LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPEAL

VR/9/1986

BETWEEN

COASTAL CONTAINER HOLDINGS LIMITED - APPELLANT

AND

THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND - RESPONDENT

Lands Tribunal for Northern Ireland - The President, Judge R T Rowland QC

Belfast - 10th and 11th November 1988

This appeal relates to three areas of land within the property of the Belfast Harbour Commissioners at Herdman Channel Road. None of the three areas is contiguous to the others but all three form part of a complex known as the Herdman Channel Unit Load Terminal, and all three are the subject of separate entries in the Valuation List. In each case the Commissioner has sought to charge the Appellant Company (hereinafter called "Coastal") with rates by inserting in the Valuation List in each case the name of the occupier of each "hereditament" as "Coastal Container Holdings Ltd" and in each case the hereditament has been distinguished in the Valuation List under the description "Freight Transport" and described as "Dock". In this appeal the appellant contends that the Commissioner was wrong in law in entering Coastal as the rateable occupier of the premises because neither in law nor in fact does Coastal have the necessary exclusive occupation of the premises to constitute rateable occupation. The Commissioner, on the other hand, contends that in each case, on the facts and in all the circumstances, Coastal are in exclusive beneficial occupation and that the entry in the valuation list is correct. The sole question for decision by the Lands Tribunal in this appeal is whether or not Coastal, during the relevant rating year 1984/85, were in reasonable occupation of each hereditament.

The Belfast Harbour Commissioners ("BHC") were constituted by the Belfast Harbour Act of 1847 with extensive powers of managing and improving the dock and harbour facilities throughout the port of Belfast. They had power (inter alia) to purchase lands, borrow money, carry out improvements, levy dues on goods and ships and appoint officers and

pilots. The area over which BHC exercise jurisdiction as a Dock and Harbour Authority comprises the whole of that part of Belfast Lough which lies to the South of a line drawn from Carrickfergus to Grey Point and extends to the lock and weir of the River Lagan at Stranmillis. Out of harbour revenues the BHC maintain all the accommodation and facilities of the Port of Belfast. Within their area they dredge, repair, light, cleanse, police and watch the whole of the Harbour Estate, both on land and sea and carry on the general administration and management. They supply berths for ships, quays, wharves, modern cranes, weighbridges and other facilities necessary to a port. The development of the various quays, wharves and docks has been a gradual process over the years from 1848 onwards. Herdman Channel Wharf was opened in 1943 and large port development works have been in progress since 1956 giving new and improved accommodation. Vessels using the port facilities and engaged in both passenger and cargo services between Northern Ireland and Great Britain and all classes of trade are catered for; as the volume of trade has increased so also have the facilities and organisation of the port. Foreign trade covers all five continents and the port is also equipped to deal with cargoes for transhipment. To handle the volume of cargo entering and leaving the port the BHC have power, under the Belfast Harbour Act of 1918, to allocate "exclusive, partial or preferential" use of their facilities to outside bodies and agencies.

The three areas with which this appeal is concerned are all part of the Herdman Channel Terminal and are each situated close to the Herdman Channel Road (described on the map as Northern Road):

41A - The Yellow Area.
M51A - The Blue Area.
M53 - The Green Area.

During the relevant rating year 1984/85 these areas were used by Coastal for loading and unloading ships and general dock purposes. Coastal is one of a group of companies engaged in Shipping Services. Only two of them, however, have any connection with these lands. Coastal provide Stevedoring services; they are ship owners; they operate container shipping services owning both the containers and the "flats" which they ship and they are also, though in a modest way, hauliers for their customers. For some years past, including the relevant rating year, Coastal used these three areas for the purposes above stated. It is this use which has given rise to the present appeal, the Commissioner contending that

Coastal's use was exclusive use and thus constituted rateable occupation by Coastal of all three hereditaments.

Rating History

The three hereditaments had separate entries in the Valuation List under the descriptions of "Offices, Compound", "Container Park" and "Yard". The occupier in each case was entered as "Coastal Container Holdings Limited". In the case of the offices, 41C, which is no longer under appeal, Coastal concedes that it is the rateable occupier and that the Valuation List is correct. On first appeal Coastal applied for alteration of the list on the ground that "the occupier of the premises is Belfast Harbour Commissioners. Coastal Containers Holdings Limited only have a preferential berthing agreement." The Commissioner of Valuation declined to make any change in the identity of the occupier and apart from distinguishing each of the three hereditaments as "Freight Transport" in the list, dismissed the appeals on the grounds that "the rateable occupier is correctly recorded as Coastal Container Holdings Limited". From his decision Coastal has appealed to the Lands Tribunal the sole issue being whether Coastal have been correctly entered in the list as rateable occupier. The Tribunal was informed that the parties have accepted that the hereditaments have been correctly distinguished as "freight-transport" and no argument was addressed on this point. The Tribunal is not to be taken as necessarily agreeing with this concession; if Coastal are the rateable occupiers Coastal is not a "dock authority" nor is it the owner or lessee of a dock within the meaning of Schedule 6 to the 1977 Order and the decision of the Northern Ireland Court of Appeal in W & R Barnett v The Commissioner of Valuation [1942] NI 20 would appear to present a difficulty in this regard.

The Tribunal now turns to consider the facts upon which the outcome of the appeal depends. These were proved in evidence by Mr William Noel Kenneth McClelland, Deputy Chairman of Coastal and Mr George Maxwell, Managing Director of the Stevedoring Company, Coastal Container Services Ltd which provides dock labourers both in Belfast and Liverpool.

Prior to 1976 the three areas in question or part of them were operated by a company called Cawoods Containers Ltd ("Cawoods") and were occupied under separate leases from BHC all of which were in similar terms. Under the terms of the lease the premises were demised to Cawoods for a period of 21 years from 1st January 1969 at an annual rent which was reviewable after seven and fourteen years respectively. The lease contained the

usual covenants to pay the rent, to pay and discharge all rates and taxes, to keep the premises in repair, to insure and not to assign or sub-let. In addition there were specific covenants which required Cawoods:

(a) Prior to 31st March 1970 to carry out works of levelling, draining, surfacing and fencing the demised premises to the satisfaction and specification of BHC.

(b) Not to construct on the demised premises any building except with the approval of BHC.

(c) At the expiration of the lease to remove from the premises, if so required by BHC, all buildings and other works which may have been erected.

(d) Not to use the demised premises for any purpose other than the maintenance marshalling and storage of vehicles containers flats and cargo. (This covenant was specifically referable to part of the Blue area. A similar covenant applied to the Yellow area.)

(e) Not to use the demised premises in any manner inconsistent with the objects and provisions of the Belfast Harbour Acts and the Commissioners' Bye-Laws and Regulations.

(f) To construct and maintain such drains and sewers on the demised premises as may from time to time be required and with the approval of BHC.

(g) To indemnify BHC against any claims brought against them in respect of damage or injury.

(h) To permit BHC to enter upon the premises to inspect the state and condition thereof.

(i) To pay all harbour dues, tolls and charges for the time being in force.

For their part BHC made a covenant for quiet enjoyment by Cawoods. There were also provisions for forfeiture for breach of covenant. The lease could be determined by BHC before the expiration of 21 years.

(i) If BHC were of opinion that Cawoods were making insufficient use of the demised premises or

(ii) If BHC required possession of the demised premises for the purpose of carrying out their functions under any enactment or any rule of law. In that event Cawoods were entitled to six months notice.

From 1st June 1976 Coastal began to operate stevedoring services in the Herdman Channel and later took over the leases of Cawood who ceased operations. Between 1976 and 1980 Coastal used the Yellow Area for temporary accommodation of the containers and flats prior to loading or distribution after unloading. The Blue Area was divided into two parts according to the use to which it was put. One part "X" was used for the same purposes as the Yellow Area. The other part "Y" was reserved for Customs Clearance that is, it was strictly set apart to the order of BHC and HM Customs and Excise for Customs Clearance purposes. All imported dutiable containers were deposited in part "Y". The Green Area was not used by Coastal until nearly 1980. Prior to that a Company called Bob Williams Containers Ltd used it but in 1979 Coastal acquired that Company and took their lease with the consent of BHC. In or about 1978 Cawoods, who still held the leases, applied to have the Yellow and Blue Areas distinguished as Freight- Transport Hereditaments. That matter was not settled until 1983 when consent orders were lodged with the Lands Tribunal. Cawoods leases of Yellow and Blue Areas were surrendered in 1980.

From 1976 until 1980 and onwards Coastal had been developing the volume of business worked through Herdman Terminal. As the volume increased so did the need for facilities. Cargo through Herdman Terminal was worked by two large cranes situated on the quay side but outside the Yellow Area. The cranes were owned and operated by BHC on their own property - the White Area adjoining Herdman Channel. The entire success of operations at the Herdman Terminal depended on the efficiency and good mechanical condition of these two container cranes. Eventually, between 1976 and 1980, they had fallen into such a bad state of repair that they became unserviceable. Coastal asked BHC to finance the cost of a new crane for the Use of the Company at Herdman Terminal. The capital cost involved in supplying and installing a new container crane would be of the order of one million pounds - an amount which Coastal could not raise. BHC refused Coastal's request to supply a crane for Coastal's sole use.

Instead, they agreed to supply two cranes at their own expense but subject to clear strict conditions:

(i) Both new cranes were the property of BHC.

(ii) Both would be operated and maintained by BHC.

(iii) They would not be for the sole use of Coastal but would be available for the use of any Stevedores who might want to use it or for the use of any vessel which might use the berth at Herdman Terminal. This agreement marked a significant change in the control of operations at the Terminal. Under the previous system Coastal could exercise absolute control over the vessels, the crane and the stevedores. Under the agreement they lost that absolute control.

The question of the cranes was but one of many topics for discussion between BHC and Coastal. They had a common purpose - BHC to develop and increase the volume of trade and shipping through the Port of Belfast and Coastal to increase traffic substantially through the Herdman Terminal. Discussions had been proceeding on a regular basis from January 1976 including the existing and future use and occupation of the Herdman Berth by Coastal. In a letter dated 27th January 1976 BHC set out the basis upon which Cawoods then occupied the Berth - that is, the Yellow and Blue Areas ("Y"). That letter, which constitutes an agreed basis, establishes the following points:-

(i) The Yellow and part of the Blue Area (Customs reservation) was to be allocated to Cawoods for a period of one year subject to BHC reserving the right to give 3 months notice at any time.

(ii) The rental for the sites per annum was fixed.

(iii) In the absence of formal legal documents Cawoods occupied these two areas subject to the usual terms and conditions applicable to BHC leases of operational land eg the lease dated 28th January 1971 between BHC and Cawoods in respect of Blue Area (Part X).

BHC further stated as follows:-

> "As you are aware, the Board's officers are actively examining the question as to whether it would be desirable for the Commissioners to revise the whole basis on which land is made available for the use of unit load operators. This is, of course, a very complex problem, but you may rest assured that it will be dealt with as

quickly and as sympathetically as possible; that the representations which your Company have already made on the subject will be duly taken into consideration, and that any advantage to operators arising from such review will be passed on to the Companies concerned."

When Coastal took over the Berth later in 1976 it also took over the same terms and conditions. Discussions between Coastal and BHC culminated in a "leads of agreement" document dated 30th January 1980 between BHC and Coastal. This is known as "The Preferential Berth Agreement". Under it the following terms (inter alia) were agreed:

(1) BHC would redevelop and re-equip the Terminal by

0 (a) providing two large 30 ton container handling cranes and new crane rails on the quay side.

(b) Upgrading and surfacing in asphalt the two operational areas Yellow and Blue.

(c) Surfacing in bitmac an area of approximately 4000 square yards now known as the Green Area.

(2) BHC would grant to Coastal the "preferential use" of the Terminal for a term of 21 years for the operation of shipping services etc by itself and/or all of any of its subsidiaries.

(3) For the avoidance of doubt it was declared and agreed that "Consistent with such preferential use, BHC shall have the right to berth other ships at the Terminal when the berths alongside are not occupied by ship(s) owned or operated by Coastal and/or its subsidiaries and BHC and all persons doing business with them shall have a right of way and passage with or without motor vehicles from the quay to Herdman Channel Road.

(4) Coastal would guarantee for the said 21 years a minimum annual revenue to BHC from Port charges and on Goods using the Terminal of £160,000, any shortfall to be paid on demand in one lump sum and any such revenue generated by ships using the berth alongside and not owned by Coastal or its subsidiaries to be taken into account.

(5) For the period of 21 years Coastal would be responsible for the maintenance and repair of the terminal and all its facilities and equipment except maintenance and repair of the quay structure and the dredging of the berth alongside the terminal.

(6) The two cranes were to be (and subsequently were) made the subject of a separate crane agreement. The previous agreement dated 28th January 1971 relating to the use of the large Strachan and Henshaw Crane would continue until the new agreement was completed. Thereafter BHC would transfer ownership of this crane to Coastal for the sum of £10 and Coastal would then dispose of it.

In addition to the above, Coastal also agreed the following matters:-

(a) To provide at its own expense its own personnel and equipment necessary to work the Terminal.

(b) Not to build without the consent of BHC.

(c) Not to use the Terminal in any manner inconsistent with the objects and provisions of the Belfast Harbour Acts.

(d) Not to assign or underlet.

(e) To indemnify BHC against loss and damage arising out of or directly attributable to the use or occupation of the Terminal by Coastal.

And under the agreement BHC had power:

(i) To terminate the agreement on 6 months notice if Coastal were, in the opinion of BHC, making insufficient use of the Terminal.

(ii) To terminate the agreement on one month's notice for breach or non performance of any of its terms and conditions.

The terms of that agreement were subsequently embodied in a formal written agreement dated 27th May 1986 and were in substantially the same terms as the earlier agreement referred to above. The payment of Port charges by Coastal was, in addition, specifically dealt with by clause 3 of the 1986 Agreement as follows:-

"3. The Company shall pay all Port charges and other sums of money which may from time to time be payable under the Rules Regulations Bye-Laws and Schedules of Rates and Charges of the Commissioners for the time being in force in respect of its operations at the Terminal."

Although that agreement was not signed until 1986 its provision were to operate from the 1st January 1981 and were thus in de facto operation during the relevant rating year of 1984/85.

Summary of User during relevant rating year 1984/85

The Yellow Area

This area was used by Coastal for depositing containers which had been unloaded from ships using the port. These included cargoes of potatoes shipped by the Northern Ireland Potato Exporters Association and also other dutiable cargoes requiring Customs Clearance. In order to handle dutiable goods the Customs Authorities in consultation with BHC, in 1986 required a strip of quayside to be set apart for depositing "Interport Boxes" (ie containers) which contained dutiable goods requiring customs clearance. This narrow strip which was sited close to the berth was under the control of Customs and had to be reserved solely for Interport Boxes. Coastal was not permitted to use this area for its own containers or for the the deposit of other non-dutiable containers. It was set apart for the exclusive use of "customs cargo". Under the terms of the agreement Coastal were obliged to relinquish the berth to any other Stevedores in Belfast Harbour when it did not have a ship occupying the berth or was prevented from using the berth due to an industrial dispute. In the relevant year at least four vessels were worked at this berth by outside Stevedores but apart from those, because of the volume of trade being generated by Coastal, the remainder of ships using the berth were all Stevedored by Coastal and were loaded or unloaded from Coastal's own vessels or vessels on charter to Coastal. A total of about 250 ships per year used this berth. In every case, a ship occupying the berth was unloaded by the BHC cranes and the containers are deposited on the quayside. They are then hauled away either to their destination in trailers owned by Coastal or sub-contracted to Coastal (Coastal's own trailers handle only 10% of the total) or are moved to an adjoining area - the Blue Area - to await Customs clearance or onward dispatch.

The Blue Area

This is divided into two compounds which, for present purposes, are marked "X" and "Y" Area. "Y" is the area reserved for HM Customs. It is not used by Coastal for its own business but is reserved for the cargo of one particular importer called Kersten Hunig. Coastal have an agreement with Kersten Hunig under which Coastal is paid for the Stevedoring of their vessels and for ancillary services. All Kersten Hunig cargo is deposited in Compound "Y" to await customs clearance. It is approved by Customs and Coastal has been directed to place their cargo in Compound "Y" and not in any other compound. Coastal do not charge a quay rent or any other rent to Kersten Hunig and it cannot use Compound "Y" for its own containers.

Area "X" in the Blue Area is used by Coastal for its own domestic cargoes awaiting collection for onward dispatch. In general the user of Compound "X" is the same as the "Yellow Area". Of the total number of containers worked at the berth about one third are owned by Coastal. The remainder are owned by deep-sea shipping lines.

The Blue Area as a whole is essential for the carrying out of the functions of both BHC and Coastal. But Compound "Y" is essential for Customs Clearance purposes and is used for those purposes under the agreement and control of BHC and HM Customs. It is Customs who dictate and control the handling of goods and their movement into Compound "Y" to await inspection and clearance.

At the Southern end of Area "X" is a small area used for parking cars. The drivers who park their cars there include employees of Coastal, Kersten Hunig employees and employees of other shipping companies, stevedores and hauliers.

Coastal have no obligation to provide a car park but there is, in fact, a car park, on which Coastal pays rates, at the rear of the office block, which is let separately at a rent, and on which it also pays rates. Car parking in recent years has proved to be an increasing problem as the volume of trade through the Port has increased and this has given rise to the creation of the Green Area.

The Green Area

This area, situated on the Northern Side of Coastal's office building was developed by BHC because of growing problems of ill-controlled parking of vehicles and trailers throughout the harbour estate. As stated before, the harbour estate is at all times in the occupation and overriding control of BHC who are the owners of all three hereditaments the subject of this appeal. When so much trailer traffic is using the port accommodation has to be found for parking trailers. If none is available the practice emerged of parking on thoroughfares which in turn causes congestion and in some instances, obstruction. In 1978/79 the Herdman Channel gate was closed and a new gate called "Fortwilliam Gate" was opened, and it became a main thoroughfare. The practice of vehicles parking on the roadside had to cease and so the Green Area which before had been used largely for parking Coastal's vehicles now became a general trailer park at the behest of BHC whose duty it was to regulate traffic using the Harbour Estate. Since then outsiders have used the Green Area to park their trailers including the Larne Ferry vehicles. Coastal tried to prevent this but BHC intervened, when Larne Ferry complained, and instructed Coastal it had no such authority. The use of the Green Area became (approximately) 15% Coastal; 20% Coastal's Sub-Contractors; 60% Kersten Hunig; Coastal's Customers; Outsiders including complete strangers who strayed off the M2.

Submissions on behalf of Coastal

Mr Alan Comerton QC submitted:-

(1) The fundamental test of rateability is rateable occupation. The four essential ingredients of rateable occupation were formulated by the House of Lords in Westminster Council v Souther Railway Company [1936] AC 511. One of those ingredients is "exclusive occupation". We say that in this Case Coastal are not in 'exclusive occupation' of any one of the three hereditaments and are therefore not the rateable occupiers.

(2) On the facts and in all the circumstances the only true and reasonable conclusion is that BHC did not at any time part with their general control and supervision of the premises so as to constitute Coastal the rateable occupier.

(3) BHC are owners of the hereditaments and prima facie they are to be regarded as occupiers. Ryde 13th Edition Page 26.

(4) The intention of the parties to the agreement is relevant in determining who is in rateable occupation. See Allan v Liverpool Overseas [1874] LR9QB180 per Lord Blackburn at page 192. In that Case it was held that exclusive occupation had not been parted with. On the other hand Young v Liverpool Assessment Committee [1911] 2KB 195 was a decision which, on its facts, went the other way. In that Case the particular hereditament was let at a rent.

(5) The rights of the parties under the agreement are relevant and essential for determining not only the quality of the occupation but also who is to be regarded as the rateable occupier. In the present Case there is no lease, no rent and no parting with general control by BHC in respect of any one of the three hereditaments. The purpose of the agreement in the present case was to give Coastal preferential use of the three areas in return for BHC's rights to berth other ships and the use of the cranes at the quays. The general effect of the agreement, after 1980, was that BHC would allocate the three areas concerned to Coastal on a preferential use basis; Coastal would not be charged a rent but would pay harbour dues and port charges in the same way as many other persons were charged who used the harbour facilities at other wharves and quays. Preferential use meant more harbour dues payable by Coastal and therefore more revenue for BHC. But under the agreement BHC retained paramount control and occupation.

(6) On the facts, BHC's power to intervene was evidenced in many aspects of the user and control. BHC could berth other ships at this terminal; Coastal could not ask them to leave until they had been unloaded. The fact that only four "outsider" ships used the terminal in the relevant rating year, whether de minimis or not, is irrelevant because the berths are not part of the hereditament; Coastal did not have exclusive occupation of the Blue Area because "X" was used by various outside hauliers for lorry parking and goods handling; "Y" was set apart for use by HM Customs; part of "X" was originally Coastal's car park but BHC ordered a cessation of such use on safety and health grounds; and also part of "X" was appropriated for road widening; on the Yellow Area there was also an area set aside for dutiable containers (called "inter port boxes") at the direction of HM Customs sot that these could be inspected. After 1986 this area was greatly extended. Such part was not available for use by

Coastal; the Yellow Area was also used by other persons as well as Coastal, for example hauliers coming to deposit containers or to transport them after unloading; 65% use was by strangers; 35% use by Coastal; the Green Area was used by all and sundry for parking lorries and containers even by casual lorry-drivers coming off the M2 motorway. The facts of the case demonstrate that after 1980 the Yellow, Blue and Green Areas were put in the same position as other berth areas within the Harbour Estate; Coastal were not in exclusive occupation of any of them but paid harbour dues for preferential use of them; BHC's occupation was paramount.

Submissions on behalf of the Commissioner of Valuation

(1) Coastal are in actual occupation of the hereditament; the question is - are they in exclusive possession? To answer that the correct approach is to look at the de facto occupation of the hereditament and ask - is it exclusive for the purposes of the possessor? John Laing & Son Limited v Kingswood Assessment Committee [1949] IKB344, 350. Then look to see if the agreement between the parties if of any assistance. Westminster City Council v Southern Railway (Supra) at p 511.

(2) Occupation is not synonymous with legal possession; rateable occupation, however, must include actual possession. It is not a matter of title for example, a lease as opposed to a licence. It is erroneous to look at Title.

(3) The question is - has Coastal got exclusive occupation NOT has it got "exclusive rights"? The answer to that must depend upon the degree of actual control exercised. See 13th Edition Ryde at page 65 and page 532 of the Westminster Case.

(4) On the facts of the present case there is no interference by BHC of Coastal's enjoyment of the hereditament for Coastal's purposes. Therefore BHC's enjoyment is subordinate.

(5) The Cases of Allan, Rochdale and Young depend on their own facts in determining the question "was the occupation subject to the general control of the Dock Board"? Allan and Rochdale can hardly now be supported in principle after the decision of the House of Lords in Westminster. In the instant case BHC do not interfere with Coastal carrying on its business. The four "outsider" ships using the berth do not interfere and even if they do such interference is de minimis.

(6) HM Customs are not interfering with Coastal's business because Customs clearance is a part of any international shipping business.

(7) If the Tribunal finds that there is no interference by BHC - that fact relates to actual occupation and also to rateable occupation. It mean, in effect, that Coastal are in exclusive occupation. That is the determinative factor without even looking at the 1980 or 1986 agreements because they merely set out what can happen not what does happen. It is the substance of the practice that must prevail irrespective of the form of the documents. It is erroneous to base rateability on the terms of the contract.
-405

(8) Assuming that the documents can be looked at, they merely serve to reinforce the Commissioner's argument. Clause 2 of the 1980 Preferential use agreement is so limited in scope that it does not make BHC's occupation paramount. The proviso in the 1986 Agreement simply means that when a vessel has completed unloading at the berth Coastal is entitled to require the removal of the Ship from the berth.

(9) Coastal have, on the facts, sufficient de facto control of each of the three areas, to constitute exclusive occupation because Coastal have no rivals. The acts of user by "outsiders" relied on by Coastal are not of a quality or nature to deprive Coastal of paramount control. Therefore Coastal are in rateable occupation.

DECISION

The liability to be assessed to the payment of rates in Northern Ireland is governed by the Rates (Northern Ireland) Order 1977 and it is the occupier of the hereditament who is liable to be rated in respect thereof. Article 18 provides:

> "Subject to the provisions of this Order, every occupier of a hereditament which is included in the valuation list shall be chargeable to rates in respect of the hereditament according to its rateable value."

By Article 17, the rateable value is to be ascertained in accordance with the net annual value of the hereditament (subject to certain exceptions mentioned in the 7th Schedule).

The basis of calculating net annual value is contained in the 12th Schedule and is taken to be -

> "the rent for which, one year with another, the hereditament might, in its actual state, be reasonably expected to let from year to year, the probable average annual cost of repairs, insurance and other expenses (if any) necessary to mountain the hereditament in its actual state, and all rates taxes or public charges (if any) being paid by the tenant."

Whilst that basis for estimating net annual value can be and, indeed, is applied to most hereditaments which are capable of being let and which have a letting value there are some hereditaments (or undertakings) to which it cannot readily be applied. One such hereditament is a Dock for which there are special provisions in part X of the 12th Schedule. Part X applies to:

> "any hereditament occupied by a dock authority for the purpose of carrying on its undertaking under the authority conferred by or under any statutory provision".

The net annual value of such a hereditament for any year, where the dock undertaking is wholly comprised in one hereditament shall be:

> "the appropriate percentage of the relevant receipts of the dock undertaking in the immediately preceding year."

It is common case in the present appeal that the Belfast Harbour Commissioners are a dock authority carrying on an undertaking under statutory provisions; that their property is a rateable hereditament; that rateable value is to be assessed as a freight-transport hereditament and its net annual value for rating purposes is calculated by reference to percentage of its "relevant receipts" defined as:

> "All receipts by way of revenue included or to be included in the accounts of the undertaking, whether derived from the operations carried on under the statutory provision by which the dock is authorised or otherwise, and includes such receipts from all ancillary land and buildings occupied by the dock authority ..."

It is to be noted, however, that where parts of the dock undertaking are let as separate hereditaments, the rents from those lettings are not to be included in the relevant receipts for the purpose of calculating the net annual value of the dock undertaking. There are, scattered throughout the harbour estate, various buildings let as separate hereditaments at a rent occupied by persons or bodies other than BHC. Such persons or bodies are the

rateable occupiers and it is they who pay rates in respect thereof, not BHC. In the instant case both the office block and the car park at the rear thereof are separately let to Coastal at a rent and Coastal are the rateable occupiers of both hereditaments and pay rates in respect thereof. Thus the harbour estate with all its berthing, loading and unloading facilities constitute a rateable hereditament occupied by BHC who pay rates in respect thereof according to a percentage of annual receipts derived from port charges and harbour dues. Where, within the harbour estate, hereditaments are separately let to and occupied by other persons in circumstances giving rise to rateable occupation, such other persons pay rates in respect thereof and the rents derived from the lettings do not form part of BHC's "relevant receipts". There cannot be two rated occupiers of the same property (apart from joint tenants). Lord Diplock observed in Commissioner of Valuation v Fermanagh Board of Education [1969] 3 All ER 352 at 364.

> "Under the Northern Irish legislation, as under the English, the liability to pay rates is imposed on the occupier. Parliament cannot have intended to impose separate and independent liabilities to pay the rate for the same hereditament on more than one person except where their legal right of occupation is a joint right, as in the case of joint tenants. In English law, therefore, although there may be a joint occupation of a single hereditament there cannot be rateable occupation by more than one occupier whose use of the premises is made under separate and several legal (or equitable) rights".

The question therefore, which the Tribunal has to decide is whether Coastal are, as the Commissioner contends in beneficial occupation of each of the three hereditaments. Both counsel have accepted the four ingredients of rateable occupation adopted by the Court of Appeal in the case of John Laing & Son Ltd v Kingswood Assessment Committee [1949] 1 All ER 224. These are:- First, there must be actual occupation, or possession; secondly, it must be exclusive for the particular purposes of the possessor; thirdly the possession must be of some value or benefit to the possessor; and fourthly the possession must not be for too transient a period. In the present Appeal the argument has centred on the second of those ingredients namely - are Coastal in exclusive beneficial occupation of the three hereditaments? The question whether a person is an occupier or not within rating law is a question of fact and does not depend upon legal title.

Holywell Union v Halkyn District Drainage Co [1895] AC 117

But title may be relevant in order to show the element of exclusive occupation where the facts do not speak for themselves. In such cases it has been said that there is a presumption that the owner of the land is the occupier until it is shown that he has parted with the occupation to someone else.

See Ryde on Rating 13th Edition P52

Where, as in the present case, the Harbour Authority have power under statutory provisions to carve out of their harbour premises separate hereditaments which though still within the precincts of the harbour estate and in one sense form part of it may yet be demised or disposed of to others, the title upon which those other premises are held can be looked at in order to discover whether there is exclusive occupation. In the Holywell Union Case (Supra) Lord Davey said at page 133:

> "But then it is said that the occupation is not exclusive inasmuch as the Duke of Westminster has reserved certain rights to himself and his Licensees over the tunnels and water-course, and in pursuance of such reserved rights the Halkyn Mining Company have laid a tramway along one of the tunnels and have placed ventilating pipes there. Two questions arise: what is meant by exclusive occupation when used in connection with the subject of rating? And, what are the conditions subject to which the Duke exercises his reserved rights? It is clear that exclusive occupation does not mean that nobody else has any rights in the premises. The familiar case of landlord and lodger is an illustration. The cases show that if a person has only a subordinate occupation subject at all times to the control and regulation of another, then that person has not occupation in the strict sense for the purpose of rating, but the rateable occupation remains in the other who has the right of regulation and control."

Three "dock cases" were cited in argument which illustrate this concept of subordinate, as opposed to paramount, occupation and in each of them the title under which the respective hereditaments were held was examined in order to discover whether or not the ratepayers had exclusive occupation for rating purposes. The first is Rochdale Canal Company v Brewster [1894] 2 QB 852. The facts in that case were that the Mersey Docks and Harbour Board had appropriated and set apart to the Canal Company a berth with an adjoining quay. In the agreement there were provisions for a fixed yearly rent, termination on six months notice, payment of rates and taxes by the Company, a covenant by the Company to

keep in repair, to conform to dock regulations and to allow the Boards at all times to have full access to the premises; there were also provisions for re-entry by the Board. It was held that having regard to the intention of the parties, as expressed in the agreement, the Board had not parted with the exclusive possession of the premises and that the Canal Company were not rateable in respect of their occupation. Lindley LJ said at page 857:

> "The term 'occupy', the rent to be paid, the treatment of the Mersey Board as landlords, the provision as to repair and, above all, the provision for re-entry and quiet enjoyment all point to a letting and taking of so much land, and not merely to the creation and enjoyment of a mere easement of licence to use.
>
> But for rating purposes it is essential to look further and see what kind of occupation the person sought to be rated really has".

The ratio decidendi of that case can be found in two passages from the judgment of Lopes LJ. Firstly, at page 858, he said:

> "The point in this case is whether such exclusive possession has been parted with by the Board as is necessary to make the respondents liable to pay rates.
>
> In determining this question, it is the intention of the parties which has to be looked at: it is not the words only that are to be regarded. The whole of the circumstances must be taken into consideration. It is the substance of the transactions rather than the form that determines the question whether such an exclusive occupation exists as will make the property rateable."

And further on he continued (on the same page):

> "I have come to the conclusion that there is such a predominating right of control reserved to the Board as to prevent the occupation being so exclusive as to be rateable. In my judgment, what passed to the respondents was the licence to use the accommodation of the cranes, quays, and water berths subordinated to the superintending control of the Board - a mere incorporeal right. They could not exclude the Board.

A similar result emerged in the second case referred to, that of Allan v The Liverpool Overseers [1874] LR 9 QB 180, also a dock case, in which the Mersey Docks and Harbour

Board had appropriated to the use of the shipowners certain berths for ships with quay space and sheds attached (all of which formed part of the system of docks belonging to the Board) on payment of a fixed charge and the arrangements were to last during the pleasure of the dock Board. Emphasis was laid on the Special Acts under which the Mersey Dock Board was authorised "to set apart and appropriate any particular portion of any dock, wharf, quay, warehouses sheds or other works, with the appendages thereto, for the exclusive accommodation and use of any company or firm provided that such company or firm should be subject to the general rules and regulations of the Board". It was held that the Board had not parted with the occupation, and therefore that they and not the appellants were rateable.

A case which was decided the other way, on its facts, was Young & Co v Liverpool Assessment Committee [1911] 2KB 195 where the paramount occupation was held to be retained by the actual occupiers - a firm of vintners who were held to be also in rateable occupation. The hereditament concerned was a bonded warehouse which had been "demised" for seven years to the firm of vintners. The Dock Board reserved to themselves the right to enter the demised premises (and in fact did enter the demised premises daily) for the purpose of repairing or inspecting certain hydraulic machinery which ran through the premises and which was admittedly in occupation of the Dock Board. The bonded warehouses were kept locked - one key being in possession of Customs and the other of the tenants. The premises were wholly within the dock area but they were separated from the rest of the dock estate by solid brick walls. It was held that the Dock Board had power to let and did let the demised premise on terms which made the tenants occupiers; that the limited right of the dock Board to enter for inspection of their machinery was consistent with such a letting and that the object for which the demised premises were let (for use as a bonded warehouse) was inconsistent with the retention of general control of the demised premises by the Dock Board.

Counsel for the Commissioner submits that the Rochdale and Allan cases cannot now stand in view of the decision of the House of Lords in Southern Railway Company v Westminster City Council [1936] AC 511 in which the whole question of rateable occupation was exhaustively examined. That case concerned certain buildings and structures - bookstalls, chemist shop, kiosks, hairdressing salons and other tenaments - erected within the precincts of Victoria Railway Station. Each of them was capable of separate occupation; each of them constituted a hereditament erected and occupied by the 'tenant' for which he paid rent. Each tenant used it for the purposes of his trade. It was

nevertheless contended that the tenant had mere enjoyment of his premises and not rateable occupation; the rateable occupier was the Railway Company who, it was said, occupied the shop or other premises just as they occupied the site as a part of the station before the premises were erected. But is was held in each case that the hereditaments had been so let out as to be capable of separate assessment and were therefore not "railway hereditaments" and that accordingly the tenant was the rateable occupier in each case.

Both Counsel agree that all cases of this kind, including the present one, must now be determined according to the principles enunciated in the Westminster Case. Before passing to consider these, however, a word must be said about the Rochdale and Allan decisions. Mr Shaw, for the Commissioner, submitted that they are no longer authority for what they purported to decide and that if they came up for decision today they would be decided the opposite way. He pointed out that Rochdale, in particular, had been criticised in Ryde on Rating 13th Edition and that the facts found far from supporting the conclusion reached led to the contrary conclusion. Mr Comerton QC, pointed out that the Rochdale Case had been cited in Westminster and had not been disapproved. The Tribunal considers however that neither Rochdale nor Allan can be relied upon today as authority in determining this kind of case. There are at least two reasons for this. Firstly the decision itself (in Rochdale) was reached on what was said to be the binding authority of London and North Western Railway Co v Buckmaster LR 10 QB 70, 444. This decision was expressly disapproved in Westminster. Secondly, Lord Wright said of Rochdale: "In my opinion it, like so many of the earlier cases, can only be justified if at all, as based upon the special view taken by the Court of the particular circumstances of the case".

The principles to be applied are to be found in two passages from the speech of Lord Russell of Killowen who said, firstly, at page 529:

> "In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land is rateable; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival

> claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact - namely, whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate, but who is in paramount occupation of the particular premises in question.

And further at page 530:-

> "The general principle applicable to the case where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts."

The question, of degree, for the Tribunal in the present appeal is, therefore, whether the owner of these three hereditaments, BHC, retained to themselves general control over them or to put it another way, whether they had parted with exclusive occupation to Coastal so as to make the latter the rateable occupier. In applying the general principles set out above the following subsidiary rules can, in summary form, be extracted from the Westminster Case:

(a) The occupier, not the land, is rateable; but the occupier is rateable in respect of the land which he occupies. Occupation, is not synonymous with legal possession. Rateable occupation, however, must include actual possession and it must have a degree of permanence.

(b) Where there is no rival claimant to the occupancy, no difficulty can arise, the simplest example is where a landlord grants a tenancy to a tenant under an agreement which confers exclusive occupation upon the tenant. But in some cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the

premises. The question in every such case is one of fact - namely whose occupation is paramount and whose position in relation to occupation is subordinate?

(c) For the control of the landlord to be paramount his control must be over the use of the premises appropriated. In this respect Young v Liverpool Assessment Committee is an example of a landlord parting with exclusive possession and occupation of a bonded warehouse which lay within the dock area. Similarly in the present case BHC had demised the office block and the car park into the exclusive occupation and possession of Coastal.

(d) The effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case. In each case the degree of control must be examined to ascertain the extent to which its exercise would interfere with the enjoyment by the occupant of the premises for the purposes for which he occupies them or would be consistent with this enjoyment of them to the substantial exclusion of all other persons.

(e) The crucial question is what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence or an easement. This rule was established finally to dispose of the old fallacy enunciated in Smith v Lambeth Assessment Committee 10 QBD 327 that a demise was necessary and a mere licence was insufficient to create rateable occupation. This case was overruled by the Westminster decision. But the title may be looked at in order to discover the quality of the occupation and the intention of the parties, whether, in fact, the occupation is exclusive. Lord Wright emphasised the need to read the relevant contractual document as a whole. It is not the words only that are to be regarded but rather their effect which must not be to destroy the grant. What is material is not necessarily the terms of the grant but the de facto occupation.

(f) Mere control of access without control over the user of the premises is not sufficient to negative occupation.

(g) Byelaws, regulations and covenants restrictive of the tenant's user of the premises will not of themselves prevent the tenant or licensee being rateable.

With these principles in mind it remains only to state the conclusions to which the Tribunal has come. It should be noted that the hereditaments themselves were not the berths but

the quay spaces adjoining the berths which together constituted the Herdman Load Terminal. The intention of the parties was to increase substantially traffic through the Terminal. The Herdman Berth was at all material times in the occupation of BHC who paid rates in respect of it and who received port charges and harbour dues from those using it. But prior to the agreement of 1980 the existing facilities at the Terminal were inadequate to service a substantial increase in traffic through the Berth. In order to improve the facilities for loading and unloading at the Berth BHC equipped it with two new large cranes which they owned and operated and they resurfaced the Yellow and Blue Areas and also the Green Area. When those works had been completed they allocated to Coastal the preferential use of the Terminal for a period of 21 years. Coastal, in return, would continue to pay harbour dues and port charges on all cargoes which they handled as a result of the increased traffic. But the preferential use benefit attracted in return a corresponding liability namely "a minimum annual revenue to BHC from Port charges on ships and on goods using the Terminal of £160,000". BHC also reserved to themselves, consistently with such preferential use, the right to berth other ships at the Terminal when the berths alongside were not occupied by ships owned and operated by Coastal. The preferential use of the facilities by Coastal was further circumscribed by an agreed power of BHC to determine the agreement if they were of opinion that Coastal were making insufficient use of the Terminal. Such power was not to be arbitrarily exercised but only after consultation with Coastal. The actual use made of the three areas in question, following that agreement, involved not only substantial use by Coastal, but also use by others as well. For example the use of the Blue Area was interfered with by BHC who took a portion of it for road widening; hauliers other than Coastal used the Yellow Area for stacking their containers and transporting them; Customs after 1985, used the Yellow Area for "interport" boxes that is, boxes of dutiable goods which had to be stacked to await Customs examination; area Y in the Blue Area could not be used for non dutiable goods but was reserved exclusively for the use of Customs. These allocations came directly under the authority of BHC whose duty it was as part of their harbour operations to provide space for Customs to inspect dutiable goods. Coastal had no say or right of control in these allocations. The Green Area developed into a general vehicle and trailer park for hauliers, including Coastal, who used the Harbour Estate but Coastal had no power of control or regulations as to who use it. All this was in stark contrast to the position which existed before the 1980 agreement when the Blue and Yellow Areas were let at a rent in the possession and enjoyment of Coastal. After 1980 the position changes when a substantial measure of de facto control reverted to BHC. It was BHC who had the paramount control of their own property and conversely Coastal did not

have exclusive control or occupation of any of three areas. The Yellow Area was used as to 65% by strangers and 35% by Coastal; the Blue Area "Y" was substantially set apart for use of Customs and was outside Coastal's control; the Green Area came to be used, not as an exclusive vehicle park for Coastal, but for many others as well.

Once it is accepted, as the Tribunal considers it must be accepted, that it is permissible to construe an agreement dealing with the occupation of property for the purpose of determining whether it confers exclusive possession upon the occupier, there emerges a significant contrast between the old Cawood leases of 1976 (taken over by Coastal) and the 1980 preferential use agreement. Cawoods and Coastal both had exclusive possession and enjoyment (and therefore exclusive occupation) of the three areas in consideration of a rent payable to BHC.

The effect of the 1980 agreement, however, was to confer on Coastal the privilege of using the land on a preferential basis; it did not confer exclusive possession on Coastal nor did the latter have exclusive enjoyment of the land. The facts, in the opinion of the Tribunal lead irresistibly to the conclusion that Coastal were not, during the relevant rating year, in exclusive possession and control of the areas in question so as to constitute themselves rateable occupiers thereof. The paramount control lay with BHC who received port charges and harbour dues in return for allowing Coastal preferential use of their own property. The appeal is therefore allowed and the Valuation List should be amended accordingly.

The Respondent shall pay the Appellant's costs which, in default of agreement, shall be taxed on the High Court Scale.

ORDERS ACCORDINGLY

The President, Judge R T Rowland QC
Lands Tribunal for Northern Ireland

10th February 1989

<u>Appearances</u>:-

Mr A E Comerton QC and Mr N Drennan of Counsel (instructed by Comerton & Hill, Solicitors) for the Appellant.

Mr S Shaw of Counsel (instructed by the Crown Solicitor) for the Respondent.