SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Council v Amos* [2016] QSC 131
PARTIES:	**BRISBANE CITY COUNCIL** (plaintiff) **v** **EDWARD AMOS** (defendant)
FILE NO/S:	SC No 6704 of 2009
DIVISION:	Trial Division
PROCEEDING:	General Civil Trial
DELIVERED ON:	13 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 and 26 November 2015 and 12 February 2016
JUDGE:	Bond J
ORDER:	**The order of the Court is that:** **The parties bring in proposed short minutes of order to give effect to these reasons for judgment, with supporting submissions, in accordance with the following timetable:** **1. The Council, within 2 days of the date of this judgment.** **2. The defendant within a further 2 days.** **3. Any reply by the Council within a further 2 days.**
CATCHWORDS:	LOCAL GOVERNMENT – POWERS, FUNCTIONS AND DUTIES OF COUNCILS GENERALLY – where Council commenced proceeding against defendant to recover unpaid rates and charges – where defendant disputes the rates and charges levied – whether the defendant is liable for unpaid rates and charges STATUTES – ACTS OF PARLIAMENT – REPEAL – SAVINGS AND TRANSITIONAL CLAUSES WITHIN REPEALING ACT – where Council argued the effect of transitional provision required validity of decision to be determined by repealing Act – whether necessary to have regard to the repealed Act to determine validity of decisions made under the repealed Act LOCAL GOVERNMENT – REGULATION AND ADMINISTRATION – MEETINGS – RESOLUTIONS – GENERALLY – where statute required that Council decide by "resolution" the rates and charges – where records showed

that certain documents were "presented and passed" – where defendant argued records did not fulfil statutory requirements – whether adequate proof to establish resolutions were passed

LIMITATION OF ACTIONS – LIMITATION ON PARTICULAR ACTIONS – MORTGAGES AND CHARGES – WHAT CLAIMS ARE WITHIN LIMITATION STATUTES – where defendant argued claim was an action to recover sum recoverable by virtue of an enactment under s 10(1)(d) – where Council argued claim was an action to recover a principal sum of money secured by a charge under s 26(1) – whether s 10(1)(d) or s 26(1) applied

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – CONFIRMATION – ACKNOWLEDGEMENTS AND PROMISES TO PAY – where Council argued that action had fresh accrual on either acknowledgment or part payment by defendant – where defendant argued he reserved his rights and no such acknowledgment made out – whether contents of various correspondence amounted to express or implied admission of debt

Acts Interpretation Act 1954 (Qld), s 20, s 38
City of Brisbane Act 1924, s 6A, s 48, s 49, s 60, s 61, s 62, s 63, s 64, s 65, s 68C
City of Brisbane Act 2010, s 11, s 29, s 30, s 93, s 94, s 96, s 97, s 232, s 254, s 257
City of Brisbane (Finance, Plans and Reporting) Regulation 2010 (Qld), s 36, s 37, s 38, s 50, s 59, s 60, s 62, s 66
Fire and Emergency Services Act 1990 (Qld)
Limitation of Actions Act 1974 (Qld), s 10, s 26, s 35
Local Government Act 1993 (Qld), s 20, s 25, s 1037A, s 1038

Australia and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd [1992] 1 Qd R 478, followed
Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd (2007) 232 CLR 1, cited
Dixon v LeKich [2010] QCA 213, cited
Master Education Services Pty Ltd v Ketchell (2008) 236 CLR 101, cited
Ostabridge Pty Ltd (In Liquidation) (Receiver & Manager Appointed) v Stafford [2001] NSWCA 335, cited
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited
Surrendra Overseas Ltd v Government of Sri Lanka [1977] 2 All ER 481, cited
The Stage Club Ltd v Millers Hotels Pty Ltd (1981) 150 CLR 535, cited

Trow v Ind Coope (West Midlands) Ltd [1967] 2 QB 899, cited

COUNSEL: A Wheatley for the plaintiff
J Dillon for the defendant

SOLICITORS: Brisbane City Legal Practice for the plaintiff
Keller Nall & Brown for the defendant

Introduction

[1] The Brisbane City Council is the body corporate responsible for the local government of Brisbane. It operates pursuant to the *City of Brisbane Act* 2010 ("the 2010 Act"), which came into force on 1 July 2010. Prior to that date, it operated pursuant to the *City of Brisbane Act* 1924 ("the 1924 Act").

[2] Within some limits, the Council has power to do anything that is necessary or convenient for the good rule and local government of Brisbane[1], including the power to make and enforce any local law that is necessary or convenient for the good rule and local government of Brisbane[2].

[3] The taxing power of the Council is conferred by the power to levy rates and charges, defined as "levies" which the Council imposes on land for a service facility or activity supplied or undertaken by the Council or someone on its behalf[3]. Rates and charges are divided into "general rates" (which are levied on all rateable land) and "special rates and charges" (which are levied for things which have a special association with particular land), "utility charges" (which are levied for utilities, like waste management or gas) and "separate rates and charges" (which are for other charges not covered by the previous three categories)[4].

[4] The Council must decide what rates and charges are to be levied for a particular financial year, by resolution at its budget meeting for that year[5]. It then levies rates and charges by rate notices. Specific requirements are provided governing the person to whom rates notices may be given and the information which must be contained in rates notices[6].

[5] The Council may recover overdue rates or charges by bringing court proceedings for a debt against a person who is liable to pay them[7]. But, additionally, overdue rates and charges are made a charge on the land to which they relate, which the Council may register over the land by lodging the appropriate documents with the registrar of titles[8].

[6] The defendant was, and is, the registered owner of 7 lots of rateable land on which the Council has levied rates and charges. Up until 20 April 2015, he was the registered owner of

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1 See s 11(1) of the 2010 Act. Section 6A(1) of the 1924 Act when taken with s 25 of the *Local Government Act* 1993 (Qld) conferred an equivalent power.

2 See ss 11(4) to 11(8), 29 and 30 of the 2010 Act. Section 6A(1) of the 1924 Act when taken with s 20 of the *Local Government Act* 1993 (Qld) conferred an equivalent power.

3 See s 93 of the 2010 Act. Section 60 of the 1924 Act conferred an equivalent power.

4 See s 94 of the 2010 Act. Section 48 of the 1924 Act contained an equivalent provision.

5 See s 96 of the 2010 Act. Section 49 of the 1924 Act contained an equivalent provision.

6 See ss 36 to 38 of the *City of Brisbane (Finance, Plans and Reporting) Regulation* 2010 (Qld) ("the 2010 Regulation"). Sections 60 to 65 of the 1924 Act contained equivalent provisions.

7 See s 66(1) of the 2010 Regulation. Section 1038(1) of the *Local Government Act* 1993 (Qld) contained an equivalent provision.

8 See s 97 of the 2010 Act. Section 1037A of the *Local Government Act* 1993 (Qld) contained an equivalent provision.

a further lot of rateable land ("the Sandgate Rd property") on which the Council has levied utility charges.

[7] By this proceeding, the Council seeks to recover as a debt from the defendant unpaid amounts of such rates and charges[9]. The claim encompasses rates and charges which were the subject of rates notices issued in the period 30 April 1999 to 9 January 2012. Together with interest, the total amount claimed exceeds $494,000. The defendant disputes the rates and charges levied, on a number of bases.

[8] By their written and oral submissions in the proceeding, the parties narrowed the issues which arose on the pleadings. It was common ground that the matters raised by the defendant can conveniently be analysed under five separate headings. I do so below.

The applicable Act issue

[9] Amongst other things, the defendant challenges the validity of Council resolutions passed and rates notices issued before 1 July 2010, namely at a time when the applicable Act was the 1924 Act.

[10] An antecedent question is whether the validity of resolutions passed and rates notices issued before 1 July 2010 should be assessed by reference to the 1924 Act or the 2010 Act.

[11] Section 257 of the 2010 Act expressed the relevant transitional provision in these terms (emphasis added):

> 257 Decisions under repealed Acts
>
> (1) **A decision under the following repealed Acts, that was in force immediately before the commencement of this section, continues in force as if the decision were made under this Act, made at the same time as it was made under the repealed Act** –
>
> (a) [**the 1924 Act**];
>
> …
>
> (2) A **decision includes** an agreement, appointment, approval, authorisation, certificate, charge, consent, declaration, delegation, determination, direction, dismissal, exemption, immunity, instruction, licence, memorandum of understanding, order, permit, plan, policy, protocol, **rates**, release, **resolution**, restriction, settlement, suspension and warrant.

[12] The evident intention of the transitional provision was to preserve the force and effect of a wide group of "decisions" which were made under the 1924 Act and which were in force immediately prior to 1 July 2010. It did so by stating that such decisions would continue in force as if they were decisions made under the 2010 Act, made at the time they were in fact made under the 1924 Act.

[13] For example, a resolution made on 1 December 1999, under the 1924 Act would continue in force as if it was a resolution made under the 2010 Act, but made on 1 December 1999.

[14] As a matter of general principle, the phrase "decision under the … repealed Acts, that was in force …" must be read as a reference to decisions which were valid decisions[10] under the

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9 The amounts claimed include for a fire levy imposed pursuant to the *Fire and Emergency Services Act* 1990 (Qld), previously the *Fire and Rescue Service Act* 1990 (Qld). Because it was common ground that the amounts claimed for fire levy rise or fall with the other matters, it is not necessary further to consider the fire levy aspects of the claim.

10 Cf, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

relevant Act, in the sense that they were decisions which complied with any legislative requirements which, on the application of the *Project Blue Sky* test[11], were properly to be regarded as conditions of validity of the decision.

[15] The result would be that if, for example, the validity of a resolution made on 1 December 1999 was in issue, that question would be resolved, first, by reference to the conditions of validity created by the 1924 Act in respect of such a resolution and, second, by the application of the transitional provision set out in s 257 in the 2010 Act.

[16] The defendant supported that approach and contended that the statutory intention of the 2010 Act was to preserve the force and effect of decisions which were validly made under the 1924 Act rather than to apply retrospectively the validity requirements of the 2010 Act to decisions made under the 1924 Act.

[17] The Council submitted that the defendant's interpretation of s 257 had an "initial attraction", but that when one considered the provision as a whole, the remaining sections in the relevant Chapter and the explanatory notes, the question of the validity of a "decision" was only ever to be considered by reference to the conditions of validity specified in the 2010 Act. The Council argued that the qualification that a decision must first be "valid" under the 1924 Act did not sit comfortably with:

(a) the wide and inclusive definition of "decision" in s 257(2), which includes commercial matters not ordinarily subject to administrative review;

(b) the inclusion in s 257(1) of a list of repealed Acts and the absence of words expressly imparting a validity requirement, indicating that the legislative intention is to refer to a decision being made during the currency of those Acts rather than "in accordance with" or "pursuant to" those Acts;

(c) the remaining provisions in Chapter 8, including s 254, which provides for "the transition…(including the transition of rights, liabilities and interests, for example)" from certain repealed Acts to the 2010 Act;

(d) the *City of Brisbane Bill* 2010 (Qld) Explanatory Notes, which stipulate that the policy objectives of the 2010 Act were to provide a contemporary legislative framework for the Council to undertake its governance and service delivery role and for the 2010 Act to be "comprehensive and contemporary, making [the repealed Acts] unnecessary"; and

(e) if s 257 was to be construed in the way for which the defendant contends, it would achieve nothing more than would have been achieved in any event by the operation of s 20(2) of the *Acts Interpretation Act* 1954 (Qld), which provides that the repeal of an Act does not affect "anything suffered, done or begun" or "a right, privilege or liability acquired, accrued or incurred" under a repealed Act.

[18] I agree with the defendant's construction of s 257. I do not find the reasons advanced by the Council in support of its construction of s 257 to be at all compelling. Neither the definition of "decision" in s 257(2), the structure of s 257(1), the wording of the other provisions in

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[11] In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93] the plurality said "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'."

Chapter 8, nor the policy objectives of the 2010 Act justify a departure from the general principles identified at [14] and [16] above.

[19] I also do not think that such a construction renders s 257 otiose. Section 257 operates so that a decision under the 1924 Act continues in force, but deems it to be a decision under the 2010 Act. The former is a feature of s 20(2) of the *Acts Interpretation Act* 1954 (Qld), the latter is not. Accordingly s 257 does have an operation beyond s 20(2).

Validity issues

[20] The Council alleged that it validly levied rates and charges which it had formulated in accordance with valid Council resolutions, by valid written rates notices which it had given to the defendant. For his part, the defendant admitted that the Council purported to levy rates and charges by written rates notices given to him, but contended that they were invalid and/or ineffective. This contention gave rise to a number of points concerning the adequacy of the Council's proof of its case, the extent of any non-compliance with the applicable legislative regime which was revealed by the evidence, and whether such non-compliance as might be revealed sounded in the invalidity of relevant resolutions or rates notices.

Adequacy of proof that resolutions were passed

[21] The first question which arises is whether the Council had proved the existence of resolutions validly made pursuant to the terms of the applicable Act.

[22] Section 232 of the 2010 Act provides that a certificate which purports to be about the state of, or a fact in, a record of the Council and purports to be signed by the chief executive officer is evidence of the matters contained in the certificate.

[23] Exhibit 1 was a certificate under the hand of the Council's chief executive officer certifying:

> … that the records of [the Council] show that:
>
> (a) a document entitled "Resolutions of Rates and Charges for 1998-1999" were [*sic*] presented and passed as part of [the Council's] Budget for 1998-1999

[24] Subparagraphs (b) to (o) of the exhibit were in similar form for each of the following financial years up to and including 2012-2013. The certificate then stated that the documents referred to as (a) to (o) were attached to the certificate.

[25] The result is that the certificate was evidence that –

(a) for each of the financial years from and including the year ended 30 June 1999 to and including the year ended 30 June 2013 a document entitled "Resolutions of Rates and Charges for [that financial year]" was presented and passed as part of the Council's budget for that financial year; and

(b) the documents attached to the certificate were the documents presented and passed as part of the Council's budget for that financial year.

[26] It will suffice to make the following observations about the form of each of the documents:

(a) Each was headed "Resolution of rates and charges".

(b) Each commenced with a further heading "presentation and submission by the Right Honourable the Lord Mayor for the approval of and adoption by the Council".

(c) Each commenced with words to the following effect:

> Pursuant to the provisions of [the Act and applicable regulations], the Rules of Procedure and the Local Laws of the Council, I present and submit to the Council recommendations as to the rates,

> charges and fees to be fixed for the year ending 30 June [that financial year] for the approval of and adoption by the Council;

(d) The reference to "adoption" should be read in the context that at least by the time of the 2010 Act, "adopt" was defined to mean "by resolution of the council". I think in the context in which it appeared in the documents, it would be taken to mean that even when there was no specific legislative definition.

(e) Each then set out detailed provisions as to the way in which rates and charges would be levied for that financial year.

[27] The defendant contended that the certificate simply established that budget documents were adopted, and that the budget documents included documents identifying proposed rating resolutions. The argument was that I could not be satisfied that the Council had in fact done what either s 49 of the 1924 Act or s 96 of the 2010 Act required, namely –

(a) (for the 1924 Act) that the rates and charges were "made for a financial year by resolution at the council's budget meeting for the year"; and

(b) (for the 2010 Act) that the Council had decided "by resolution at the council budget meeting for a financial year, what rates and charges are to be levied for that financial year".

[28] I reject the submission. The certificate was evidence that, at relevant times, a document purporting to be a resolution "was presented and passed as part of the budget" for each relevant financial year. To my mind, that is sufficient proof that the Council acted in a way which met the statutory requirement in either the 1924 Act or the 2010 Act. If I had any doubt – which I do not – I would have been prepared to apply the presumption of regularity[12] to bolster my conclusion.

Adequacy of time allowed for payment in the rates notices

[29] The defendant submitted that certain rates notices issued to him between about April 1999 and January 2012[13] were invalid. The impugned rates notices all identified as the "due date" the date which was the 30th day after the date which was identified as the issue date, e.g. for a rate notice with an issue date of 27 October 1999 the due date specified was the date which was the 30th day after 27 October, namely 26 November 1999.

[30] The defendant submitted that such notices were invalid because they did not provide a due date which was at least 30 days after the issue date, in contravention of s 65(2)(a) of the 1924 Act or s 50(2)(a) of the 2010 Regulation[14]. The effect of his submission was that rates notices which identified as the "due date" the date which was the 30th day after the "issue date" would all identify a due date which was one day too early because, for the purposes of counting, s 38 of the *Acts Interpretation Act* 1954 (Qld) required the exclusion of both the start date and the end date of the 30 day period.

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12 See, *Dixon v LeKich* [2010] QCA 213 at [20], where Fraser JA (with whom McMurdo P and White JA agreed) said: "The presumption of regularity has been described as 'a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.'" In this case the conduct of the Council in issuing rates notices could only legally be done if there had been a resolution duly passed in terms of the statute applicable at the time.

13 The rates notices concerned were particularised in the defendant's pleadings at paragraph 9(k).

14 Both the 1924 Act and the 2010 Act need to be considered because the rates notices were notices which were given both before and after the commencement of the 2010 Act.

[31] I reject this submission.

[32] Section 65 of the 1924 Act relevantly provided (emphasis added):

> 65 Time within which rates must be paid
>
> (1) At its budget meeting, the council **must, by resolution, decide** the date by which, or **the time within which, each rate must be paid**.
>
> (2) The date by which, or **the time within which, the rate must be paid must be**-
>
> (a) **at least 30 days after the rate notice is issued**; and
>
> (b) the same date or time for each person liable to pay the rate.
>
> …

[33] Section 50 of the 2010 Regulation relevantly provided (emphasis added):

> 50 When rates or charges must be paid
>
> (1) **The council must decide** the date by which, or **the period within which, rates or charges must be paid**.
>
> (2) The date by which, or **the period within which, the rates or charges must be paid must be** –
>
> (a) **at least 30 days after the rate notice for the rates or charges is issued**; and
>
> (b) subject to part 10, the same date or period for each person liable to pay the rates or charges.
>
> (3) The council must, by resolution, make the decision at its budget meeting.

[34] Section 38 of the *Acts Interpretation Act* 1954 (Qld) applied to both the 1924 Act and the 2010 Regulation and provided:

> 38 Reckoning of time
>
> (1) If a **period beginning on a given** day, act or **event is provided or allowed for a purpose by an Act, the period is to be calculated by excluding** the day, or **the day of the** act or **event**, **and**—
>
> (a) **if the period is expressed to be** a specified number of clear days or **at least a specified number of days—by excluding the day on which the purpose is to be fulfilled**; and
>
> (b) in any other case—by including the day on which the purpose is to be fulfilled.

[35] It can be seen that the function of each of s 65(2)(a) of the 1924 Act and s 50(2)(a) of the 2010 Regulation is not to identify a period within which something is to be done, but rather is to regulate the nature of the decision which the Council is both authorised and obliged to make. What is relevant is to identify the decision made by Council and ask whether it complies with s 65(2)(a) of the 1924 Act or s 50(2)(a) of the 2010 Regulation, whichever is applicable. Section 38 has no relevance to that question.

[36] In this case, for reasons already given, the chief executive officer's certificate was evidence that, at relevant times, a document purporting to be a resolution "was presented and passed as part of the budget" for each relevant financial year. Each of those documents evidenced that Council had decided that the period within which rates and charges had to be paid was "within 30 days after the date of issue of [the rates notice]". Such a decision was a decision which was authorised by the terms of s 65(2)(a) of the 1924 Act or s 50(2)(a) of the 2010 Regulation. The decision would have been just as valid had it been "within 60 days after" (or, indeed, any number of days which was 30 or more).

[37] The result is that at all material times the Council had made a lawful decision that the period within which rates and charges had to be paid was "within 30 days after the date of issue of [the rates notice]".

[38] A question arises whether the impugned rates notices were consistent or inconsistent with the Council's decision, given, as I have already noted, that the notices identified as the "due date", the date which was the 30th day after the date which is identified as the "issue date". As to this:

(a) Section 38 of the *Acts Interpretation Act* has no relevance to that question as the period concerned was the period allowed by the Council's decision, not by an Act. I would conclude that the word "after" in this context would receive an interpretation as excluding the first and including the last day of the period in question[15].

(b) But, if I am wrong and s 38 applies to the decision, the same result would be reached because s 38(1)(b) would apply, not s 38(1)(a).

(c) Accordingly, I would conclude that specifying as a due date the date which was the 30th day after the date of the issue date complied with Council's intention as revealed by the decisions which it had made.

The inclusion of "projected interest" figures in rates notices

[39] Each of the rates notices also include various amounts for interest, including a calculation of interest which may be referred to as "projected interest". On many of the rates notices it was referred to as such, although in some of the earlier rate notices it was just referred to as "interest".

[40] "Projected interest" was an amount of interest which, because the account was in arrears and there was an opening balance, was calculated on that opening balance from the last accrual date of the rate notice up to the due date for payment. This was done to allow a rate payer to know the total amount (in addition to the new amount of rates and charges levied by the notice) which should be paid by the due date to pay off the whole amount owed and bring about a zero balance.

[41] The defendant made the following submissions:

(a) To the extent that projected interest includes amounts which had not accrued until after the date of issue, rates notices including projected interest must be taken to have included amounts "other than rates".

(b) That course is only permissible if it is clear on the face of the rate notice that –

(i) the amount is "not a rate" (the 1924 Act) or "not for rates or charges" (the 2010 Regulation); and

(ii) payment of the amount does not affect any "discount relating to the rate" (ss 60(2B) and 60(2C) of the 1924 Act) or "discount that applies to the rates or charges" (s 37 of the 2010 Regulation).

(c) The rates notices which included projected interest amounts failed to make it clear that –

(i) those amounts were not rates; and

(ii) the failure to pay would not affect any discount,

and, accordingly such rates notices were invalid.

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15 Cf *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899 at 916 to 917, 918, 921 to 922.

[42] The contention at [41](a) was correct because in each of the 1924 Act and the 2010 Regulation "rates" was defined. As defined, the term included interest accrued, but would not have included interest not yet accrued. The inclusion of amounts prospectively due for interest meant that the notices included amounts "other than rates". The Council contended the contrary, but in my view it is plain that in making a distinction between "rates" and "other than rates", s 65 of the 1924 Act and s 50 of the 2010 Regulation, were each referring to a distinction which obtained at the time the notice was issued. It would not matter that, by the time of the due date, the projected interest would fall within the definition of "rate".

[43] However the remainder of the defendant's argument must be rejected for these reasons:

(a) It was clear on the face of the rates notices that the amount was not a "rate". The projected interest calculation was separately listed and described.

(b) In circumstances attracting projected interest (namely where other "rates" must have been unpaid) there could not be any relevant discount, because the discount provisions did not apply to payments if other rates were unpaid[16].

(c) Either –

(i) on their proper construction s 60(2C)(b) of the 1924 Act and s 37(2)(b) of the 2010 Regulation could not have been intended to apply to such a situation and could not be regarded as having been breached; or

(ii) (if that conclusion is wrong) there would be no invalidation of the rates notice because it could hardly be thought that the legislative intention was to invalid a rates notice for failing to make clear that there was no effect on an entitlement which could not exist[17].

Utility charges for the Sandgate Rd property

[44] The Council claimed that the defendant remained liable for utility charges for the Sandgate Rd property notwithstanding that he is no longer the registered owner of the lot. For his part, the defendant contended that once he was no longer registered owner, he ceased to be liable for rates and charges.

[45] In order to determine which contention is right, it is necessary first to identify the relevant facts.

[46] The defendant was registered owner of the Sandgate Rd property during the period October 2000 to, and including, April 2015. The property was an old workers cottage which had a residence upstairs and business premises downstairs. During the period in which the defendant was registered owner, the property was occupied. He rented the upstairs residence out to others and he used the downstairs as a real estate agency and office. Water and sewerage services were already connected to the cottage when he became registered

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16 See s 68C of the 1924 Act and s 62(10) of the 2010 Regulation.

17 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] quoted at footnote 11 above and see also *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [11], where the High Court approved the test explained in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at [46] that the effect of the statute: "…depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. Ultimately, the question is one of statutory construction."

owner and they stayed connected and were used by the occupiers during the period he was registered owner.

[47] The water and sewerage charges which were the subject of this claim were levied during 2001 to 2010, during the period when the Council was responsible for and did levy utility charges in the form of water and sewerage access and consumption charges. The rates levied under the 1924 Act for utility charges continued in force as if levied under the 2010 Act: s 257 of the 2010 Act.

[48] The resolution of this issue turns on the proper construction of s 59(1)(b) of the 2010 Regulation. Section 59 provided:

> 59 Who must pay rates and charges
>
> (1) Subject to section 94, the following persons are liable to pay rates and charges—
>
> (a) for rateable land—the current owner of the land, even if that owner did not own the land during the period to which the rates or charges relate;
>
> (b) for a service that is supplied to a structure, or to land that is not rateable land—the entity who asked for the service to be supplied;
>
> (c) for previously rateable land—the owner of the land immediately before it stopped being rateable land.
>
> (2) Previously rateable land is land that was, but has stopped being, rateable land because—
>
> (a) the tenure of a holding is terminated; or
>
> (b) the land is surrendered or forfeited to the State; or
>
> (c) the land is acquired by the State or the Commonwealth; or
>
> (d) the land is exempted from rating; or
>
> (e) the property description of the land no longer exists.
>
> (3) If more than 1 person is liable to pay rates or charges, all the persons are jointly and severally liable to pay the rates or charges.

[49] The claim in respect of the Sandgate Rd property is for utility charges, which are a service. The cottage which was constructed on the lot is a structure. The entity who asked for the service to be supplied to a structure, remains liable for that service. The Council contends that the defendant must be regarded as having asked for the service to be supplied because on the evidence there was an implicit request by the defendant for continued supply of the water and sewerage services given that the premises were occupied by his rent-paying tenants and the services were used by the occupiers.

[50] I agree and conclude that the defendant remained liable for utility charges for the Sandgate Rd property notwithstanding that he is no longer the registered owner of the lot. There is nothing in the scheme of the 2010 Act which required that the request for the supply of services had to be an explicit request. It seems to me that if a landlord rents out premises to tenants who will undoubtedly use water and sewerage services, when those services are in fact used by the tenants, that must be taken as the landlord having made an implicit request to the Council for the continued supply of the water and sewerage services.

[51] One possible argument against liability should be mentioned. The Sandgate Rd property was rateable land. If the scheme of s 59 is that there is not intended to be any overlap between the three cases mentioned in the three subparagraphs of s 59, then that would suggest that the defendant was not liable. It seems to me that that is not the intention. Structures are obviously capable of being built on land which is rateable and on land which is not rateable,

yet s 59(1) simply uses the term "structure" without differentiation. Moreover, s 59(3) evidently contemplates the possibility that the outcome of the application of the rules in s 59 might be that there is more than one person made liable.

[52] The defendant also submitted that the Council had failed to prove that any amount was outstanding in relation to the Sandgate Rd property. The defendant framed the submission as a failure to prove that the debt was owing rather than a positive assertion that the debt had in fact been paid.

[53] The structure of the Council's pleadings was to plead liability arising from the rates and charges levied by the Council, the payments made by the plaintiff and the outstanding balance owed. The Council alleged and the defendant admitted that the Council had levied rates and charges. The Council alleged that "[t]he defendant has made various payments of the rates and charges levied, as pleaded in …, which are particularised, in relation to the land, in Schedule 2."

[54] Schedule 2 then set out, amongst other things, the various rates, charges and interest levied in respect of the properties, as well as any payments (or other credits) made towards the relevant account. In relation to the Sandgate Rd property, it suffices to observe that there were no "payments (or other credits) made towards the water account" noted in the relevant column.

[55] The defendant's responsive pleadings were that "…[t]he defendant admits that he made the payments and says that the payments were made under protest without admitting liability and with the full reservation of the defendant's rights." There was no proper pleaded traverse of the Council's allegation concerning the absence of payments. Accordingly, the Council was not required to put in any evidence going to the amounts outstanding or the absence of any payments made. Those issues simply did not arise on the pleadings.

Is any part of the Council's claim statute barred?

[56] The proceeding was commenced in 24 June 2009. It encompasses claims in respect of overdue and unpaid rates and interest the subject of rates notices issued in the period 30 April 1999 to 9 January 2012. If a 12 year limitation period applies, then no difficulty arises (except, possibly insofar as the amounts claimed by the Council include opening balances for rates which predate the period pleaded). But if a 6 year limitation period applies, then some of the Council's claims will be statute barred, unless a relevant acknowledgement or part payment of debt has occurred.

[57] It is necessary to consider these issues:

(a) First, what is the applicable limitation period?

(b) Second, has there been any relevant acknowledgement or part payment of debt?

(c) Third, what is the application of the limitation period in the circumstances?

What is the applicable limitation period?

[58] The relevant provisions of the *Limitation of Actions Act* 1974 (Qld) were as follows:

> 10 Actions of contract and tort and certain other actions
>
> (1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose—
>
> …

(d) an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture.

…

26 Actions to recover money secured by mortgage or charge or to recover proceeds of the sale of land

(1) An action shall not be brought to recover a principal sum of money secured by a mortgage or other charge on property whether real or personal nor to recover proceeds of the sale of land after the expiration of 12 years from the date on which the right to receive the money accrued.

…

(5) An action to recover arrears of interest payable in respect of a sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land or to recover damages in respect of such arrears shall not be brought after the expiration of 6 years from the date on which the interest became due.

(6) This section does not apply to a mortgage or charge on a ship.

…

[59] The defendant contended that s 10(1)(d) applies on the basis that the action is to recover a sum recoverable by virtue of an enactment. Unless s 26 applies, and applies to the exclusion of s 10(1)(d), that proposition would be plainly right and there would be a 6 year limitation period.

[60] For its part, the Council contends that s 26 applies so that the relevant limitation period is 12 years, on the basis that the proceeding is to recover "a principal sum of money secured by a mortgage or other charge on property".

[61] The Council relies on the fact that s 97 of the 2010 Act provides that overdue rates and charges are a charge on the land. It notes that unlike other States[18], the Queensland *Limitations of Actions Act* does not exclude from the operation of s 26 the charge on land by way of rates. The only type of charge excluded from the generality of the statutory wording is a mortgage or charge on a ship: s 26(6). If Queensland had intended a similar outcome to that which Victoria and Tasmania have achieved, that would have been easy to do.

[62] The defendant says that s 26 does not apply. He contends that the reference to "principal sum of money" is the indication that the subject matter and statutory intention of s 26 is to provide a 12 year limitation period for an action to recover a primary or capital sum lent and subject to a mortgage or charge by way of security.

[63] I am unable to discern in s 26 the intention for which the defendant contends. The section uses words of generality to apply where the action is to recover a principal sum secured by mortgage or charge on real or personal property. There is no reason to read the words down so that they apply only to circumstances where monies have been lent. Charges can arise in many circumstances other than a lending transaction.

[64] The result is that I agree with the Council's submission that s 26 applies. Because it applies, it will apply to the exclusion of s 10(1)(d) because the provisions of s 26(1) will be regarded as "specific and therefore governing": see *Australia and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 at 482 to 483 per McPherson J (with whom Connolly and Williams JJ agreed).

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18 See, s 20(4)(b) of the *Limitations of Actions Act* 1958 (Vic) and s 23(6) of the *Limitations Act* 1974 (Tas).

[65] The defendant then submitted that if s 26(1) and the 12 year limitation period applied, s 26(5) further provides that a 6 year limitation period applies to the Council's claim concerning interest on unpaid rates.

[66] The Council's response (with which I agree) was –

(a) The 2010 Act provides in s 97(2) that "the overdue rates and charges are a charge on the land".

(b) "Overdue rates and charges" are effectively defined by s 64(1) of the 2010 Regulation as having three components, being rates or charges not paid by the due date for payment, court costs and interest.

(c) The effect of s 97(2) was to make the interest which was payable on unpaid rates and charges, part of the principal sum which by operation of s 97(2) was secured by a charge on the land.

(d) Accordingly, s 26(5) had no operation.

[67] The result is that the limitation period applicable is 12 years as set out in s 26(1).

[68] On that basis it is not necessary to consider the issues which arise between the parties in relation to whether there has been any acknowledgment or part-payment of rates. However, in case I am wrong about the selection of the limitation period, it is appropriate to indicate the view which I take on those matters.

Has there been any relevant acknowledgement or part payment of debt?

[69] Section 35 of the *Limitations of Actions Act* relevantly provided (emphasis added):

> 35 Fresh accrual of action on acknowledgment or part payment
>
> …
>
> (3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, … and the person liable or accountable therefor **acknowledges the claim or makes a payment in respect thereof**, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

[70] The defendant made three tranches of payments of rates on 23 August 2000, 26 June 2001, and 5 November 2001 with respect to amounts owed in respect of the land with respect of which this proceeding is concerned. Council receipts evidence that:

(a) the payments on 23 August 2000 were made to the Council's Chermside Customer Service Centre;

(b) the payments made on 26 June 2001 were payments made at the Albion Post Office; and

(c) the payments made on 5 November 2001 were payments made to the Brisbane City Customer Service Centre.

[71] The defendant gave evidence that on each of the three occasions that payments were made, he also personally handed over a handwritten letter or note addressed to the town clerk. Copies of the documents were tendered. Each handwritten document identified the amount paid and how it was to be applied and also stated words to the effect that the payment was made under protest with a reservation of his rights because of his contention that the rates notices were all invalid.

[72] The Council invited me to reject the evidence of the defendant because:

(a) the Council had not been able to locate any record of the handwritten documents in circumstances in which it would have expected to be able to do so if such documents had been provided;

(b) no alleged reservation of rights, in relation to the payments were raised in response to the notice to admit facts or pleaded in the defence; and

(c) on other occasions when the defendant had written to reserve his rights he had faxed the letter and kept a transmission report.

[73] I do not find Council's submissions to provide any persuasive reason why I should not accept the sworn evidence of the defendant. I did not find the evidence of Council's record keeping sufficiently compelling to reach the conclusion that proof of absence was absence of proof. I accept the truth of what I have recorded at [70] and [71] above.

[74] What flows from the reservations which were made in the handwritten documents?

[75] The defendant accepted as a correct the following passage from *The Stage Club Ltd v Millers Hotels Pty Ltd* (1981) 150 CLR 535 at 560 to 561 per Wilson J (emphasis added):

> The subject of acknowledgments has received consideration in three cases in this Court. In *Hepburn v McDonnell* (1918) 25 CLR 199, and in *Bucknell v Commercial Banking Co of Sydney Ltd* (1937) 58 CLR 155 the Court was concerned with appeals from the Supreme Court of New South Wales. In each case **the question was whether a letter written by the debtor to the creditor constituted an acknowledgment under the rules of law and construction** associated with the *Statute of James and Lord Tenterden's Act*. In both cases **there is the recognition that under the old law the extension of liability resulted from the existence of a new promise to pay the debt which was either explicit or implicit in the admission of the debt**: see per Isaacs J in *Hepburn* (1918) 25 CLR 199 at 207 to 209 ; per Dixon J in *Bucknell* (1937) 58 CLR 155 at 163 ; and cf *Spencer v Hemmerde* (1922) 2 AC 507. Both Isaacs J and Dixon J make it clear that **the precise extent of the acknowledgment will depend on the circumstances, the admission of the debt and the consequent implied promise being capable of qualification or condition. In other words, the "liability is revived only according to the tenor of the promise"** (per Dixon J in *Bucknell* (1937) 58 CLR 155 at 163), **thereby allowing considerable flexibility in the application of the doctrine to particular circumstances**.

[76] The defendant contended that the same approach is to be taken to the fact of part payment: cf *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481 at 490 to 491, which was referred to with approval in *Ostabridge Pty Ltd (In Liquidation) (Receiver & Manager Appointed) v Stafford* [2001] NSWCA 335 at [36].

[77] The defendant then contended that the part payments were made in circumstances which supported the conclusion that there was no admission made as to the remainder of any alleged debt. However it is in that respect in which I depart from the defendant's analysis. In my view the letters and payments do support an implicit admission of the debts identified on the face of the rates notices with which they dealt. That is because the protest and reservation of rights was made only in respect of one issue, namely the contention that the rates notices were invalid. In compliance with *The Stage Club Ltd v Millers Hotels Pty Ltd*, the flexible application of doctrine leads me to conclude that the letters and payments should be regarded as an admission and an implicit promise to pay, qualified only by the contention as to invalidity. The qualification now being determined against the defendant, the letters and payments are now to be regarded as amounting to an implicit promise otherwise to pay. Accordingly, they operate as acknowledgements and payments for the purposes of s 35(3).

[78] The Council sought to rely on one other document as an acknowledgement within the meaning of s 35(3), namely a letter under the defendant's own hand of 23 February 2007 which stated "… My dispute is not primarily that I do not owe any rates but rather as to what and how much is the correct amount that is owing." Objection was taken by the defendant

to the tender of the letter on the grounds that it was the subject of the privilege in aid of settlement. The Council disputed the existence of the privilege and also contended that if it existed, it had been waived. I admitted the letter provisionally, reserving my decision on the claim for privilege and the contention as to waiver.

[79] The letter was addressed to the Council's lawyers in these terms:

> I enclose copies of the following documents:
>
> 1. Letter Fry & Co to Keller Nall & Brown 20/4/06.
> 2. Letter Keller Nall & Brown to Fry & Co 11/10/06.
> 3. Letter McKelvey Hu Lawyers to Keller Nall & Brown 12/10/06 (McKelvey Hu Lawyers are town agents for Fry).
> 4. Application for Reconsideration S4763/00.
> 5. Application for Reconsideration 3003/05.
>
> As soon as the costs issues in the Supreme Court have been resolved then there is no reason for the moneys in the estate of my father not to be distributed to the beneficiaries. I have a 1/3 entitlement. I anticipate this should happen within 3-4 months. I want to reach a settlement of the rates and I see this as presently the only real way of providing funds. My dispute is not primarily that I do not owe any rates but rather as to what and how much is the correct amount that is owing. In view of the above it is appropriate that both [the Council] and myself mutually agree to take no further steps in action S3175/03 for 4 months to enable possible terms of settlement to be reached.

[80] In my view, if the letter was admissible, it could not be regarded as giving rise to an acknowledgement of debt for the purposes of s 35(3). I agree with submissions advanced by the defendant that –

(a) there is no express or implied admission that a debt is owing, but rather that the dispute relates "primarily" (but, notably, not solely) to the amount.

(b) the letter expressly states that there is a dispute as to "what and how much is owing" in circumstances where no minimum or agreed amount is identified or acknowledged; and

(c) there is thus no admission of the debt, or alternatively, any admission is so qualified that the entire amount allegedly owing remains the subject of dispute.

[81] In light of that view, I can express my conclusions on the claim of privilege and the question of waiver briefly:

(a) The letter sought to bring about the negotiation of a settlement on "the rates". That can only be regarded as a reference to the long standing dispute between the parties which, at least at that stage, encompassed issues concerning validity of rates notices and also what was the correct amount. There is no reason why the letter should not be regarded as attracting the privilege in aid of settlement.

(b) That said, it is evident that the Council had a different view. It pleaded reliance on the letter as an acknowledgement and the conduct of the defendant after that occurred evidently accepted that the Council could do so. The relevant course of events was as follows:

(i) On 16 September 2011, as part of the Council's pleaded reply to the limitations defence, the Council pleaded that the defendant had acknowledged the claim on or about 23 February 2007, in writing signed by the defendant.

(ii) On 21 September 2011, the defendant requested particulars of the Council's reply including in relation to the relevant paragraph.

(iii) On 29 September 2011, the Council provided particulars which identified the relevant paragraph of the letter.

(iv) On 5 April 2012, those particulars were then incorporated into the pleaded reply in a form which specifically referenced the letter by date and quoted the relevant paragraph and that paragraph stayed the same in successive iterations of that pleading.

(v) The evidence does not reveal that the defendant ever took objection to that course, or asserted the existence of a claim for privilege. Indeed, on 20 October 2015, as part of steps the defendant took in compliance with his disclosure obligation, the defendant specifically disclosed the document concerned without advancing any claim for privilege.

(vi) It was only when the defendant entered the witness box on 26 November 2015 and was asked questions about the document, that the claim for privilege was made.

(c) The privilege in aid of settlement cannot be waived unilaterally. Both parties' consent would be required. The Council had conducted itself in a way inconsistent with any claim for privilege since 16 September 2011. By his conduct at all times from 21 September 2011 up until advancing the claim for privilege for the first time at trial, so had the defendant.

(d) The defendant gave evidence that he had made a mistake when disclosing the document. Although he had conceded that he personally did the relevant disclosure and did so by going through a bundle of documents, he said he must not have looked at the document carefully enough because if he had, he would have realised that he should not put it in. He then submitted that mistake by a lay client in conducting disclosure should not be prevent him from asserting the privilege once the mistake was realised.

(e) I did not find the defendant's evidence concerning the disclosure to be persuasive. Rather it struck me as an opportunistic explanation which I should not find to be reliable. In any event, the argument subsequently advanced was to significantly underplay the extent of the conduct by the defendant whilst he was legally advised which was inconsistent with his subsequent assertion of the privilege.

(f) I would conclude that by virtue of his conduct to which I have adverted, the defendant had, by the time of trial, lost his right to rely on the claim to the privilege in aid of settlement which he might otherwise have asserted.

<u>What is the application of the limitation period in the circumstances?</u>

[82] If, as I have found, a 12 year limitation period applies, then the claims which would be statute barred would be claims which accrued due more than 12 year prior to the commencement of the proceeding, namely 12 year prior to 24 June 2009. The relevant date is, accordingly, 24 June 1997.

[83] The Council claims rates commencing on 24 April 1999, which is well within time, given the application of a 12 year limitation period. The utility charges for the Sandgate Rd property were sought from 2 March 2001, which again, is within time.

[84] One potential complicating issue was that the amounts claimed by the Council included opening balances for rates which predate 24 April 1999. The defendant contended that those opening balances must include amounts which were beyond the limitation period, even allowing for a 12 year period.

[85] In this regard, the Council submitted, and I agree, that the payments made for rates on each property (whether properly the subject of an alleged reservation of rights or not) must be taken to have reduced the opening balances, as the payments were directed firstly to the overdue rates or charges: s 60(2E) of the 1924 Act[19]. The application in that way of the payments which were made, logically gave rise to the conclusion that of the opening balances which existed, the only amounts which could have been outstanding once the last payments were allocated, were amounts which, on any view must have accrued due in the preceding quarter of the financial year prior to the date of the earliest rate notice sued on by the Council[20]. The result is that the claim for those amounts would also be within time.

[86] I conclude that there is no part of the Council's claim which is barred by operation of the *Limitations of Actions Act*.

Conclusion

[87] There should be judgment in favour of the Council, together with costs.

[88] During the course of the hearing, the parties agreed that rather than my formulating the terms of the order in my reasons for judgment, especially in light of the need to carry out interest calculations, I would give the parties an opportunity to formulate a form of order which was consistent with my reasons.

[89] Accordingly, I order that the parties bring in proposed short minutes of order to give effect to these reasons for judgment, with supporting submissions if necessary, in accordance with the following timetable:

(a) the Council, within 2 days of the date of this judgment;

(b) the defendant within a further 2 days;

(c) any reply by the Council within a further 2 days.

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19 Section 60(2) of the 2010 Regulation is to similar effect.

20 See the Council's written submissions at [108] and Table C to the written submissions.