SUPREME COURT OF QUEENSLAND

CITATION:	*Sojitz Coal Resources Pty Ltd v Commissioner of State Revenue* [2015] QSC 9
PARTIES:	**SOJITZ COAL RESOURCES PTY LTD** ACN 063 050 680 (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	SC No 9444 of 2012
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 January 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2014
JUDGE:	Philip McMurdo J
ORDER:	**Appeal allowed.**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – TRANSACTIONS CONCERNING DUTIABLE PROPERTY – LAND RICH ENTITIES – LIABILITY TO PAY DUTY – DUTIABLE PROPERTY – where the Commissioner issued the appellant with an assessment calculating land rich duty and imposing unpaid tax interest and penalty tax – where the appellant paid these amounts whilst it objected against the assessment pursuant to s 63 of the Taxation Administration Act 2001 (Qld) – where the Commissioner gave notice of its decision to disallow that objection against which this appeal is brought – whether a corporation's land-holdings included its interest in a mining lease granted under the *Mineral Resources Act* 1989 (Qld) – whether the appellant's transaction was subject to land rich duty *Acquisition of Land Act* 1967 (Qld), s 12(5) *Acts Interpretation Act* 1954 (Qld), s 4, s 14(7), s 14B(1), s 14B(3) s 36, Sch 1 *Duties Act* 2001 (Qld), s 8, s 9(1)(a), s 10, s 34, s 35, s 157, s 158, s 165, s 167, s 167(1)(a), 167(1)(b), 167(1)(c), s 168, Sch 6

Duties Act 1997 (NSW), s 163C(1)
Fiscal Repair Amendment Act 2012 (Qld)
Interpretation Act 1987 (NSW), s 21(1)
Lands Acquisition Act 1955 (Cth), s 10(4)
Mineral Resources Act 1989 (Qld), s 10
Roads Act 1993 (NSW)
Stamp Act 1894 (Qld), s 2C(1), s 56FA, s 56FL
Taxation Administration Act 2001 (Qld), s 61, s 63, s 69(2)(a), s 70C
Trade Practices Act 1974 (Cth), s 53A, s 53A(1)(b)

Megarry and Wade, *The Law of Real Property*, 8th ed (2012)

Aerotel Limited v Telco Holdings Ltd & Ors [2007] 1 All ER 225, cited
Agripower Australia Ltd v J & D Rigging Pty Ltd [2013] QSC 164, cited
Andara Homes Pty Ltd v Palm [2014] ACTSC 141, cited
Bennett v Elysium Noosa Pty Ltd (in liq) (2012) 202 FCR 72, considered
CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue [2013] NSWSC 1072, considered
Commissioner of State Revenue v WestNet Rail Holdings No 1 Pty Ltd (2013) 45 WAR 140, considered
Commonwealth of Australia v Maddalozzo (1980) 29 ALR 161, considered
J & D Rigging Pty Ltd v Agripower Australia Ltd [2013] QCA 406, cited
Mentech Resources Pty Ltd v MCG Resources Pty Ltd (in liq) [2013] QCA 79, considered
Mijo Developments Pty Ltd v Royal Agnes Waters Pty Ltd [2007] NSWSC 199, cited
Newcrest Mining (WA) Ltd v The Commonwealth (1997) 190 CLR 513, cited
Re Brooks' Caveat [2014] QSC 76, cited
Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads [2007] 2 Qd R 373, considered
TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia) (2010) 241 CLR 576, cited
Stow v Mineral Holdings (Australia) Pty Ltd (1979) 180 CLR 295, cited
The Queen v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327, considered
Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177, cited
Wik Peoples v Queensland (1996) 187 CLR 1, cited

COUNSEL: M Richmond SC, with HG Lakis
J McKenna QC, with A Stumer

SOLICITORS: McCullough Robertson for the appellant
Crown Law for the respondent

[1] By Chapter 3 of the *Duties Act* 2001 (Qld) ("*Duties Act*"), a certain duty, described as land rich duty, applies on a "relevant acquisition", which for present purposes includes the acquisition of a "majority interest in a land rich corporation". A corporation is of this kind if it has land-holdings in Queensland worth at least $1 million and its land-holdings, in any location, comprise at least 60 per cent of the value of all of its property. The question here is whether, at the relevant time, a corporation's land-holdings included its interest in a mining lease granted under the *Mineral Resources Act* 1989 (Qld) ("MRA").

[2] This is a question of the proper interpretation of s 167(1) of the *Duties Act*, as it was at the time of the subject transaction (December 2010), which defined what constituted a corporation's land-holdings. It defined a corporation's land-holdings to mean (relevantly here) "the corporation's interest in land …". The appellant argues that this expression had a recognised legal meaning by which it was limited to a proprietary interest in land, which is not the nature of a mining lease under the MRA. Indeed, s 10 of the MRA specifically provides that the grant of a mining tenement (such as a mining lease) under that Act "does not create an estate or interest in land".

[3] The respondent Commissioner accepts that a mining lease does not create an estate or interest in land. The Commissioner also apparently accepts that, absent what it says is the impact of the definition of "interest" in the *Acts Interpretation Act* 1954 (Qld), the expression "interest in land" in the then definition of "land-holdings" would not include a mining lease under the MRA. In turn, the appellant apparently accepts that if that definition of "interest" did apply in its full terms to the then s 167 of the *Duties Act*, then a mining lease was included within a corporation's land-holdings. So the question here is whether the expression "interest in land" in this context employed the entirety of the meaning of "interest" within that definition in the *Acts Interpretation Act*.

[4] The corporation in question is Minerva Coal Pty Ltd ("Minerva"), in which the appellant acquired 51 per cent of the issued shares on 20 December 2010. As at that date, Minerva had two mining leases issued under the MRA. It is common ground that those leases had an unencumbered value of $2,378,568, Minerva then owned real property with a total unencumbered value of $3,435,000 and that it owned other assets of a total unencumbered value of no more than $150,000.

[5] Section 165 of the *Duties Act* then relevantly defined a "land rich corporation" as follows:

> "165 What is a *land rich corporation*
>
> (1) A *land rich corporation* is an unlisted corporation that -
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> (a) has land-holdings in Queensland, the unencumbered value of which are $1000000 or more; and
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> (b) has land-holdings, whether within or outside of Australia, comprising 60% or more of the unencumbered value of all of its property. …"

[6] Real property owned by Minerva had in total an unencumbered value of more than $1 million. Therefore Minerva was a land rich corporation if its land-holdings comprised at least 60 per cent of the unencumbered value of all its property. That was the case only if the value of Minerva's mining leases was included within the value of its land-holdings.

[7] The Commissioner issued the appellant with an assessment on 18 October 2011, calculating land rich duty at $141,337.50 and imposing unpaid tax interest of $8,091.84 and penalty tax of $28,267.50. These amounts were paid by the appellant whilst it objected, pursuant to s 63 of the *Taxation Administration Act* 2001 (Qld), against the assessment. In August 2012, the respondent gave notice of its decision to disallow that objection against which this appeal is brought under s 69(2)(a) of the *Taxation Administration Act*.

[8] Section 167 of the *Duties Act* then defined what constituted a corporation's land-holdings as follows:

> "167 What are a corporation's *land-holdings*
>
> (1) A corporation's *land-holdings* means the following -
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> (a) the corporation's interest in land and anything fixed to the land that may be separately owned from the land, other than -
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> (i) a security interest; or
> (ii) an interest in a trust;
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> *Editor's note* -
> *Acts Interpretation Act* 1954, section 36 -
> *interest*, in relation to land or other property, means -
> (a) a legal or equitable estate in the land or other property; or
> (b) a right, power or privilege over, or in relation to, the land or other property.
>
> (b) rights held by the corporation that -
>
> (i) relate to, or affect, the use of the corporation's land and other land; and
> (ii) enhance the value of the corporation's land;
>
> (c) an interest in land, and anything fixed to the land, that is the subject of a purchase agreement or sale agreement made by the corporation.
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> (2) Also, a corporation's *land-holdings* includes the land-holdings, under subsection (1), of a subsidiary of the corporation as if a reference in the subsection to a corporation were a reference to the subsidiary.

> (3) However, a corporation's land-holdings do not include land-holdings held on trust by the corporation or a subsidiary of it unless the corporation or any subsidiary of it is a beneficiary of the trust."

[9] As can be seen, the Act contained an editor's note within paragraph s 167(1)(a), by which the reader was given a definition which then appeared in s 36 of the *Acts Interpretation Act*.[1] It is unnecessary to set out that s 36 definition separately here because it was accurately set out in the editor's note within s 167.

[10] The Commissioner accepts that Minerva's interests in its mining leases were not within paragraph (a) or what the arguments refer to as the first limb of the definition of "interest" in s 36.[2] But the Commissioner argues that they fell within the second limb: that which was paragraph (b) of that definition. There is no dispute that if the second limb did apply to the interpretation of "the corporation's interest in land", then the mining leases were interests of that kind and were therefore part of Minerva's land-holdings. The contest is whether at least the second limb applied.

[11] By s 36 of the *Acts Interpretation Act*, it was provided that "in an Act", the various definitions then set out in that section were to apply. By s 32A of that Act:

> "Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires."

And by s 4 of the *Acts Interpretation Act*, its application:

> "… may be displaced, wholly or partly, by contrary intention appearing in any Act."

[12] By s 14(7) a footnote or editor's note to an Act or to a provision of an Act is not part of the Act. But an editor's note is "extrinsic material" for the purposes of s 14B of the *Acts Interpretation Act*, to which I will return:

"Interest in land": its ordinary meaning

[13] Unaffected by the definition in s 36 of the *Acts Interpretation Act*, the expression "interest in land", as it appeared in s 167(1)(a) of the *Duties Act*, would have been confined to some proprietary interest in the land itself. Not all rights in relation to land are of that kind. In *Stow v Mineral Holdings (Australia) Pty Ltd*,[3] Aickin J, with the concurrence of the other members of the court, said that:

> "[T]he ordinary meaning of the compound expression 'estate or interest in land' is an estate or interest of a proprietary nature in the land. This would include legal and equitable estates and interests, e.g., a freehold or a leasehold estate, or incorporeal interests such as easements, profits à prendre, all such interests being held by persons in their individual capacity."[4]

Citing that passage, in *The Queen v Toohey; Ex parte Meneling Station Pty Ltd*, Mason J said:[5]

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1 The same definition now appears in Schedule 1 of that Act.
2 Commissioner's written submissions, paragraph 22.
3 (1979) 180 CLR 295.
4 (1979) 180 CLR 295 at 311.
5 (1982) 158 CLR 327 at 342.

> "There is no question that the phrase 'estate or interest' … has, in its ordinary and natural usage, a proprietary connotation … No-one who has a merely personal right in relation to land can be said to have an 'estate or interest' in that land."[6]

[14] As already noted, the Commissioner (correctly) concedes that these mining leases did not create an estate or interest in land in that ordinary sense. As its submissions point out, the express provision to that effect in s 10 of the MRA reflects a substantial body of case law in which mining leases have been treated as creating a licence or a personal right to remove minerals rather than creating an estate or interest in land.[7]

[15] The expression "interest in land" can include an estate in land. In *LexisNexis Concise Australian Legal Dictionary*, 4th ed (2011) at 312, the primary meaning of "interest in land" is expressed as follows:

> "A property right in land. Technically, the term includes an 'estate', but it is often used in contradistinction to 'estate', as in the common phrase 'estate of interest in land'."

In *Commissioner of State Revenue v WestNet Rail Holdings No 1 Pty Ltd*,[8] McLure P and (in a separate judgment) Pullin and Newnes JJA said that an interest in land was proprietary in that land other than an estate.[9] No authority was cited by their Honours in that respect and their observations were not essential for the outcome. However in Megarry and Wade, *The Law of Real Property*, 8th ed (2012) at [3-001], the authors explain that "the term 'estate' … indicates an interest in land of some particular duration".

[16] Unaffected by the definition of "interest" in the *Acts Interpretation Act*, the expression "interest in land" would, in my view, include any interest of a proprietary nature in the land, including an estate, in accordance with the dictionary meaning quoted above.

[17] Consequently, absent any application of the definition of "interest" in the *Acts Interpretation Act*, the expression "interest in land" in s 167 of the *Duties Act* did not include a mining lease, because a mining lease was neither an estate in land nor another proprietary interest in the land itself.

[18] The appellant's argument appears to accept that the s 36 definition of "interest" had some impact upon s 167. It argues that the s 36 definition has been made inapplicable only to an extent, which is that the second limb of the definition was not to be applied.

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6 See also, to the same effect, the judgment of Wilson J in that case at (1982) 158 CLR 327 at 351.

7 For which the Commissioner cites *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192 (Windeyer J); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117 (Toohey J); *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 616 (Gummow J); *TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia)* (2010) 241 CLR 576 at 586-588 [28]-[32] (per curiam); *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2013] QCA 406 at [45] (Applegarth J, with whom Holmes JA and Boddice J agreed), approving (on this point) *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 at [61], [66], [72] (Margaret Wilson J).

8 (2013) 45 WAR 140; [2013] WASCA 110.

9 (2013) 45 WAR 140 at 153 [85] (McLure P) and 164 [153] (Pullin and Newnes JJA).

[19] The first limb of the definition referred to "a legal or equitable estate". But the word "estate" in that definition was itself defined in s 36, as including an "easement, charge, right, title, claim, demand, lien and encumbrance, whether at law or in equity". As already noted, the Commissioner concedes that a mining lease is not within that extended meaning of "estate" and therefore is not within the first limb of the s 36 definition of "interest".

The appellant's argument

[20] The appellant's argument for this limitation upon the application of the s 36 definition of "interest" is largely based upon the use of the word "interest" in s 167 of the *Duties Act*, not in isolation or within an expression such as "interest in relation to land", but rather within the expression "interest in land". The application of the second limb of the s 36 definition would include very many rights, powers or privileges *in relation to land* which could not be regarded as interests in land. It is said that the expression "interest *in* land", with its well understood meaning in property law, was deliberately employed so as to limit a corporation's "land-holdings" to its proprietary rights in land.

[21] That submission has obvious force. Some effect was apparently intended for the words "in land" where they were used to describe the requisite "interest" in s 167. The apparently qualifying effect of those words would be negated by the application of the entirety of the s 36 definition of "interest". Any interest in land would include any interest in relation to land. The difference between the two has been discussed in several cases.

[22] Most recently, in *CCM Holdings Trust Pty Ltd v Chief Commissioner of State Revenue*,[10] the point arose in the course of a challenge to an assessment of land rich duty under the then corresponding but not identical provisions of the *Duties Act* 1997 (NSW). That Act imposed duty upon relevant acquisitions in a corporation according to whether it had certain "land holdings". Section 163C(1) then provided that "a land holding is an interest in land other than the estate or interest of a mortgagee, chargee or other secured creditor or a profit à prendre". There was an issue as to whether a right to charge a toll on Sydney's Cross City Tunnel, if a separate item of property, was an "interest in land". Unlike the *Duties Act* (Qld), the NSW Act itself contained a definition of "interest". As defined, "interest" included "an estate or proprietary right". The term "estate" was defined in s 21(1) of the *Interpretation Act* 1987 (NSW) as relevantly including an "interest, charge, right, title, claim, demand, lien and encumbrance, whether at law or in equity …". But the Chief Commissioner argued that regard should be had also to the definition of "interest in land" in the *Roads Act* 1993 (NSW), under which it meant "an estate, interest, right or power, at law or in equity in *or over or in connection with* the land" (my emphasis).

[23] Bergin CJ in Eq rejected the submission that the definition in the *Roads Act* applied and made these observations:

> "174 If the definition in the *Roads Act* were to apply to the *Duties Act*, a land holding would not be confined to an interest in land as ordinarily understood. It would be extended to an interest over land or in connection with land …

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10 [2013] NSWSC 1072.

> 175 The Tolling Right was a right to impose a levy on motorists driving through the Tunnel. Albeit that such a right might reasonably be described as a right in connection with land, it is not reasonably described as an interest 'in' land within the meaning of the definition of 'land holding' in the *Duties Act*."

[24] In *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads*,[11] the question was whether the holder of a contractual licence to park cars, which was not an interest in land, was entitled to claim compensation upon the resumption of that land under the *Acquisition of Land Act* 1967 (Qld). The majority (McMurdo P and Chesterman J) held that it could do so by the application of the definition of "interest" in s 36 of the *Acts Interpretation Act*. Holmes JA dissented upon the basis that the s 36 definition was not to be applied. The relevant provision was s 12(5) of the *Acquisition of Land Act*, the full terms of which were set out in the judgment of the President with this emphasis by her Honour:[12]

> "(5) On and from the date of the publication of the gazette resumption notice the land thereby taken shall be vested or become unallocated State land as provided by the foregoing provisions of this section absolutely freed and discharged from all trusts, obligations, mortgages, charges, rates, contracts, claims, estates, or interest of what kind soever, or if an easement only is taken, such easement shall be vested in the constructing authority or, where the gazette resumption notice prescribes, in the corporation requiring the easement, and the estate and *interest of every person entitled to the whole or any part of the land* shall thereby be converted into a right to claim compensation under this Act and every person whose estate and interest in the land is injuriously affected by the easement shall have a right to claim compensation under this Act."

After setting out that provision, by reference to the expression which she had italicised, her Honour then posed the question:[13]

> "Were the appellant's car parking rights over the resumed land an 'interest of [a] person entitled to the whole or any part of the land?'"

Her Honour noted the use of the phrase "estate and interest in the land" towards the end of s 12(5), but said that this did not assist in interpreting the phrase which she had italicised.[14] Her Honour did observe that "the appellant did not have an 'interest in land' as that phrase has been construed at common law and in some statutory contexts".[15] But by the application of the definition of "interest" in s 36 of the *Acts Interpretation Act*, the words which her Honour had emphasised in s 12(5), namely, "interest of every person entitled to the whole or any part of the land", had a meaning which included the appellant's car parking rights.

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11 [2007] 2 Qd R 373; [2007] QCA 73.
12 [2007] 2 Qd R 373 at 378 [4].
13 [2007] 2 Qd R 373 at 378 [5].
14 [2007] 2 Qd R 373 at 378 [7].
15 [2007] 2 Qd R 373 at 378 [10].

[25] In his judgment, Chesterman J (as he then was) set out only part of s 12(5) and did not include that part which referred to an "estate and interest in the land". Like the President, Chesterman J apparently saw no relevance in those words. He described the question raised by the appeal as being whether the appellant's contractual right was an "interest of [a] person entitled to … any part of the land" which was resumed.[16] Chesterman J then reasoned as follows:[17]

> "[49] The critical phrase to construe is 'the estate and interest of every person entitled to the whole or any part of the land'. The conjunctive 'and' is clearly misplaced. There can be no doubt that the estate *or* interest of any person entitled to the whole or any part of resumed land is converted into a right to claim compensation. The question is whether the phrase provides a statutory context making the extended definition of 'interest' inapplicable. It can only do so if one reads that part of the phrase 'entitled to the whole or any part of the land' as meaning that the interest must be 'in' the land because it must be an interest of a person entitled to the whole or any part of the land. To adopt this reasoning is to assume what is to be ascertained. The word 'entitled' is quite general. It does not necessarily mean entitled to an interest in land."

[26] Therefore, in the view of each of the judges in the majority in *Sorrento*, it was important that the phrase which they considered was not expressed as an estate or interest *in* land. That is the important difference in the present case. The expression in s 167 is an interest in land. The majority judgments in *Sorrento* thereby provide no significant support for the Commissioner's argument. Indeed, the judgment of Chesterman J provides support for the appellant's argument here. Chesterman J wrote:[18]

> "[55] The respondent would construe the phrase as if it read 'the interest (in land) of every person entitled to the … land (or an interest in the land) is converted to a right to claim compensation'. This is a possible construction but there is nothing in the phrase, or the balance of s 12(5), which indicates that that is the true meaning.
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> [56] The truth is that the statutory context provided by the subsection is neutral. When the word 'interest' is used it could as easily mean 'interest in land' or 'interest' as defined by the *Acts Interpretation Act*."

[27] The appellant submits that one way of illustrating the tension between the expression "interest in land" in s 167 and the definition of "interest" in the *Acts Interpretation Act* is to insert and substitute the defined term so that s 167(1)(a) might say:

> "The corporation's right, power or privilege over, or in relation to, in land and anything fixed to the land …"[19]

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16 [2007] 2 Qd R 373 at 384 [38] and 385 [41].
17 [2007] 2 Qd R 373 at 387 [49].
18 [2007] 2 Qd R 373 at 388.
19 Appellant's written submissions paragraph 36.

The grammatical difficulty of that substitution is obvious. But more importantly the s 36 definition cannot be applied without changing the meaning of the words of the subject provision.

[28] The appellant also submits that the application of the s 36 definition would have made for an inconsistency between paragraphs (a) and (b) of s 167(1). If the second limb of the s 36 definition was to be applied to paragraph (a), then a land-holding could have been constituted by a corporation's "right … in relation to … land", regardless of whether it was a right relating to land in the more specific circumstances described in paragraph (b) of s 167(1). In response, the Commissioner argues that s 167(1)(b) would have operated to expand the categories of rights which had to be included in a corporation's land-holdings.[20] But that expansionary effect is not apparent, because any right which would be within s 167(1)(b) would have been within the second limb of the s 36 definition and therefore already within s 167(1)(a).

[29] Next the appellant refers to the use (again) of the expression "interest in land" in s 167(1)(c). It submits that s 167(1)(c) would have had no work to do on the Commissioner's construction of s 167(1)(a). For example, it is said that where a corporation had a contract to purchase an interest in land, then upon the Commissioner's interpretation, the corporation's interest as a purchaser would have been already within s 167(1)(a) by the application of the second limb of the s 36 definition. That submission is not so persuasive. Section 167(1)(c) included, as a land-holding, not a contractual right to purchase an interest in land, but instead the interest in the land which was the subject of that contract. The two could have been different, at least where the purchase agreement did not confer an equitable estate in the land. Therefore, s 167(1)(c) could have had an operation in circumstances where the same interest was not already a land-holding under s 167(1)(a).

[30] The appellant's argument also refers to s 168 of the *Duties Act* which relevantly provided as follows:

> "(1) A corporation's *property* means the corporation's interest in any property other than a security interest or interest in a trust ..."

[31] The appellant suggests that if the s 36 definition was applied in s 167, so it must also have applied to the word "interest" in s 168. That may be accepted. The appellant then submits that rights such as were described in the second limb of the s 36 definition could be difficult to value, both as land-holdings under s 167 and as property under s 168. However, the potential difficulties in valuing a right of the kind within the second limb would not provide a sufficient reason to displace the application of that limb, most relevantly, to s 167(1)(a) if that was not to occur otherwise.

[32] Of these arguments for the appellant, the most persuasive is the tension between the application of that part of the s 36 definition of "interest" to that word in s 167(1)(a), because of its express limitation within that provision to an "interest in land".

The Commissioner's arguments

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[20] Commissioner's written submissions paragraph 64.

[33] The Commissioner submits that there are many statutes which have applied the definition "right, power or privilege over, or in relation to … land" to a phrase such as "interest in land". Before going to the examples cited by the Commissioner, two observations should be made. The first is an enactment which deals with a different subject matter and has quite a different object or objects may not provide a reliable comparison. The second is that it might be somewhat easier to apply such words where they appear as a definition within the same enactment. For example, in *Commonwealth of Australia v Maddalozzo*,[21] the respondent had been granted mining leases over land which was compulsorily acquired by the Commonwealth and the question was whether the Commonwealth thereby acquired his leases. By s 10(4) of the *Lands Acquisition Act* 1955 (Cth), the Commonwealth's acquisition of land had the result of vesting in it the land "freed and discharged from all interests …". The same Act defined "interest" by two limbs which corresponded with the presently relevant definition in s 36. There was no apparent grammatical difficulty for substituting the definition of interest (or the relevant part of it) within s 10(4). And this was not an example of the tension between the subject provision and the definition to which was to be applied in its interpretation.

[34] The Commissioner cites also to *Bennett v Elysium Noosa Pty Ltd (in liq)*,[22] a case involving an alleged breach of s 53A(1)(b) of the *Trade Practices Act* 1974 (Cth). By that provision, a corporation was not to make a false or misleading representation in connection with the sale of "an interest in land". But within s 53A itself, the term "interest" was defined. A definition of "interest" which was specifically directed to the subject provision could not be disregarded in its interpretation.

[35] The Commissioner also refers to *Mentech Resources Pty Ltd v MCG Resources Pty Ltd (in liq)*,[23] where Gotterson JA, with whom McMurdo P agreed, applied both limbs of the s 36 definition to the phrase "right or interest in *or in respect of* an exploration permit". The words which I have highlighted show a distinction between that case and the present one, as well as the fact that the phrase was not, as in the present case, an expression with such a well-established meaning as "interest in land".

[36] The Commissioner also refers to cases in which the s 36 definition, or its equivalent outside Queensland, had been suggested to be of possible application to provisions of Torrens legislation under which there was a right to caveat against dealings with land which was given to a person claiming an interest in the land. But in the first of those cases, which is *Mijo Developments Pty Ltd v Royal Agnes Waters Pty Ltd*,[24] the application of the s 36 definition was conceded.[25] And in the other cases, *Re Brooks' Caveat*[26] and *Andara Homes Pty Ltd v Palm*,[27] no concluded view was reached.[28]

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21 (1980) 29 ALR 161.
22 (2012) 202 FCR 72.
23 [2013] QCA 79 at [63].
24 [2007] NSWSC 199.
25 [2007] NSWSC 199 at [29].
26 [2014] QSC 76.
27 [2014] ACTSC 141.
28 In the latter case, Refshauge J said at [27], that the (s 36) definition was "extraordinarily wide" and that "it may be that the width of the definition is not co-extensive with the width of a caveatable interest" adding that "I do not need to explore that question, it must await another day".

[37] A further submission by the Commissioner is based upon what is said to be the dutiability of a transfer of a mining lease itself. It is said that this is a dutiable transaction because a mining lease is "land in Queensland" and is for that reason "dutiable property" according to s 10 of the *Duties Act*. Upon that premise, it is submitted that this is a contextual indication of the meaning of "interest in land" in s 167(1)(a). However, the correctness of that premise is far from demonstrated.

[38] Transfer duty is imposed by Chapter 2 of the *Duties Act*. By s 8 transfer duty is imposed on "dutiable transactions". One kind of dutiable transaction is a transfer of "dutiable property": s 9(1)(a). The term "dutiable property" is defined by s 10 as follows:

> "10 What is *dutiable property*
>
> (1) Each of the following is *dutiable property* -
>
> (a) land in Queensland;
> (b) a transferable site area;
> (c) an existing right;
> (d) a Queensland business asset;
> (e) a chattel in Queensland.
>
> *Note* -
>
> Section 498 includes provision about references to dutiable property.
>
> (2) A reference to property in subsection (1) includes a reference to an interest in the property, other than the following—
>
> (a) a security interest;
> (b) a partner's interest in the partnership;
> (c) a trust interest;
> (d) the interest of a discretionary object of a trust that holds property mentioned in the subsection.
>
> *Editor's Note* -
>
> *Acts Interpretation Act* 1954, section 36 -
>
> *interest*, in relation to land or other property, means -
>
> (a) a legal or equitable estate in the land or other property; or
>
> (b) a right, power or privilege over, or in relation to, the land or other property."

[39] The Commissioner refers to the editor's note as confirmation that the s 36 definition of "interest" applies here also, with the consequence that a mining lease is "land in Queensland".

[40] The appellant agrees that the mining lease is "dutiable property" but says that this is because it is "an existing right" within s 10(1)(c). The term "existing right" is defined in Schedule 6 of the *Duties Act* relevantly as follows:

> "*existing right* means any of the following -

> (a) an existing statutory licence, other than a statutory business licence, granted by the State …"

The term "statutory licence" is also defined within Schedule 6 as follows:

> "*statutory licence* means a licence, permit or other authority issued or given under a Queensland or Commonwealth Act, other than the following -
>
> (a) a chattel authority;
> (b) an exploration or prospecting permit under the *Mineral Resources Act 1989;*
> (c) an authority to prospect under the *Petroleum Act 1923* or the *Petroleum and Gas (Production and Safety) Act 2004*;
> (d) an exploration permit under the *Petroleum (Submerged Lands) Act 1982*."

And the term "statutory business licence" is defined in Schedule 6 to mean:

> "a statutory licence that is required to be held by a person to carry out an activity for gain or reward."

[41] A mining lease would fall within the description of a "licence, permit or other authority issued or given under a Queensland … Act" within that definition of "statutory licence" and it is not within any of the four specified exclusions in that definition. Therefore, it would appear that a mining lease would be a "statutory licence" as defined and an existing mining lease would therefore be an "existing right" within s 10(1)(c), unless it is a "statutory business licence". The Commissioner's argument does not go so far as to contend that it would be a "statutory business licence", but suggests that there is a sufficient doubt in that respect to warrant a conclusion that a mining lease is a dutiable property, not as an "existing right", but as "land in Queensland".

[42] At the relevant time, Schedule 6 contained this definition of "land":

> "*land* includes airspace above land and the coastal waters of the state, but does not include -
>
> (a) an exploration or prospecting permit under the *Mineral Resources Act 1989*; or
> (b) an authority to prospect under the *Petroleum Act 1923* or the *Petroleum and Gas (Production and Safety) Act 2004*; or
> (c) an exploration permit under the *Petroleum (Submerged Lands) Act 1982*."

The Commissioner submits that these three express exclusions indicated that they would otherwise have constituted "land" as defined and thereby dutiable property under s 10(1)(a), or (at least) interests in the property under s 10(2). It is submitted that this is a further indication of the application of the s 36 definition to s 10. Because a mining lease was not within those express exclusions, it fell within the definition of "land".

[43] However, those three exclusions in the definition of "land" also appeared as express exclusions in the definition of "statutory licence". The evident intention was to ensure that these particular rights should not be dutiable property on any basis. That somewhat weakens the Commissioner's argument based upon the express

exclusions within the definition of "land", because in the same way, it could be said that those exclusions within the definition of "statutory licence" indicated that they would otherwise have been within that definition. As the appellant submits, a statutory definition can sometimes include a list of exclusions which would not otherwise be within the definition.[29]

[44] The Commissioner's reservations about the meaning of "statutory business licence" are not persuasive. Such a licence was of a kind which was required to be held for a person to carry out an activity for gain or reward, that is to say an activity which itself was gainful or rewarding. In essence, a mining lease is a statutory licence to undertake certain work at a particular place, rather than more generally to undertake some gainful or rewarding activity.

[45] In any case, if a mining lease was a "statutory business licence", it would be "dutiable property" as referred to in s 10(1)(d), namely a "Queensland business asset" as defined by ss 34 and 35 of the *Duties Act*.

[46] In this discussion, of course, it has been necessary to refer to the *Duties Act* as it was at the time of the subject transaction. Subsequently the *Duties Act* was amended by the *Fiscal Repair Amendment Act* 2012 (Qld) which amended the definition of land in Schedule 6 so as to have it include "a resource authority", a term which was then defined to include a mining tenement under the MRA.

[47] At this point, I should note that the Commissioner did not argue that the word "land", as then defined, had the consequence that a corporation's property in its mining lease was itself an "interest in land" quite apart from the suggested application of the s 36 definition. The likely explanation is a recognition that, absent the s 36 definition, the expression "interest in the land" has an established ordinary meaning which would not be displaced by a definition, not of that term, but of "land".

[48] The Commissioner's argument also emphasises the purpose of the land rich duty provisions and refers to this passage in the Explanatory Notes to the *Duties Bill* 2001:[30]

> "Direct transfers of property are generally liable for duty at transfer duty rates of up to 3.75% of the property's full value. However, where property is acquired through the acquisition of shares in the company owning the property, the transfer attracts a lesser rate of duty (0.6%) on the net value of the interest in the company represented by the shares.
>
> Chapter 3, Part 1 addresses this issue by imposing duty on relevant acquisitions of shares in a land rich corporation at the general rates of transfer duty by reference to the land-holdings of the corporation."

It is submitted that if mining leases are dutiable property *because they are an interest in land*, then the purpose of the land rich duty provisions could be easily defeated by selling the company which owns a mining lease rather than the lease itself. That submission is unpersuasive because again it has the premise that a

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29 Citing *Aerotel Limited v Telco Holdings Ltd & Ors* [2007] 1 All ER 225 at [118].

30 Explanatory Notes, Duties Bill 2001 (Qld) at 42.

mining lease was dutiable property as land under s 10(1)(a), rather than as an existing right under s 10(1)(c).

[49] The parties have made detailed submissions by reference to the legislative history relating to duty on transactions involving mining leases in Queensland. The end point of the Commissioner's extensive submissions in this respect was that if a mining lease was not a land-holding under s 167(1)(a), this would have been a departure from the effect of previous statutes. If that were so, then the legislative history might be considered to be relevant in resolving any relevant ambiguity within s 167.

[50] It is sufficient to refer only to the position immediately prior to the enactment of the *Duties Act*. As the Commissioner's submissions demonstrate, a transfer of a mining lease was then subject to stamp duty under the now repealed *Stamp Act* 1894 (Qld), because a mining lease was specifically defined to be "property".[31] This was the result of an amendment to the *Stamp Act* 1894 which commenced contemporaneously with the commencement of s 1.1 of the *Mineral Resources Act* 1989 (Qld), which provided that the grant of a mining lease did not create an estate or interest in land. The Commissioner does not suggest that a transfer of a mining lease was dutiable under the *Stamp Act* 1894 as a transfer of "land" or "real property". In the same way then, upon the enactment of the *Duties Act* a transfer of a mining lease was dutiable but not because it was a transfer of an interest in land.

[51] The *Stamp Act* 1894 contained provisions for the transfer of shares in land rich corporations. To the extent that those provisions might be relevant here, they would not support the Commissioner's case. A relevant corporation was identified in those provisions as a "land-holder" according to its entitlement to "land".[32] The term "land" was there defined to include "any estate in land" and "anything fixed to the land that is or may be taken to be the subject of ownership separate from the ownership of the land".[33] That would not have included a mining lease and there was no submission for the Commissioner otherwise.

[52] The Commissioner emphasises the editor's note to s 167 as well as a footnote in identical terms to cl 167 of the *Duties Bill* 2001. An identical footnote appeared in cl 10 of the Bill, and in the editor's note published with s 10 of the *Duties Act*.

[53] These notes and footnotes are "extrinsic material" within s 14B(3)(a) and (e). They may be considered in the interpretation of a provision if the provision is ambiguous or obscure, its ordinary meaning would lead to a manifestly absurd or unreasonable result or to confirm an interpretation conveyed by the ordinary meaning of the provision: s 14B(1). The second of those circumstances does not exist here: it would not be manifestly absurd or unreasonable to give the expression "interest in land" in s 167(1)(a) its ordinary meaning. In particular, I have rejected the argument that to do so would defeat the evident purpose of the land rich duty provisions. On the other hand, the application of the second limb of the s 36 definition of "interest" could well give rise to absurd or unreasonable consequences for companies whose assets could not be realistically described as land holdings in any ordinary sense.

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31 *Stamp Act* 1894 (Qld) s 2C(1).
32 *Stamp Act* 1894 (Qld) s 56FL.
33 *Stamp Act* 1894 (Qld) s 56FA.

[54] Nor do I regard the expression "interest in land" as obscure or ambiguous.

Appellant's alternative argument

[55] Lastly I should note an alternative submission for the appellant, which was based upon s 10 of the MRA. The appellant argues that if both limbs of the s 36 definition applied to "interest in land" in s 167(1)(a) of the *Duties Act*, so they applied to that expression in s 10 of the MRA. Consequently, the MRA should be understood to have excluded the possibility of a mining lease being an interest in land, according to the full terms of the s 36 definition, within any other statute. So although other rights *in relation to* land could have been "interests in land" under s 167(1)(a), there was a specific exception for mining tenements under the MRA.

[56] That submission is unpersuasive. The application or exclusion of the s 36 definition, either at all or to an extent, will depend upon the text, context and purpose of the particular statute to which it might be applied. It need not have the same impact, if any, upon s 167 of the *Duties Act* and s 10 of the MRA. Further, the end point of this submission would be that, applying the s 36 definition to s 10, a mining tenement would confer no "right power or privilege over or in relation to the land" for which it was granted. Clearly then, the s 36 definition could not be applied, at least in full, to s 10. But it does not follow from that conclusion that it could not apply elsewhere and in particular within s 167.

Conclusion and orders

[57] In my conclusion, the subject corporation was not a land rich corporation because its mining leases did not form part of its land-holdings. That is because the expression "interest in land" in the then s 167(1)(a) of the *Duties Act* contained its ordinary meaning. The definition of "interest" in the *Acts Interpretation Act* could not apply to the expression in s 167 because the word "interest" was used in that provision specifically and unambiguously in a way which was qualified by the words "in land". It would defeat that express qualification to import the wider subject matter of any interest in relation to land.

[58] The appeal will be allowed in full pursuant to s 70C of the *Taxation Administration Act* 2001 (Qld). The appellant's written submissions suggested a number of consequential orders, including an order for costs as well as for the repayment of the duty, penalty tax and unpaid duty interest and for an allowance in favour of the appellant of interest under s 61 of that Act. I should hear the parties as to whether those orders and any other consequential order should be made.