IN THE SUPREME COURT OF NEW ZEALAND

SC 76/2006
[2007] NZSC 61

BETWEEN	ROYAL NEW ZEALAND FOUNDATION OF THE BLIND Appellant
AND	AUCKLAND CITY COUNCIL Respondent

Hearing: 19 April 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: J E Hodder, M C Sumpter and T D Smith for Appellant
A R Galbraith QC and G D Palmer for Respondent

Judgment: 2 August 2007

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs in the sum of $15,000 plus disbursements and other necessary payments, to be fixed if necessary by the Registrar.

REASONS

(Given by Anderson J)

The issue

[1] This appeal concerns the rateability of land at Parnell in Auckland City, which is owned by the appellant and from which it derives rental income. Pursuant

to s 7 of the Local Government (Rating) Act 2002 all land is rateable unless the Act or another Act states otherwise. The Foundation argues that its Parnell land is exempted because s 8 provides that the land described in Part 1 of Schedule 1 is non-rateable, and cl 5(e) of that Schedule refers to:

> Land that is owned or used by, and for the purposes of, —
>
> …
>
> (e) The Royal New Zealand Foundation of the Blind, except as an endowment.

[2] The Foundation sought and obtained from the High Court a declaration that the land was non-rateable.[1] The Court of Appeal set aside that declaration and substituted a declaration that the land was not within the rating exemption provided by cl 5(e) of the Schedule.[2]

The facts

[3] The relevant facts are succinctly stated in the following terms in the Court of Appeal's judgment:

> [2] Since the late nineteenth century, the Foundation has owned a property in Parnell from which it has operated. Over time it has acquired adjoining properties. Originally the Foundation used the Parnell property to provide schooling for the blind. From the 1920s, the Foundation provided a wide range of other facilities in Parnell including accommodation for the blind of all ages. The Foundation's primary focus was on institutional care. Since the 1970s that focus has shifted towards supporting the blind (and now the partially sighted) in the community.
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> [3] With that shift in focus, the Foundation's needs in relation to the Parnell property have evolved. Most of the property has been retained for the use of the Foundation (as its national administration centre) but the balance – around 25% - has been leased to the Bledisloe Estate Trust ("the Trust"), a charitable trust established in 1988 by the Foundation. It is this portion of the property which is in issue in this case and, for ease of reference, we will refer to it as "the land". The Trust is effectively the commercial arm of the Foundation. The Trust sublets the land to various commercial tenants. The rent paid by the Trust to the Foundation and the

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1 *Royal New Zealand Foundation of the Blind v Auckland City Council* (High Court, Auckland, CIV 2004-404-6545, 18 May 2005, Keane J).

2 *Auckland City Council v Royal New Zealand Foundation of the Blind* [2007] 2 NZLR 441.

> profits which it distributes back to the Foundation are used to fund (in part) the services the Foundation offers.

[4] In the High Court Keane J held that the land in issue was not rateable because it was owned by the Foundation, and was so owned for the purposes of the Foundation. He decided that those purposes are to be found in s 4 of the Royal New Zealand Foundation for the Blind Act 1963, and in the objects of the Foundation identified in s 10 of the current Act, which is the Royal New Zealand Foundation of the Blind Act 2002. Having regard to the nature of the Foundation's present functions, it had a need for revenue to accomplish its purposes. Leasing the Parnell site for a sustainable income clearly lay within the bounds of its general objects.

[5] Keane J dealt summarily with the exception for land owned or used as an endowment, finding that it did not disturb his conclusion. Both in the Court of Appeal and in this Court that exception turned out to be the decisive issue.

[6] Much of the argument in the Court of Appeal and in this Court, particularly on behalf of the Foundation, was directed to the issue whether land owned or used by the Foundation in order to produce revenue to be applied to the Foundation's purposes was, by reason of such intended application, owned or used by the Foundation for its purposes. The Court of Appeal noted that there are many cases in which the courts have addressed statutory language which provides exemptions from rating or tax in relation to land "used" for particular charitable purposes. Such cases[3] suggest or show that the production of revenue is not itself a charitable purpose, notwithstanding that the money will be applied to a charitable purpose. Those authorities were considered to be of limited assistance, however, because here the statutory expression includes "owned" as well as "used". The Court considered that the question in issue could be resolved by examining whether the land comes within the exception relating to endowment.

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[3] For example *Oxfam v Birmingham City District Council* [1976] AC 126 and *Trustees of the Dunedin Central Methodist Mission v Commissioner of Inland Revenue* (1989) 11 NZTC 6,090.

[7] The Court of Appeal held that the land was rateable. It did not fall within the exempting provisions because it was land owned or used by the Foundation as an endowment. The term "endowment" may denote property in respect of which there has been a prior act of endowment. However, it can also denote assets of a charity which have been set aside for the purpose of producing income. In the Court of Appeal's view, the legislative pattern of exemptions pointed to a consistent policy that land held for investment purposes and not for the direct use of the charities concerned should be rateable.

[8] In this Court the Foundation submitted that the expression "endowment", in its ordinary meaning, refers to a particular type of land holding that restricts the owner's ability to deal with or use the property. From a policy perspective, the Foundation argued, the exclusion of land held as an endowment, in the narrow sense, was understandable. That is because where land is gifted on restrictive terms, the purposes for which it is held are determined by the donor, and the non-rateability of the endowed land should be a matter of discretion for the local authority rather than the subject of a blanket exclusion.

[9] The Foundation further submitted that the Court of Appeal adopted a non-standard definition which was unusual and impermissible.

The concept of "endowment"

[10] There is dictionary and case authority as to the meaning and connotations of the term "endowment". They are of limited assistance in the present case. *Black's Law Dictionary* defines endowment as:[4]

> A gift of money or property to an institution (such as a university) for a specific purpose, esp. one in which the principal is kept intact indefinitely and only the interest income is used.

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[4] (8th ed, 2004), p 569.

A similar concept is indicated by the *Oxford English Dictionary* for "endow":[5]

> … to provide (by bequest or gift) a permanent income for (a person society, or institution).

"Endowment" is defined as:[6]

> The property or fund with which a society, institution etc. is endowed.

[11] But the term has not always been used to connote a particular provenance or the specific purpose of the provision of income. So, in the Charitable Trusts Act 1863 (UK),[7] endowment meant, in effect, all property of every description belonging to or held in trust for a charity, for any purpose. The origin of the property was irrelevant.

[12] The Auckland City Empowering Act 1913 required the Auckland City Council to hold land "as and for an endowment for the benefit of the inhabitants of the City of Auckland, and not for any special purpose".[8] In dealing with that provision in *Auckland City Corporation v The King*,[9] Fair J determined that the land was "held for the specific purpose of ensuring that income be derived from it".[10] He cited Lord Cranworth LC in *Edwards v Hall*:[11]

> By the endowment of a school, an hospital or a chapel, is commonly understood, not the building, or providing a site for a school, or hospital, or chapel, but the providing of a fixed revenue for the support of those by whom the institutions are conducted.

[13] The term under consideration does not, of course, stand alone in the Act but in a context. That context is concerned with purpose, not origin. The meaning and effect of Part 1 of Schedule 1, cl 5(e), is that land will be exempt if it is owned or used by the Foundation for its purposes, unless it is owned or used as an endowment.

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5 (2nd ed, 1989), p 234.
6 At p 235.
7 Section 66.
8 Section 2.
9 [1941] NZLR 659.
10 At p 667.
11 (1856) 25 LJ Ch (NS) 82 at p 83.

And, as the authorities we have mentioned indicate, in common usage the term "endowment" connotes, essentially, land held in order to produce income, even though it may also connote a gifted provenance. That this type of land holding or use is envisaged by the exception is indicated by the statutory history of the term in a rating context.

The legislative history of the present Act

[14] The expression "held otherwise than as an endowment" seems to have been first used by the legislature in connection with rating legislation in 1931. Section 40(1) of the Finance (No 4) Act 1931 stated:

> No rates shall be levied by any local authority within the meaning of the Rating Act, 1925, on any land held by or on behalf of any education authority and reserved or set apart, or otherwise in any manner acquired, for any purpose of such education authority and held otherwise than as an endowment.

[15] In 1935 a Bill specifically dealing with the position of the Foundation was introduced into the House of Representatives as the New Zealand Institute for the Blind Rating Exemption Bill. Speaking to its second reading the Member for Auckland East, Mr Schramm, said:[12]

> Sir, this Bill is introduced at the request of the New Zealand Institute for the Blind. That institute was established for the care, protection, and education of blind people, and is situated at Parnell Road, Parnell, Auckland. Formerly it was known as the Jubilee Institute for the Blind. The purpose of the Bill is to exempt the lands used by the institute for the purposes of any school, and so on, from the payment of local rates. Water rates will, however, be excepted. The Bill has been approved by the Auckland City Council. The necessity for the measure arises from the fact that recently, when certain lands were acquired by the institute, it was found that no statutory provision existed for its exemption from rates, though no rates have been paid since the establishment of the institute over forty years ago. Originally the land was in the old Parnell Borough, and among the records there were found papers endorsed "Exempt from rates." A judgment was given by the Assessment Court in Auckland in 1885 under which the institute was declared to be exempt from rates. However, no statutory authority for the exemption exists, and it was decided that a direct statutory authority was

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[12] (16 October 1935) 243 NZPD 315 (emphasis added).

> necessary. The present Bill proposes to give exemption from past as well as future rates. It has received the approval of the Department of Health. *It is not desired that other properties owned by the institute and let in the ordinary way for revenue purposes, or which may be acquired by the institute for that purpose, be exempted.* I move that the Bill be now read a second time.

[16] The Bill was passed and the Act had the following terms:[13]

> Notwithstanding anything contained in the Rating Act, 1925, or any other Act, all lands and buildings situated in the City of Auckland for the time being vested in and actually used by the Institute for the purposes of any school, workroom, shop, gardens, recreation-grounds, residences, or residential quarters for blind persons and held otherwise than as an endowment shall be deemed not to be and never to have been rateable property for the purposes of the Rating Act, 1925 …

[17] It is to be noted that the Act recognised a distinction between land and buildings actually used by the Foundation for its charitable functions and land and buildings held for another purpose, namely "as an endowment". The use of the term "endowment" to capture the concept expressed by Mr Schramm in the penultimate sentence of his speech shows that "endowment" was understood, at that time and in connection with rating, to have the meaning Mr Schramm indicated.

[18] By s 9 of the Education Amendment Act 1949, the Foundation was brought within the definition of "education authority" for the purposes of s 40(1) of the Finance (No 4) Act 1931. Its purpose and effect was to extend the Foundation's rates immunity to land in the area of every local authority, not just in Auckland City.[14]

[19] The Foundation was removed from the operation of s 40(1) of the Finance (No 4) Act 1931 by the New Zealand Foundation for the Blind Act 1955.[15] However, continuing immunity was assured by s 35(1) of that Act which provided:

> No rates shall be levied on the Foundation by any local authority within the meaning of the Rating Act 1925 on any land held by or on behalf of the Foundation and reserved or set apart, or otherwise in any manner acquired,

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13 Section 2(1) of the New Zealand Institute for the Blind Rating Exemption Act 1935.

14 The Hon Mr McCombs, Minister of Education identified this purpose when introducing the Bill to Parliament: (28 September 1949) 287 NZPD 2424.

15 Section 38(2) and Schedule 2.

> for any purpose of the Foundation, and held otherwise than as an endowment.

[20] Section 35(1) of the 1955 Act was re-enacted by s 43 of the Royal New Zealand Foundation for the Blind Act 1963. That section was then repealed by s 177(1) of the Rating Act 1967. However s 4 and cl 11 of Schedule 1 to the 1967 Act granted immunity to the Foundation in the same material terms, as did its successors, s 5 and cl 8 of Part 2 of Schedule 1 to the Rating Powers Act 1988. The current provisions, identified at the beginning of these reasons for judgment, have continued the immunity. There is no basis for thinking that the term "endowment" changed from its obvious meaning in 1935, when it was reiterated in subsequent legislation of a similar nature.

The general nature of excluded land

[21] Exempting certain categories of land from rates has been a constant feature of rating legislation. The Rating Act 1876, which repealed all existing legislative provisions, national or provincial, and replaced them with a single regime, exempted certain Crown lands, lands held from the Crown under lease, licence or other authority for gold mining purposes, lands occupied by churches and chapels, and lands over which native title had not been extinguished or which were occupied only by aboriginal natives.[16] An amendment in 1882[17] extended the categories to include, amongst others, cemeteries other than cemeteries conducted by private persons for pecuniary gain or profit, and all lands and buildings used for the purpose of a public school as defined by the Education Act 1877 or of any other school which was not carried on for gain or profit. Later Acts extended the categories to include, amongst other things, various educational and charitable organisations.

[22] The categories of non-rateable land in Schedule 1, Part 1, of the present Act are diverse but have, generally, an altruistic, charitable, or public service objective or quality. They include, for example, National Parks, reserves, and conservation

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16 Section 37.
17 Section 2 of the Rating Act 1882 (No 32).

areas;[18] land used by local authorities for public gardens or children's playgrounds, public halls, libraries and museums;[19] and land used by educational institutions[20] or religious institutions.[21] But in a number of cases the exemption is qualified by an exclusion in respect of land used to generate income.[22]

[23] Thus, the catalogue of exempted land which has been accumulated over a period of about 130 years indicates a policy of not excluding from rates land which, although held for or by an organisation with a generally charitable or public service objective, is nevertheless used to produce revenue.

[24] It would be difficult to understand why the various Acts which, over many years, have excluded land owned or used or held as an endowment would be concerned with the provenance of the land. Indeed, s 40(1) of the Finance Act (No 4) 1931 and s 35(1) of the New Zealand Foundation for the Blind Act 1955, referring as they do to "land … otherwise in any manner acquired" suggest that the legislature specifically regarded provenance as irrelevant. On the other hand, it is not at all difficult to understand why the legislature would be unwilling to exempt from rates land being used to produce revenue. Rates are a normal expense of the use of land for commercial purposes.

Conclusion

[25] Having regard to the commonly accepted view that the essential quality of an endowment is to provide a source of income, and to the case law, and to the legislative history and context of the expression "endowment", we are satisfied that the Court of Appeal correctly determined that the land in question was not exempted from rates because it is land owned or used as an endowment. The appeal is dismissed. The appellant is to pay the respondent costs in the sum of $15,000 plus

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18 Clause 1.
19 Clause 4.
20 Clauses 6 and 7.
21 Clause 9.
22 For example, cl 3(c), cl 4(e), cl 9(b), cl 10(a). Note also cl 6(b)(iv) and (v) where there is an exclusion for particular institutions "that operate for profit".

disbursements and other necessary payments, to be fixed if necessary by the Registrar.

Solicitors:
Chapman Tripp, Auckland for Appellant
Simpson Grierson Auckland for Respondent