevant consideration – whether primary judge erred – whether the resolution and rates notices should be set aside

Local Government Act 1993 (Qld), s 513A, s 518, s 519, s 520A, s 520A(2), s 963, s 964, s 966, s 976, s 977, s 978, s 979
Valuation of Land Act 1944 (Qld), s 3, s 17, s 72

Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537, cited

COUNSEL: W Sofronoff, with S Hooper, for the appellants
R Gotterson, with S Fynes-Clinton, for the respondent

SOLICITORS: Allens Arthur Robinson for the appellants
King & Company Solicitors for the respondent

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **HOLMES JA**: I agree with Chesterman JA that the learned primary judge erred in concluding that the capacity of a landowner to pay, independent of any quality of the subject land, was a relevant consideration in the decision to set rates. Accordingly, I agree with the orders his Honour proposes.

[3] **CHESTERMAN JA**: The appellants jointly own and operate two coal mines which are located within what was formerly the Bowen Shire. They commenced proceedings for judicial review against the respondent, which was the former local government authority for that area. It merged into a newly formed local authority, the Whitsunday Regional Council, during the course of the litigation. The application for judicial review was allowed to continue, notwithstanding the respondent's loss of its identity, pursuant to s 56 of the *Local Government Reform Implementation Regulation* 2008.

[4] On 13 June 2007 the respondent ("the Council") resolved to adopt a revenue policy for the financial year 2007-2008 which included particular policies with respect to levying rates and charges. On 27 June 2007 the Council resolved to adopt a revenue statement which included a policy of charging differential general rates for the year. The resolution determined that there should be 20 separate categories of land. By a separate resolution passed at the same meeting the Council adopted a differential general rate for each of the 20 categories.

[5] The land comprising five of the 20 categories was used for coal mining. The appellants between them owned all the land which fell within four of the categories, 11, 17, 19 and 20.

[6] Category 11 was described as:

> "… Land used for the purposes of and incidental to the extraction of coal outside a radius of 50 kilometers (sic) of a major township in the Bowen Shire".

A general rate of 28.79 cents in the dollar was applied to that category.

Category 17 was:

> "… Land used for the purposes of and incidental to the extraction of coal within a radius of 50 kilometers (sic) of a major township in the Bowen Shire with a UCV between $1 to $250,000 inclusive".

The rate applicable to this category was 12.01 cents in the dollar.

Category 19 was:

> "… Land used for the purposes of and incidental to the extraction of coal within a radius of 50 kilometers (sic) of a major township in the Bowen Shire with a UCV between $600,001 to $1,000,000 inclusive".

The applicable rate was 54.38 cents in the dollar.

Category 20 was:

> "Land used for the purposes of and incidental to the extraction of coal within a radius of 50 kilometers (sic) of a major township in the

> Bowen Shire with a UCV between $1,000,001 to $4,000,000 inclusive".

The rate for this category was fixed at 13.676 cents in the dollar.

[7] The acronym ("UCV") is, of course, a reference to the unimproved capital value of the land.

[8] Pursuant to its resolutions the Council issued rates notices to the appellants which in total charged the sum of $437,826.21 by way of general rates for a half year with respect to the four categories. The amount represents an increase of more than 400 per cent over the rates levied for the previous half year. The amount in one rate notice was a tenfold increase over the corresponding previous period.

[9] The appellants commenced proceedings for judicial review of the Council's resolutions claiming that in fixing the categories of coal mining land, 11, 17, 19 and 20, and more particularly in fixing the differential rates with respect to each category, the Council took irrelevant considerations into account. The application was dismissed on 18 November 2009. The appellants challenge the dismissal of their application and seek orders that the resolution and rates notices be set aside.

[10] The appeal was efficiently and economically argued. In the end one point only remained in contention. It was whether the Council, in resolving on the particular categories of land, and in fixing the differential rate with respect to each category, took into account the capacity of the appellants, who owned the land in the four categories, to pay the increased rate of burden. The appellants argue that it did and that the consideration was irrelevant so that the resolution was vitiated by error. Before dealing with the arguments, and the primary judge's reasons, it is convenient to set out some relevant statutory provisions.

[11] The starting point is s 72 of the *Valuation of Land Act* 1944 ("*Valuation Act*") which provides that the annual valuation conducted pursuant to the *Valuation Act* is to be the unimproved value of land for the purposes of the Act. Section 3 and s 17 of the *Valuation Act* contain an elaborate definition of unimproved value.

[12] Section 513A of the *Local Government Act* 1993 ("the Act") requires local governments to prepare, and adopt by resolution, a revenue policy for each financial year. By s 518 each financial year local governments must adopt by resolution a budget and a revenue statement. By s 519 every budget must be developed consistently with the local authority's revenue policy.

[13] By s 520A(2) if a local government proposes to make and levy a differential general rate for a financial year its revenue statement must set out:

> "(i) the categories into which rateable land … is to be categorised; and
>
> (ii) the criteria by which land is to be categorised … ".

[14] Section 963 provides that:

> "A local government may, for a financial year, make and levy –
>
> (a) a general rate or differential general rates … ".

By s 964, a differential general rate may only be made for a financial year by resolution passed at the local government's budget meeting for the year.

[15] Section 966 provides:

> "(1) Before a differential general rate is made and levied, rateable land must be categorised into 2 or more categories under part 3.
>
> (2) A differential general rate made and levied on rateable land in a category may be the same as or different to the differential general rate made and levied on land in another category.
>
> (3) If a local government makes and levies a differential general rate for rateable land for a financial year, the local government must not make and levy a general rate for the land for the year.
>
> (4) …
>
> (5) … ".

[16] Sections 976 to 979 are in Part 3 of the Act. They provide:

> 976: "**Land must be categorised for differential general rates**
>
> A local government may make and levy a differential general rate for a financial year only if all the rateable land in its area has been categorised under this part".
>
> 977: "**Establishing criteria and categories**
>
> Before making and levying a differential general rate for a financial year, a local government must decide by resolution –
>
> (a) the categories into which rateable land in its area is to be categorised; and
>
> (b) the criteria by which land is to be categorised".
>
> 978: "**Identification of categories for parcels of land**
>
> (1) After the categories and criteria have been decided, all rateable land in the … area must be categorised … identifying the category in which each parcel of rateable land is included.
>
> (2) The category in which a parcel of rateable land is included may be identified in any way the local government considers appropriate".
>
> 979: "**Specification of categories for parcels of land**
>
> (1) If a local government resolves to make and levy a differential general rate, the resolution must specify the categories in which rateable land is to be included.
>
> (2) …
>
> (3) … ".

[17] The first question raised by the appeal is one of fact: did the Council take into account the appellants' capacity to pay the increased rates when resolving to levy differential general rates for categories of land 11, 17, 19 and 20? There is no doubt

it did. The learned primary judge made that finding, counsel for the respondent conceded the point, and the evidence is all one way.

[18] The learned judge noted at [44]-[45] that the appellants had submitted:

> "… that the Council's rating decisions are invalid, as the Council took into consideration the ability of landowners to pay the rates proposed … .
>
> It does not seem to be in issue and it is apparent from a number of documents, that the Council took this matter into account in making these decisions". (footnote omitted)

[19] The Council's revenue policy, which it adopted on 13 June 2007:

> "… set out the principles used by Council … for:
> - The making of rates and charges (and)
> - The levying of rates … ".

One of the principles the policy expressed was:

> "Equity by taking account of the different levels of capacity to pay within the local community … ".

The revenue statement adopted by resolution on 27 June 2007 expressed the opinion:

> "… that a more effective system of differential general rating will achieve a fairer and more equitable distribution of the rating burden to the extent that it provides a system which:-
> - …
> - more effectively relates to the ratepayers' ability to pay to the level of benefit received from the expenditure of rates revenue … ".

[20] As well the Council's Chief Executive Officer accepted in cross-examination that the differential rates were set by:

> "work(ing) out how much could be taken from … owners of land in the (4) categories … given (their) ability to pay."

[21] The appellants submit that by taking capacity to pay into account, the Council's resolution fixing the differential general rates for their land in categories 11, 17, 19 and 20 is vitiated because their presumed capacity to pay was irrelevant to the decision. They argue the Act did not contemplate anything other than some attribute or characteristic of the land which was to be categorised and differentially rated being taken into account when determining the rate. The appellants submit that what might be taken into account were such things as the use to which the land might be put, including its highest and best use, the burden the land or its use may have upon the Council's budget and, of course, the value of the land including its potential to earn income for the land owner. The appellants submit, emphatically, that the Council was not entitled to take into account any characteristic of the owner of the land, such as wealth, when fixing a differential rate.

[22] The submission, must, I think, be accepted. It is clear from the statutory provisions earlier set out, and in particular s 520A and s 977, that a differential general rate must be set by reference to some attribute of the land which is the basis for its inclusion in a particular category for the purposes of setting a differential general

rate. That is to say, if a Council is to utilise the statutory powers to set a differential general rate it must divide the land in its area into categories; and the categorisation must occur by reference to identifiable criteria which in some way describe the land. The fact that a differential general rate must be applied to each category is an explicit statutory recognition that it is some attribute of the land which leads to its categorisation which in turn forms the basis for the setting of the differential rate.

[23] Richardson P in giving the judgment of the Court of Appeal (the President, Gault, McKay, Keith and Blanchard JJ) in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 noted (546):

> "… rates are levied on property, not on ratepayers as such and, materially for present purposes, the criteria specified under s 81 are directed to the characteristics of property rather than of ratepayers."

[24] The case concerned a challenge to a differential rate levied by the Wellington City Council on commercial property which was higher than that levied on residential properties. Section 81 of the *Rating Powers Act* 1988 specified how property was to be categorised for differential rating purposes. A type or group of property could be determined "according to any one or more of" specified criteria, being the use to which land was put, the activities allowed on it, the area of the land, its situation within the local government area and "Such other distinctions in relation to the characteristics of a property as the local authority thinks fit".

[25] Section 81 of the New Zealand legislation was more explicit and detailed than the provisions of the Act which allow for differential rating, but for both the relevant consideration are attributes of the land. The President's remark, that rates are levied on properties not property owners, is entirely apposite.

[26] As I mentioned, the Council accepts the point. Its written submissions concede:

> "that setting rates on an individual ratepayer basis quantified by reference to the individual's financial resources, would not be lawful."

It submits however that the differential rates in question were not set by reference to the appellant's capacity to pay, and that the learned primary judge's reasons were not to that effect. Rather, the Council submits that the financial capacity taken into account was that derived from the potential of the lands in question to generate income and wealth. That capacity is, it is submitted, an attribute of the land which could properly form the basis for setting a differential rate.

[27] The point in contention on the appeal therefore condenses to this: were the differential rates set by reference to the appellant's *personal* capacity to pay rates, or by reference to the capacity of the *land* in the separate categories to produce the capacity to pay? If it were the former, the terms of the Act, authority and the respondent's concession would invalidate the Council's resolutions. If it were the latter, the appellants' challenge to the resolution and the rates would fail.

[28] A perusal of the primary judge's reasons for judgment establishes, in my opinion, that the application was argued before his Honour, and decided by him, on the basis that the appellants' personal capacity to pay was taken into account in setting the differential general rates. His Honour said:

> "[63] However, even if general notions of what is just and equitable determine what considerations are relevant in

> imposing differential rates under the *LGA*, or are decisive of the validity of those rates, it does not follow that the decisions made by the Council in the present case are invalid. No general principle has been established that considerations of what is just and equitable prevent an entity imposing a statutory charge from taking into account capacity to pay. The Council's submissions point out that the system of income taxation in this country involves progressive rates, both the total tax payable and rates increasing as a taxpayer's income increases. The Council's submissions also point out that in the general rating system under the *LGA*, rates are imposed by reference to the unimproved value of rateable land. Thus rates are imposed by reference to a measure which, at least to some extent, is reflective of the assets owned by a ratepayer. …

[64] General considerations as to what is just and equitable do not provide a very firm or clear criterion for determining what considerations are relevant or irrelevant to the exercise of statutory rating powers. It may be that if such considerations are relevant to the validity of a decision to impose rates … , they are relevant because a decision which offends against them is arbitrary, capricious or irrational. In my view, they do not otherwise provide a meaningful criterion for determining whether a consideration is irrelevant to a decision to impose differential general rates. In any event, I am of the opinion that the consideration of a ratepayer's ability to pay rates is not precluded by reference to a consideration of what is fair and equitable.

[65] The applicants also contend that under the *LGA*, a person's capacity to pay rates is consigned to the stage at which payment is to be enforced. They rely on Chapter 14, Part 6 of the *LGA*, which expressly authorises a local government to grant concessions to landowners with a limited capacity to pay rates, or to whom the payment of rates causes hardship. In my view, the conferral of a specific power to grant relief from enforcement in individual cases does not give rise to an implication that the capacity to pay a rate is irrelevant to a decision to impose the rate.

[66] It was orally submitted on behalf of the applicants that the decision to impose the rates on coal mining land on the basis of the applicants' capacity to pay was capricious and arbitrary. Examples were offered in support of its submissions. One analogy was with the imposition of relatively high rates on a wealthy owner of a remote parcel of land which imposed little burden on the Council. Another was with the imposition of a high level of rates on land owned by members of a particular profession.

[67] In my view, it is not inevitable that a decision to impose a greater proportion of the rates burden on more wealthy

> landowners simply because of their greater capacity to pay is capricious or arbitrary. As has been mentioned, such an approach is implicit in a progressive tax system; and it is not entirely unrelated to the general rating system under the *LGA*, where rates are frequently imposed by reference to the unimproved value of land, irrespective of the demand which results from the use or occupation of that land on services provided by the local government. A decision to impose a greater proportion of the rates burden on some, but not all, wealthy landowners, where there is no rational basis for distinguishing amongst such owners, may well be arbitrary or capricious, but the applicants did not advance such a case.
>
> [68] The submissions, and the examples, do not come to grips fully with the decision made by the Council. In essence, the Council considered that coal mining activities resulted in the imposition of higher financial burdens on the Council in performing its functions; that the presence of coal mines in its local government area reduced the amount of financial assistance received below what it otherwise would be (a matter discussed later in these reasons); and that the persons who own land on which coal mining is carried out are likely to have the capacity to pay the proposed rates. The decisions in the examples are significantly different from the decisions in the present case.
>
> [69] …
>
> [70] The applicants have also submitted that while it might have been lawful for the Council to take into account the capacity of the land to generate income, but that is to be distinguished from the ability of the owners of the land to pay rates; and that in the present case, the Council has taken the latter into account. For reasons already stated, I do not consider that this is an irrelevant consideration, which would vitiate its decisions". (footnote omitted)

[29] His Honour's references to:

- "a wealthy owner of a … parcel of land"
- "a greater proportion of the rates burden on more wealthy landowners … "
- "persons who own land on which coal mining is carried out are likely to have the capacity to pay … "

are substantial indications that the primary judge was considering the individual wealth of ratepayers when addressing the question whether their capacity to pay was a factor which the Council might, as a matter of law, relevantly take into account when determining the differential rates.

[30] It is clear from the terms in which his Honour expressed his reasons in paragraph [70] that the distinction now emphasised was raised at trial. The appellants' case was put on the basis that the Council had unlawfully taken into account their personal ability to pay rates. The trial judge decided the application on that basis,

concluding for the reasons given, that personal capacity to pay was not irrelevant to the decision making process. In that he was, with respect, mistaken. That determination was the basis for the primary judgment.

[31] His Honour summarised the considerations which were taken into account by the Council in fixing the differential rates. They were:

> (i) Coal mining activities imposed higher financial burdens on the Council than other land use;
>
> (ii) Coal mines within its area reduced the amount of financial assistance received pursuant to the *Local Government (Financial Assistance) Act* 1995 (Cth));
>
> (iii) Persons who own land on which coal mining is carried out are likely to have the capacity to pay the proposed differential rate.

The third factor was not expressed by his Honour to be a capacity limited to, or originating from, the coal mining land. It is expressed as a separate, distinct criterion which described an attribute of the owner, not of the land.

[32] Reference to the Council's submissions before the primary judge corroborate the opinion that the issue at trial was whether the Council could legitimately take into account the appellants' wealth or, as the Council put it, capacity to pay the new higher differential rate, unrelated to the land itself. The Council's written submissions included these passages:

> "46. It is submitted that the proposition that ability to pay is an irrelevant consideration in the making of differential rating decisions cannot be sustained.
>
> 47. The first point … is that the question must necessarily be raised, not in respect of the particular financial circumstances of an individual ratepayer (which are freely conceded to be irrelevant), but in terms of the financial capacity of the owners of all lands included within a particular category, as compared to the financial capacity of owners of lands in other categories. …
>
> 48. Assuming … that the proposition is framed as one that ability to pay in terms of the financial capacity of the owners generically of lands in a particular category is an irrelevant consideration, the Applicants' proposition is necessarily that … the financial ability to meet a particular proportion of that burden is something which a local government must <u>wholly exclude</u> from consideration". (emphasis in original)

[33] The Council thus asserted in argument a right to take into account in setting the differential rates the financial circumstances of its ratepayers, though it sought to limit the consideration to a comparison between the financial circumstances of coal mine owners within the Bowen Shire and the financial circumstances of the owners of land in the shire not used for coal mining.

[34] The limitation, that comparative wealth between owners of various categories of land might be taken into account in fixing a differential rate, did not appear in the

Council's documents supporting and leading up to its resolution of 27 June 2007, nor does it appear in its Chief Executive Officer's evidence. The trial judge did not mention it in his reasons. The Council documents and the reasons both refer to a capacity to pay as being a relevant factor without restricting that capacity to ownership of a particular category of land or by comparison with the capacity of other ratepayers.

[35] The application appears to have been argued and decided on the basis of capacity to pay imputed to the appellants by reason of their status as coal mine owners.

[36] A ratepayer's wealth is irrelevant to the process of deciding what rates should be levied on its property. That proposition is undoubted. The comparative wealth of the owner of a particular type of land, in this case coal mines, as against the wealth of owners of other uses of land, is likewise irrelevant. In both cases what forms the reference point for the levying of the rate is the worth of the land owner, not the value or some other attribute of the property to be rated.

[37] Whether viewed in absolute or comparative terms the appellants' capacity to pay the proposed differential rate was irrelevant. The primary judge was invited by the Council to endorse the proposition that it could set a differential rate by reference to the comparative wealth of ratepayers. In fact the Council took into account the appellants' wealth in fixing the rates, and the primary judge endorsed that approach. In taking wealth into account and setting the rates by reference to it, the Council's decision making process was affected by legal error.

[38] The learned primary judge advanced two reasons to support the conclusion that a land owner's capacity to pay rates is a factor relevant to the decision to levy a particular rate. The first was that the approach of imposing a greater proportion of rate burden on wealthier landowners is "implicit in a progressive tax system". There is, with respect, no valid comparison. The subject of income taxation is income not wealth. Secondly the tax is fixed upon, and by reference to an attribute of the taxpayer, his income, and not by reference to a capital asset, such as land.

[39] The second basis was that:

> "rates are imposed by reference to the unimproved value of rateable land. Thus rates are imposed by reference to a measure which, at least to some extent, is reflective of the assets owned by a ratepayer". (footnote omitted)

The unimproved value of land is an attribute of the land. Such a value of land owned by a ratepayer says nothing about his wealth or capacity to pay rates. That the legislation fixes upon unimproved capital value as the basis for levying rates is a substantial indication that the property owner's wealth, measured by anything but that value of the land, is not a factor to be considered in the levying of rates. The Act connects the obligation to pay rates with the value of the property owned, not the value of the property owner which may derive from sources wholly unconnected with the rated land, or any other land.

[40] There are good reasons why the Act would not contemplate that wealth, or capacity to pay rates, should be a factor relevant to the rates fixed by a local government in its budget. One is the limited ability of any local authority to make an accurate assessment of that capacity of its ratepayers. Many of the ratepayers who own property within a local authority area may not be residents. To make an assessment

of wealth, or capacity to pay, one needs more than an indication of the ownership of valuable land, or an apparently profitable enterprise conducted on land, or the income of the ratepayer. Before an assessment could be made one must know also the level of debt obligation and the cost of operations. I doubt that any local authority would have access to such information concerning its ratepayers.

[41] A second reason is that the fixing of rates by reference to a ratepayer's wealth is a shifting and impermanent base. In times of volatile financial and commodities markets the capacity of a ratepayer to pay rates may fluctuate markedly in the short term. Constant adjustments to the rate would be necessary. The ability of a local authority to set a budget for income and expenditure over an extended period would be compromised.

[42] Thirdly setting rates by reference to capacity to pay is inconsistent with the system of annual valuations of property required by the *Valuation Act* and made the basis of a local government rating policy. The Act, and the *Valuation Act*, both contemplate regular valuations of land to form a stable basis for setting local authority budgets.

[43] The appeal should be allowed. The Council's resolution of 27 June 2007 by which it made and levied a general rate of:

(1) 28.79 cents in the dollar on the unimproved value of land within differential rating category 11;

(2) 12.01 cents in the dollar on the unimproved value of rateable land within differential rating category 17;

(3) 54.38 cents in the dollar on the unimproved value of rateable land within differential rating category 19;

(4) 13.676 cents in the dollar on the unimproved value of rateable land within differential rating category 20;

should be set aside, as should the rates notices bearing assessment numbers 04054-00000-000; 04058-80000-000; 04047-50000-000; 05457-20000-000; 05458-10000-000: all dated 15 August 2007 and 05457-20000-000 dated 20 September 2007.

The respondent should pay the appellants' costs of and incidental to the appeal, and of the trial.