SUPREME COURT OF QUEENSLAND

CITATION:	*Council of the Shire of Sarina v Dalrymple Bay Coal Terminal P/L* [2001] QCA 146
PARTIES:	**THE COUNCIL OF THE SHIRE OF SARINA** (plaintiff/appellant) **v** **DALRYMPLE BAY COAL TERMINAL PTY LTD** ACN 010 268 167 (defendant/respondent)
FILE NO/S:	Appeal No 4817 of 2000 SC No 163 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	24 April 2001
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2001
JUDGES:	McPherson and Williams JJA, Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Appeal allowed.** **2. Set aside the judgment of 8 May 2000.** **3. Give judgment for the appellant in the sum of $357,745.76 with interest from 24 March 2000 to date of judgment, calculated in accordance with s 1018 of the *Local Government Act* 1993 at the rate of 11% per annum.** **4. Order that the respondent pay the appellant's costs of the action and the appeal to be assessed.** **5. Liberty to apply.**
CATCHWORDS:	REAL PROPERTY – RATING OF LAND – RATES UNDER LOCAL GOVERNMENT LEGISLATION – RATEABLE LAND – PARTICULAR PROPERTIES – where appellant is a local authority with the power to levy rates – whether respondent is the "owner" of land within the meaning of the *Local Government Act* 1993 – whether respondent was the holder of an occupation permit under an Act – where overdue rates bear interest

REAL PROPERTY – GENERAL PRINCIPLES – INCIDENTS OF ESTATES AND INTERESTS IN LAND – OWNERSHIP – where respondent in possession of land pursuant to a licence issued under statute – whether Harbours Corporation empowered to grant the respondent permission to occupy the land – where respondent later entered contract for possession – whether contract made under an Act

LOCAL GOVERNMENT – POWERS FUNCTIONS AND DUTIES OF COUNCILS GENERALLY – OTHER MATTERS – OTHER CASES

Forestry Act 1959 (Qld), s 35(1)
Government Owned Corporations Act 1993 (Qld)
Government Owned Corporations (Ports) Regulation 1994 (Qld)
Harbours Act 1955-1980 (Qld) (repealed), s 8, s 64
Harbours Act Amendment Act 1976 (Qld) (repealed), s 12(1)
Local Government Act 1936 (Qld) (repealed), s 3
Local Government Act 1993 (Qld), s 4(1)(g)(i), s 4(1)(g)(i) s 1008(1), s 1010, s 1018
Primary Industries Corporation Act 1992 (Qld) (repealed)
Transport Infrastructure Act 1994 (Qld), s 161(1)(b), s 258
Water Resources Act 1989 (Qld)

Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290, considered

COUNSEL: P J Lyons QC for the appellant
J K Bond SC for the respondent

SOLICITORS: King and Company for the appellant
Allen Allen and Hemsley for the respondent

[1] **McPHERSON JA:** For the reasons given by Williams JA, I agree that this appeal should be allowed. The orders that will be made are set out in those reasons.

[2] **WILLIAMS JA:** The appellant, The Council of the Shire of Sarina, is a local authority which, pursuant to the provisions of the *Local Government Act* 1993 ("*LG Act*"), has the jurisdiction to levy rates on rateable land within its boundary. The respondent, Dalrymple Bay Coal Terminal Pty Ltd, operates the Dalrymple Bay Coal Terminal ("the Terminal") which is situated on land within the boundary of the appellant Shire.

[3] The appellant levied rates upon the respondent on the basis that the latter was the "owner" of the land on which the Terminal was located; that was disputed by the respondent and in consequence the appellant's right to recover rates from the respondent was the subject of litigation in the Trial Division of this court. The learned trial judge concluded that the respondent was not caught by the relevant definition of "owner" and so dismissed the appellant's claim. Hence this appeal. It

was conceded that the land in question was "rateable land"; the only question was whether the respondent was an "owner".

[4] From 1 April 1993 until 31 December 1998 the respondent was in possession of and occupied the Terminal pursuant to the provisions of the Dalrymple Bay Management Licence (the "Licence") entered into between The Harbours Corporation of Queensland (the "Harbours Corporation") and Queensland Treasury Corporation of the one part, and the respondent of the other. That agreement was entered into and the licence granted pursuant to s 64 of the *Harbours Act* 1955-1980. That section was inserted into the Act by the 1976 Amendment, which also brought into existence the Harbours Corporation. By operation of the definition of Harbour Board in s 8 of the principal Act and s 12(1) of the 1976 Amendment a reference to a Harbour Board includes a reference to the Harbours Corporation. All the powers and duties of a Harbour Board may be exercised and performed by the Harbours Corporation.

[5] Against that background s 64 provides:

> "(1) Subject to this section, a Harbour Board may upon such terms and conditions as it thinks fit –
>
> (a) lease for a purpose consistent with this Act land vested in or held by it;
>
> (b) authorize by licence, the use and occupation of –
>
> (i) land vested in or held by it;
>
> (ii) Crown land placed under its management and control pursuant to this Act,
>
> for any purpose;
>
> (c) permit the use and occupation of –
>
> (i) land vested in or held by it;
>
> (ii) Crown land placed under its management and control pursuant to this Act;
>
> (iii) part of the foreshore, or of other tidal land or tidal water in the harbour for which it is constituted;
>
> (iv) vacant Crown land contiguous to the foreshore in the harbour for which it is constituted,
>
> for any purpose.
>
> (2) A lease or licence granted by a Harbour Board under this section shall be in writing –
>
> (a) under the seal of the Board; or
>
> (b) under the hand of the Chairman or two other members of the Board, in either case, acting at the direction of the Board.
>
> A lease or licence granted by the Harbours Corporation under this section shall be in writing under the seal of the Corporation.
>
> A permit granted under this section shall be in writing under the hand of a person employed by the Harbour Board or engaged in the affairs of the Harbours Corporation and authorized in that behalf by the Board or, as the case may be, the Corporation.

> (3) A Harbour Board shall not lease or license the use or occupation of harbour lands unless the Minister's approval in writing of the lease or licence and of its terms, conditions and duration is first obtained.
>
> If a Harbour Board purports to lease or license the use or occupation of such land without complying with this subsection the lease or licence is void.
>
> . . .
>
> (4) Leases, licences and permits granted by a Harbour Board under this section shall be subject to the following provisions:-
> (a) –
>
> The term of a lease shall not exceed 75 years.
> The term of a licence shall not exceed 10 years.
> The term of a permit shall not exceed 2 years."

[6] By cl 4 of the Licence the respondent was granted "a licence to operate the Terminal". The term "operate" was defined as meaning primarily "to manage, administer, *occupy*, operate, maintain and use the Terminal" (my emphasis). The expanded definition referred to such matters as berthing vessels, stacking coal, and recovering and shipping coal. Clause 8.1 obliged the respondent to "properly and efficiently operate the Terminal" and cl 13.1 obliged it at its cost to "keep and maintain the Terminal in good repair and condition". It was empowered by cl 9 to levy charges on users of the Terminal at rates designed to recoup costs incurred in operating the Terminal, but so as not to make a profit. The licence does not appear to require the respondent to pay anything to the Harbours Corporation as consideration for its rights to occupy the Terminal.

[7] It seems clear from those provisions of the Licence that the respondent occupied and was in possession of the land on which the Terminal was situated pursuant to the provisions of the Licence. In terms of s 64, the Harbours Corporation authorised the respondent to use and have the occupation of the land on which the Terminal was constructed pursuant to the terms of the Licence granted by the Harbours Corporation. It is significant to note that the section does draw some distinction between a licence to use and occupy and a permit to use and occupy. The former must be in writing under seal whereas the latter must be in writing under the hand of an authorised person. The Minister's approval is also required for a licence. Finally, whilst a licence shall not exceed 10 years duration the term of a permit shall not exceed 2 years. But importantly in each case the grantee is given "the use and occupation of" land under the control of the grantor; in either case the grantee, here the appellant, is permitted or allowed or authorised to occupy the land, here the Terminal.

[8] It was accepted by all parties that if the respondent was caught by the definition of "owner" in s 4 of the *LG Act* then it was liable to pay rates levied by the appellant on land included in the area occupied by the Terminal (s 1010 of the *LG Act*). The relevant definition is as follows:

> "4(1) An 'owner' of land is –
> (a) a registered proprietor of freehold land; or
> (b) a purchaser of land to be held as freehold land that is being purchased from the State under an Act; or

(c) a lessee of land held from the State, and a manager, overseer or superintendent of the lessee who lives on the land; or

(d) a holder of –

(i) a mining claim or lease; or

(ii) an area mentioned in the *Mineral Resources Act* 1989, schedule, section 5; or

(e) a lessee under the *Petroleum Act* 1923; or

(f) a lessee of land held from a government entity or local government; or

(g) the holder of –

(i) an occupation permit under an Act, a stock grazing permit under an Act or a permit prescribed by regulation; or

(ii) a permit to occupy under the *Land Act* 1994; or

(iii) a permission to occupy from the Primary Industries Corporation; or

(h) a licensee under the *Land Act* 1994; or

(i) for land on which there is a structure subject to a time share scheme – the person notified to the local government concerned as the person responsible for the administration of the scheme as between participants in the scheme; or

(j) another person who –

(i) is entitled to receive the rent for the land; or

(ii) would be entitled to receive the rent for the land if it were leased at a rack-rent".

[9] Argument concentrated on para (g)(i); the real question is whether or not by operation of the Licence the respondent was "the holder of an occupation permit under an Act". If one takes into consideration only s 64 of the *Harbours Act*, the terms of the Licence, and wording of s 4(1)(g)(i) of the *LG Act* then it is difficult to reach any conclusion other than that during the period the Licence was in operation the respondent was the holder of an occupation permit under the *Harbours Act*. The expression "occupation permit" is not a term of art at common law and it is not defined in the *LG Act*. In those circumstances one is certainly inclined to give the words their natural and ordinary meaning; if a person is granted the right or authorisation or permission to occupy land then prima facie that person can be described as the holder of an occupation permit with respect to that land.

[10] The learned trial judge expressed the view that it was "tempting to think that the . . . language [in s 4(1)(g)(i)] was intended to embrace permits granted by Harbour Boards under the provisions of s 64(1)(c)" of the *Harbours Act*. But he then referred to other matters which so impacted on his thinking as to lead to a contrary result.

[11] The first such matter was that here the grant was of a licence with the approval of the Minister, not a permit, and the second was that this was a licence under seal. With respect to the reasoning of the learned trial judge neither of those considerations in my view is decisive. It would be a very strange result if the holder of a licence which operated for a period of up to 10 years was not regarded as an "owner" whereas the holder of a permit operable for less than 2 years was. In general terms, why should the holder of a more informal permit be held to be an

owner whereas the holder of similar rights pursuant to a more formal document (a licence) was not.

[12] But the most significant factor in the view of the learned trial judge related to the change in the definition of the "owner" brought about by the *LG Act*. The definition of "owner" in s 3 of the *Local Government Act* 1936 contained in para (f) the following:

> "in the case of any land in respect of which an occupation permit or stock grazing permit within the meaning of the *Forestry Act* 1959-1968 has been granted to any person or corporation under that Act, such person or corporation".

Relevantly s 35(1) of the *Forestry Act* 1959 at the date the *LG Act* 1993 was assented to provided:

> "With respect to any land comprised in any State forest the [Primary Industries] Corporation may from time to time grant, subject to such provisions, reservations and conditions as the Corporation thinks fit–
>
> (a) permits to occupy for a term fixed by the Corporation but not exceeding 7 years ("occupation permits"), but so that the area in respect whereof any such occupation permit is granted shall not exceed 10 ha; or
>
> . . .
>
> (c) permits to graze stock for a term fixed by the Corporation but not exceeding 7 years ("stock grazing permits");
>
> . . . ".

[13] Prior to 19 June 1992, and whilst the *Local Government Act* 1936 was in force, the reference in s 35 was to the Conservator of Forests and not to the Primary Industries Corporation ("PI Corporation"). That Corporation was constituted by the *Primary Industries Corporation Act* 1992 and it was in consequence of amendments made by that Act that s 35 of the *Forestry Act* was amended. By the *Primary Industries Corporation Act* 1992 the PI Corporation was to carry out functions conferred on the Conservator of Forests by the *Forestry Act* and by the Commissioner of Water Resources, Water Resources Commission and Commissioner of Irrigation and Water Supply pursuant to the provisions of the *Water Resources Act* 1989.

[14] It is clear, though one needs to spend a lot of time researching and establishing the fact, that when the *LG Act* came into force the only specific power which the PI Corporation had to grant permission to occupy lands was pursuant to s 35 of the *Forestry Act*. A search of the *Water Resources Act* 1989 will not reveal any power in the PI Corporation to give "a permission to occupy". There are some sections of that Act which provide for the granting of a permit to do certain things (for example, s 58 provides for a permit to take, get or remove controlled quarry material from a watercourse), but there is nothing which confers any right on the grantee of the permit to occupy land. Apart from s 35 of the *Forestry Act* there is nothing in that Act which could be classified as a grant of "a permission to occupy" land. In other words, if s 4(1)(g)(iii) of the *LG Act* is to be given any scope of operation at all it must relate to s 35 of the *Forestry Act*. If that is so, it explains why specific reference to the *Forestry Act* was deleted from the reference to an "occupation permit" in s 4(1)(g)(i) of that Act.

[15] If that is right, as logically it must be, then the reference to an "occupation permit under an Act" must be a generic description of any permit granted pursuant to a power conferred by an Act giving to the grantee a right of occupancy. If that is not the meaning, then it can have no scope of operation.

[16] The reference to "a permit prescribed by regulation" is confusing; interestingly there was no equivalent in the 1936 Act. Does it mean prescribed by regulation under the *LG Act* or by a regulation made under any Act? Further, what is the regulation to provide? Whilst the practical consequences of those words are unclear that ought not, in my view, detract from the words "an occupation permit under an Act" which can be given a clear meaning.

[17] The learned trial judge was heavily influenced by the fact that the only known use in a Queensland statute when the *LG Act* came into force of the phrase "occupation permit" was in s 35 of the *Forestry Act*. He therefore concluded that notwithstanding the inclusion in the *LG Act* of (g)(iii), the reference to "occupation permit" in (g)(i) should be restricted to an occupation permit granted pursuant to the *Forestry Act*.

[18] For the reasons I have given, I cannot accept that argument. The *LG Act* must be construed as a statute which repealed all that went before it in the local government context. The clear meaning of words used should not be affected by the language of repealed statutes unless recourse to such statutes is necessary in order to attribute some meaning to the language of the later statute. That is not necessary here.

[19] I am satisfied that s 64 of the *Harbours Act* empowered the Harbours Corporation to grant to the respondent permission to occupy land within the boundary of the appellant. That, in the circumstances, meant that the respondent was the holder of an occupation permit under an Act for purposes of s 4(1)(g)(i) of the *LG Act*. That means that the respondent was liable to pay rates to the appellant with respect to the subject land for the period from 1 April 1993 to 31 December 1998.

[20] In April 1994 the *Transport Infrastructure Act* 1994 ("*TI Act*") came into force and it effectively replaced the *Harbours Act*. By operation of s 258 of that Act the harbour at Hay Point at which the Terminal is located came under the jurisdiction of the Ports Corporation of Queensland ("the Ports Corporation"), a body corporate pursuant to the *Government Owned Corporations (Ports) Regulation* 1994 and the *Government Owned Corporations Act* 1993. It is a "port authority" for purposes of the *TI Act*.

[21] Section 161(1)(b) of that Act empowers a port authority to make land available for the establishment, management and operation of effective and efficient port facilities and services. Though the expression "make land available" is rather vague, s 174 of the Act makes it clear that a port authority may dispose of land or enter into a lease, licence or other form of tenure of its port land or port facilities. As that section provides, in certain circumstances the Minister's written approval is required.

[22] Undoubtedly relying on those provisions of the *TI Act* the Ports Corporation entered into a contract with the respondent on 9 April 1999 pursuant to which the respondent, as operator, was "responsible for the day to day operation and

maintenance of the Terminal" (cl 3.1(a)). By definition the Terminal includes the land on which it is located. The initial term of the contract was 5 years. Clause 7.1 of the contract was then in these terms:

> "The Corporation shall give to the Operator such access to the Terminal as is necessary to enable the Operator to execute the services in accordance with the requirements of the Contract.
>
> Access so given to the Operator confers on the Operator the rights:
>
> (a) to such use and control as is necessary to enable the Operator to execute the Services;
>
> (b) to give reasonable access to the Operator's consultants, agents, licensees and Shareholders;
>
> (c) to exercise supervision of persons entering the Terminal, pursuant to the Terminal Procedures; and
>
> (d) to require, as a condition of access to and use of the Terminal that a User observe the applicable provisions of the Terminal Regulations.
>
> The Operator's rights under this clause 7.1 are by way of licence only".

Also of relevance is cl 22.1 which provides:

> "(a) From the date on which the Operator is given possession of the Terminal until the Expiry Date the Operator shall take all reasonable and prudent measures for the care of the Terminal and property and items at the Terminal".
>
> (b) Without limiting the generality of the Operator's obligations, the Operator shall take such measures in respect of the care, storage and protection of coal, unfixed items, things entrusted to the Operator by the Corporation for the purpose of carrying out the Services and things brought on the Terminal by the Operator".

[23] It is also of some significance that the respondent does not levy charges for use of the Terminal. That is done by the Ports Corporation which in turn pays the respondent for the services it provides pursuant to Sch 5 of the contract. If rates are lawfully levied "in respect of or in connexion with the Terminal" they are payable by the respondent as operator (cl 13.5) in the first instance, but may be recovered from the Ports Corporation (Sch 5 cl 7).

[24] The question which arises for determination on this appeal is whether the respondent was the "owner" of the land on which the Terminal was located in consequence of the provisions of the contract dated 9 April 1999 for purposes of rates levied 30 June 1999 and 30 June 2000; again, that must involve considering whether at the material time the respondent was the holder of an occupation permit under an Act within s 4(1)(g)(i) of the *LG Act*.

[25] It is immediately obvious that there are significant differences between the Licence granted 1 April 1993 and the provisions of the contract of 9 April 1999. One does not find either of the words "occupy" or "occupation" used in the contract. But it is clear that the respondent has "possession" of the Terminal; that word is used in cl 22.1, and the expression "such access" in cl 7.1 must in practical terms amount to

possession. The weight which otherwise might attach to the consideration that the respondent does not levy charges but receives a payment for services, is weakened by the fact that if rates are lawfully levied on the land they are payable by the respondent but with a right of reimbursement.

[26] When one has regard to the extensive services which the respondent is to provide pursuant to the contract, and its control and management of the extensive infrastructure constructed on the land, it becomes clearer that it is the occupier of the site. The Ports Corporation, deriving its power from the *TI Act* (particularly s 161(1)(b) thereof) by the contract of 9 April 1999 has effectively given the respondent a permit to occupy the Terminal. The conferring of a right to take possession of land is generically the equivalent of a permit to occupy, that is, an occupation permit for purposes of the *LG Act*. Gibbs CJ in *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 295 considered the meaning of the expression "under an enactment", which, in my view, must mean the same thing as "under an Act", the phrase used in s 4(1)(g)(i) of the *LG Act*. After referring to a number of authorities he said that "under" in the context "means in pursuance of or under the authority of"; in other words, it is referring to the source of the power to do something. Here the permission to occupy was granted pursuant to the *TI Act*; it follows that all elements of s 4(1)(g)(i) are satisfied.

[27] I am therefore satisfied that for the rates levied 30 June 1999 and 30 June 2000 the respondent was the "owner" of the subject land.

[28] Section 1018 of the *LG Act* provides that an "overdue rate" bears interest "at the percentage decided by the local government" and is to be calculated "on daily rests, applying the interest as compound interest; or . . . if an equal or lower amount will be obtained - in the way decided by the local government". It was not disputed that if the Court held that the respondent was liable to pay rates for the whole of the period in question, the total amount outstanding was $357,745.76 including interest to 23 March 2000. The relevant calculation was set out in the final amended statement of claim as follows:

Year	General	Water	Excess	Waste M'ment	Interest	Write-off	Total	Paid	Date
94/95	42,981.76				2,380.54		45,362.30		
95/96	40,942.19	6,600.00			7,225.57	-6,823-70	47,944.06		
96/97	39,236.26	6,600.00			11,428.87		57,265.13	6,600.00	14/04/97
97/98	42,414.40	6,600.00	799.00	33.00	18,956.83		68,803.23	6,633.00	10/10/97
98/99	45,350.00	6,600.00		39.00	27,250.51		79,239.51	799.00	17/07/98
99/00	49,659.00	6,675.00	27.00	49.00	25,811.43	-9,030.90	73,190.53	27.00	31/08/99
	$260,583.61	**$33,075.00**	**$826.00**	**$121.00**	**$93,053.75**	**-$15,854.60**	**$371,804.76**	**$14,059.00**	

[29] In that final amended statement of claim it was asserted that: "Interest is claimed at 11% per annum from the respective dates that the rates were due pursuant to a

decision of the plaintiff council and Section 1018 of the Local Government Act 1993". In the course of the hearing of the appeal counsel intimated that they would agree on an interest calculation and provide it to the Court, but the Registrar has been notified that the parties as at 6 April were still in dispute as to the calculation of interest. In the circumstances it is desirable that judgment be delivered without further delay.

[30] The orders of the Court will therefore be:

1. Appeal allowed.
2. Set aside the judgment of 8 May 2000.
3. Give judgment for the appellant in the sum of $357,745.76 with interest from 24 March 2000 to date of judgment, calculated in accordance with s 1018 of the *Local Government Act* 1993 at the rate of 11% per annum.
4. Order that the respondent pay the appellant's costs of the action and the appeal to be assessed.
5. Liberty to apply.

[31] **DUTNEY J:** I agree with the reasons of Williams JA and with the orders he proposes.