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IN THE PRIVY COUNCIL

19 OF 1976

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

THE COUNCIL OF THE MUNICIPALITY OF ASHFIELD

Appellant

AND:

NORMAN JAMES PEEL JOYCE, THOMAS WYNN HEANEY, AUSTIN KEITH SMITH, JOHN NELSON JOYCE and FRANCIS ROBERT HEANEY

Respondents

CASE FOR THE RESPONDENTS

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FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL IN TERM NO. OF

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RECORD

INTRODUCTION

1. This is an appeal by leave of the Supreme Court of New South Wales, Court of Appeal, finally granted under the Order in Council of 1909 on the 17th day of November, 1975, from an order dated 17th July, 1975, of that Court (Reynolds, Hutley and Samuels JJ.A.) answering in a manner substantially favourable to the interests of the respondents certain questions of law submitted to that Court by way of a case stated by the Land and Valuation Court pursuant to s.17 of the Land and Valuation Court Act 1921, as amended. — p.190 L.10

(margin line number: 20)

2. The questions submitted to the Supreme Court raised in this appeal concern the proper construction of s.132 (1)(d) of the Local Government Act 1919, as amended.

3. The appellant is a duly constituted municipal council constituted under the provisions of the Local Government
10 Act. The area of the Municipality of Ashfield is a suburban area situated within a few miles of the City of Sydney. The respondents were at the relevant time the registered proprietors of land within the municipality.

4. Section 132(1) of the Act provides, inter alia, as follows:

> "132(1) All land in a municipality or shire (whether the property of
> 20 the Crown or not) shall be ratable except -
>
> ....
>
> (d) land which belongs to any public hospital, public benevolent institution, or public charity, and is used or occupied by the said hospital institution or charity as the case may be for the purposes thereof;

HISTORY

5. On 27th November 1945 a Declaration of Trust (which is hereinafter referred to p.139 L.1

as "The Ashfield Hall Trust") was entered into in respect of a parcel of land (hereinafter referred to as "the Church Site") upon which was erected a Gospel Hall or Church at Ashfield used for meetings of a Christian sect known as the Exclusive Brethren and being the principal one of a large number of such meeting places in
10 the Sydney metropolitan area. The Gospel Hall was capable of accommodating up to some 2,500 persons and from time to time numbers of this order gathered there for religious services. At other times smaller numbers attended such services. Although the building was originally constructed for use for such religious services and had continuously been used in that way, and in no other way,
20 clause 2 of the Deed of Trust was in the following terms:-

p.3 1 10

> 2. (i) The Trustees shall hold the trust property upon trust to employ it for any charitable purpose or purposes which the trustees may from time to time in their absolute discretion select.

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(ii) The Trustees hereby declare that it is their wish and desire that the primary charitable purpose to which the trust property shall be devoted shall be to employ the same for providing a meeting place for religious purposes for Christians but it is to be distinctly understood that this expression of the Trustees' wish and desire shall not impose any obligation upon the Trustees nor be interpreted as a trust."

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6. The Trustees of The Ashfield Hall Trust claimed that the Church site was exempt from rates under the provisions of s.132 (1)(d) of the Local Government Act 1919, as amended, and succeeded in the assertion of this claim in proceedings which terminated in the Full Court of the Supreme Court of New South Wales (Joyce v. Ashfield Municipal Council (1959) 4 L.G.R.A. 195).

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7. In late 1963 the then Trustees of the Ashfield Hall Trust by a series of purchases made in the name of a

p.133 1 18

solicitor acquired certain additional lands adjoining the Church site. Apart from a small area which at the date of purchase was subject to a lease to the proprietors of a commercial laundry and another small area on which there was a building used as a Bible and tract depot, the lands so purchased were from the time of their acquisition and at all relevant times used for the purpose of the parking of cars of persons attending to worship in the Gospel Hall and certain other purposes incidental to the use of the Hall. The whole of the additional lands purchased in 1963 will hereinafter be referred to as "the parking area".

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1 18

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8. The present appeal arises out of challenges by the respondents (being the Trustees of The Ashfield Hall Trust) to rates sought to be imposed in respect of lands falling within the parking area for the years 1966 and 1968. There has been no attempt by the appellant to levy rates in respect of the Church site since the decision in

favour of the then Trustees in 1959
which is referred to above.

HEARING IN LAND AND VALUATION COURT

9. Upon the appellant levying rates
upon the parking area the respondents
appealed to the Land and Valuation
Court under the provisions of s.133
(2) of the said Act, claiming that
10 the parking area was not ratable.
The claim for exemption from rating
was based on s.132(1)(d) and s.132
(1)(h)(i) of the said Act.

10. The Judge of the Land and
Valuation Court, Hardie J. (as he
then was) allowed the appeal. He
was of the opinion that the parking
area was held by the respondents either p.121 l 1
on a general charitable trust expressed
20 in the abovementioned deed or on trust
for use in connection with the adjoin-
ing church. His Honour therefore con-
cluded that the parking area was exempt
from rating under the provisions of
either s.132 (1)(d) or (h)(i).

HEARING IN COURT OF APPEAL

11. From this decision the appellant
appealed by way of stated case to the

Supreme Court of New South Wales Court of Appeal Division. The questions stated by Hardie J. for the opinion of the Court were:

1. On the facts found by me, is the subject land exempt from rating by the respondent either by virtue of s.132(1)(d) or by virtue of s.132 (1)(h)(i) of the Local Government Act 1919, as amended?

p.137 L.25

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2. Whether there was any evidence from which the inference could be drawn that members of the Brethren did constitute a religious body and that the religious exercises and services conducted in The Ashfield Hall constituted public worship within the meaning of s.132 (1) (h)(i) of the Local Government Act 1919?

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12. In the Court of Appeal the appellant contended that the parking area was not exempt from rating under s.132 (1)(d) of the Act for the following reasons:

(i) because the Ashfield Hall Trust was not a public charitable trust;

30

(ii) because the parking area was not used for the purposes of a public charity.

It was further contended by the appellant that the parking area was not exempt from rating under s.132 (1)(h)(i) of the Act because of the religious services and exercises conducted in the Gospel Hall did not constitute public worship.

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13. The Court of Appeal dismissed the appeal. It held that the parking area was exempt from rating by virtue of s.132 (1)(d) but not by virtue of s.132 (1)(h)(i). The Court did not answer the second question.

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SUBMISSIONS

14. The respondents submit that the Court of Appeal was correct in holding that the subject land was exempt from rating by virtue of s.132(1)(d) of the Act. The respondents do not desire to submit that such exemption is also supportable under s.132(1)(h)(i).

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15. The respondents submit that the parking area belongs to a public charity and is used or occupied by the charity for the purposes thereof. It is submitted

that the term "charity" in s.132 (1)(d) is used in its legal sense. When it is used in its legal sense, charity refers to a trust established for charitable purposes. It is submitted that public charity means any trust for charitable purposes, the benefit of which is available to the public or a section of the

10 public.

16. In the construction of s.132(1) (d) the guiding principle is the rule enunciated by Lord Macnaghten in Pemsel's Case (1891) A.C. 531 at 580 that "in construing Acts of Parliament it is a general rule ... that words must be taken in their legal sense unless a contrary intention, appears." See also, Chesterman v. Federal Commis-

20 sioner of Taxation (1926) A.C. 128 at 131; Adamson v. Melbourne and Metropolitan Board of Works (1929) A.C. 142 at 147; and Attorney General for New South Wales v. Brewery Employees Union of New South Wales (1908) 6 C.L.R. 469 at 531. That the legal meaning of the word "charitable" should not lightly be departed from is made clear in the joint

judgment of Dixon J. (as he then was), Williams and Webb JJ. in Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation (1952) 85 C.L.R. 159 at 175.

17. It has been held that the expression "public charitable institution" when used in a similar legislative context
10 prima facie refers to charity in the technical legal sense. See Adamson's Case (supra) at page 147 where the Privy Council expressed the opinion that the decision to the contrary of the High Court in Swinburne v. Federal Commissioner of Taxation (1920) 27 C.L.R. 377 must be regarded as having been overruled by Chesterman's Case (supra). A fortiori when the words "public
20 charity" are used without the addition of the non-technical word "institution" they must be taken in their legal sense.

18. In Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation (supra) Dixon J. (as he then was), Williams, Webb and Fullagar JJ. held that the word "charitable" when used in a not dissimilar legislative

context was to be understood in its technical sense. In the words of Viscount Radcliffe in Governors of the Campbell College Belfast v. Commissioner of Valuation for Northern Ireland (1964) 2 All E.R. 705 at 711, " ... the dictionary to be resorted to in construing 'charitable purposes' in an Act of

10 Parliament consisted of various headings of charitable uses and trusts as they appear in the English Statute 43 Eliz. Ic. 4 ...". This view is in accordance with long standing authority in England (Hall v. Derby Sanitary Authority (1885) 16 Q.B. D. 163 applied in Shaw v. Halifax Corporation (1915) 2 K.B.170) and with the highest Canadian authority (Les Dames Religieuses

20 De Notre Dame v. The King (1952) 2 D.L.R. 386).

19. In New South Wales the view has been accepted for many years that the words "public charity" where used in s.132 (1)(d) refer to charity in the legal sense. This view is expounded in the judgment of Sugerman J. (as he then was) in Young Men's Christian Association

v. Sydney City Council (1954) 20 L.G.R. 35, and in another judgment of the same learned judge in Kindergarten Union of N.S.W. v. Waverley Municipal Council (1960) 5 L.G.R.A. 365. It had earlier been adopted by Street J. (as he then was) in Warringah Shire Council v. Salvation Army (N.S.W.) Property Trust

10 (1943) 15 L.G.R. 91. The same view has been taken by Brereton J. in Greater Wollongong City Council v. Federation of New South Wales Police Citizens Boys' Clubs (1957) 2 L.G.R.A. 54; by Hardie J. (as he then was) in Boy Scouts' Association, N.S.W. Branch v. Sydney City Council (1959) 4 L.G.R.A. 260; by the Full Court of the Supreme Court of New South Wales in Joyce v. Ashfield Muni-

20 cipal Council (1959) 4 L.G.R.A. 195 and again in Waverley Municipal Council v. New South Wales Board of Jewish Education (1959) 5 L.G.R.A. 122; and by the New South Wales Court of Appeal in Trustees of the Diocese of Newcastle v. Council of the Shire of Lake Macquarie (1975) 1 N.S.W.L.R. 521.

20. It was held in Randwick Municipal Council v. Kessell (1929) 9 L.G.R. 86

that "charity" where used in s.132 (1)(d) is used in its popular sense rather than in the technical sense. Neither Chesterman's Case (supra) nor Adamson's Case (supra) was referred to in argument or in the judgment of the Court. Kessell's Case is the last reported decision in which the words "public charity" where
10 used in the section were given their popular meaning. In McGarvie Smith Institute v. Campbelltown Municipal Council (1965) 83 W.N. (Pt.1) (N.S.W.) 191 Else-Mitchell J. expressed the view that, but the weight of the authority to the contrary, he would have construed the words in what he regarded as their popular sense, but in his subsequent decision in New South Wales
20 Nursing Service and Welfare Association for Christian Scientists v. Willoughby Municipal Council (1968) 88 W.N. (Pt.1) (N.S.W.) 75 his Honour stated that it must be taken as established that the term "public charity" is used in s.132 (1)(d) in a technical sense in conformity with the rules relating to charitable trusts.

21. In some of the decisions referred to in paragraph 19 there is reference to the apparent tautology in the term "public charity". It is submitted that in construing the expression "public charity" the adjective "public" may be regarded as:

(a) simply a descriptive or tautological expression historically used as one of the conventional ways of referring to charity (cf. the definition of the term "public charitable purposes" in 35 and 36 Vic. c. 24, sec.14);

(b) a legislative attempt to clarify for the purposes of the exemption the concept of charity which at the date of the Act was not as clearly defined by reference to the public element as it is today (see per Sugerman J. (as he then was) in Kindergarten Union of New South Wales v. Waverley Municipal Council (1960) 5 L.G.R.A. 365 at 371);

(c) the expression of a policy to exclude from the exemption those charities (the scope of which at

the date of the Act was still unresolved) which have been regarded as constituting an anomalous exception to the requirement for a valid charity of benefit to the public or a section of the public, namely, the "poor relations" and "poor employees" charities (see In re Scarisbrick (1951) 1 Ch. 622 at 637 and 649).

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22. It is submitted that the law as so long understood ought not to be altered particularly as the effect would be to impose a retrospective liability for rates over a period of at least twenty years, and probably longer. Such a decision would affect not only the respondents to this appeal but also numerous other charities in New South Wales. The respondents rely on the principle in this regard stated by the Privy Council in Geelong Harbour Trust Commissioners v. Gibbs Bright & Co. (1974) A.C. 810 and by the House of Lords in Dingle v. Turner (1972) A.C. 601 at 622-3.

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23. It is further submitted that the parking area "belongs" to a public

charity within the meaning of Section 132 (1)(d). A contrary argument was not submitted to the Court of Appeal by the appellant. On this matter the respondents adopt the reasoning of Walsh J. in Joyce v. Ashfield Municipal Council (1959) 4 L.G.R.A. 195 at 212 as follows:

> "When the trust was constituted by
> 10 the deed, the land belonged no longer to the legal owners of it. There was no particular person or group of persons in whom an equitable interest in it then became vested, or to whom thereafter it belonged in any sense which could be given to that term. The trust which devoted it to such charitable purpose or purposes as might
> 20 be selected, should not be construed as permitting it to be used for private purposes, but as requiring that hence forth it must be devoted to charitable purposes which would benefit the community or a section of the community in a manner conforming to the legal concept of charitable

purposes. The trust is, therefore, one which could be enforced at the suit of the Attorney-General, representing the Crown, which "as parens patriae is the constitutional protector of all property subject to charitable trusts:
Halsbury's Laws of England, 2nd ed., (1932), vol. 4, page 339. It is therefore proper to say that a public charity was constituted, and to speak of the charitable trust declared by the Deed as being a public charity, and of the land as 'belonging to' that charity."

"Belonging to" has a wider meaning than "owned by" cf. Parramatta Municipal Council v. The Treasurer of New South Wales (1927) 44 W.N. (N.S.W.) 133 at page 134 per Davidson J.

24. It is therefore submitted that the parking area is land which belongs to a public charity within the meaning of s.132 (1)(d) of the Act. It was argued on behalf of the appellant in the Court

of Appeal that even if it were held that the parking area did belong to a public charity, the land was nevertheless not exempt from rating because it was not used for the purposes of public charity. The basis of this submission was that, having regard to the degree of exclusiveness of the Brethren, it should be held

10 that the land was not used for the purpose of public charity and reliance was placed on the decision of the House of Lords in Gilmour v. Coats (1949) A.C.426. It is the respondents' understanding that this submission will not be pressed before your Lordships' Board and for this reason no argument to the contrary is included in this Case. If it be necessary to do so the respondents rely

20 upon the reasons which are contained in the Judgment of Hutley J.A. in support of their contention that the parking area is used for the purposes of public charity. Clearly the parking area is used to facilitate the carrying out of the charitable activities on the adjoining church site: see Glasgow Corporation v. Johnstone (1965) A.C. 609.

25. It is true that because of the width of the trust there are many legitimate uses to which the land could be put. But provided the use is one within the ambit of the trust it is a use by the trust. It does not matter that the Trustees themselves may not personally use the land. The Trustees use the land by managing it in
10 such a way that it is properly devoted to the purpose of the trust. If this is done (and there can be no doubt that it is) it is irrelevant that the Trustees in their individual capacities do not take any part in the physical activities carried out upon the land.

26. The respondents respectfully submit that the Order of the Court of Appeal was correct and ought not to be disturbed
20 for the following (amongst other).

REASONS

(1) Because the Court of Appeal correctly held that the subject land was exempt from rating by virtue of s.132(1)(d) of the Local Government Act 1919.

(2) Because the subject land belongs to a public charity and is used or occupied by the charity for the
10 purposes thereof.

(3) Because the words "public charity" where used in s.132(1)(d) of the Local Government Act have a settled meaning which ought not to be disturbed by judicial decision.

T. R. MORLING