SUPREME COURT OF QUEENSLAND

CITATION:	*Educang Limited v Brisbane City Council* [2002] QSC 374
PARTIES:	**EDUCANG LIMITED (ACN) 060 936 576** (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	SC No 1496 of 1999
DIVISION:	Trial Division
PROCEEDING:	Application for judicial review
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	19 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	White J

ORDER:

1. **The respondent's decision, communicated by letter dated 21 January 1999, refusing to grant the applicant an exemption from general rates with respect to the land described at Lot 1 on RP 911369 and Lots 2 and 3 on RP 911370 for the period 1 July 1997 to 31 December 1997 be set aside.**

2. **It is declared that the land described as Lot 1 on RP 911369 and Lots 2 and 3 on RP 911370 is exempt from general rates for the period 1 July 1997 to 31 December 1997.**

3. **The respondent**
   a) repay to the applicant the sum of $19,744.08 being the sum paid by the applicant to the respondent for general rates in respect of the land described as Lot 1 on RP 911369 and Lots 2 and 3 on RP 911370 for the period 1 July 1997 to 31 December 1997;
   (b) pay the applicant interest on the sum of $19,774.08 from 7 January 1999 to 19 November 2002 at the rate prescribed from time to time by the practice direction made for the purpose of section 47 of the *Supreme Court Act* 1995.

4. **The respondent pay the applicant's costs of an**

incidental to this application, including reserved costs, on the standard basis.

CATCHWORDS: STATUTES – INTERPRETATION – RULES OF CONSTRUCTION – GENERALLY – where statute provides exemption from rates for land used for a school – whether land is used for a school in the preparatory stages

LOCAL GOVERNMENT – BUILDING CONTROL – COUNCIL CONSENT AND APPROVAL – CONTROL OF PARTICULAR MATTERS – OTHER MATTERS – exemption from payment of rates for a school

City of Brisbane Act 1924 (Qld)
Judicial Review Act 1991 (Qld)
Land Tax Act 1915 (Qld)

Arbuckle Smith & Co. Ltd v Greenock Corporation [1960] AC 813
Commissioner of Land Tax v Christie [1973] 2 NSWLR 526
Commissioner of Land Tax v Joyce (1973-1974) 132 CLR 22
Council of the City of Newcastle v Royal Newcastle Hospital (1956) 96 CLR 493; (1959) 100 CLR 1 (Privy Council)
Lewiac Pty Ltd v Gold Coast City Council (1993) 81 LGERA 219
Municipal Council of Sydney v Prince Alfred Hospital (1949) 66 WN NSW 87
Needham v Commissioner of Land Tax [1999] 2 Qd R 611
The Association of the Franciscan Order of Friars Minor v City of Kew [1944] VLR 199
The Council of the Town of Gladstone v The Gladstone Harbour Board [1964] Qd R 505
The Roman Catholic Bishop of Perth v Perth Road Board (1933) 49 CLR 37
Warringah Shire Council v Raffles [1979] 2 NSWLR 299

COUNSEL: Mr M D Hinson SC for the applicant
Mr J H Logan SC for the respondent

SOLICITORS: Deacons for the applicant
Brisbane City Legal Practice for the respondent

Preliminary

[1] This application for judicial review was heard by Douglas J in the Applications Court on 1 November 2001 and reserved. His Honour's health was such that on 11 November 2002 the Chief Justice asked me to consider the matter.

[2] My associate contacted counsel who appeared before his Honour to inquire whether they wished a hearing *de novo* or for the application to be disposed of by reference to the material read and submissions (written) made previously or, indeed, some other course. They have responded with a detailed joint submission that I should proceed to determine the application by reference to the material read and the

written submissions made previously together with any transcript of oral submissions taken before his Honour. Those joint submissions have, as requested, been marked as an exhibit and placed with the papers.

[3] Inquiries of the State Reporting Bureau reveal, not surprisingly, that no transcript was made of the hearing before his Honour. I have not thought it appropriate to consult his Honour's Notebook. There was no oral evidence taken on the application. This application is one of construction of the respondent's budgetary resolution in the light of uncontested facts and may appropriately be disposed of in the manner requested by the parties.

The application

[4] The applicant is the owner of land described as Lot 1 on Registered Plan 911369 County of Stanley Parish of Oxley and Lots 2 and 3 on Registered Plan 911370 County of Stanley Parish of Oxley ("the land") acquired on 27 June 1997, on which was to be built and operated a secondary school on behalf of the Corporation of the Synod of the Diocese of Brisbane and The Uniting Church in Australia Property Trust (Queensland).

[5] Between 27 June 1997 and 27 January 1998 when the school year commenced the applicant constructed classrooms on the land and attended to fit out and other ancillary matters.

[6] The respondent determined that between 1 July 1997 and 31 December 1997 the land was not being used for educational purposes such as to exempt it from the payment of general rates. The applicant is aggrieved of that decision and seeks a statutory order of review.

[7] Section 47(1) of the *City of Brisbane Act* 1924 provides relevantly:

> "All land is rateable land other than –
>
> (d) Land used for public, religious, charitable or educational purposes that is exempt from rating under a resolution of the council;"

Resolution 5 "Exemptions from General Rating" Schedule (e) provides:

> "Any land that is used entirely for a school conducted by or on behalf of a religious body incorporated under "The Religious Educational and Charitable Institutes Act 1861", or another statute, whether or not the land has other buildings on it that are utilised in conjunction with the school."

[8] By its letter to the applicant's solicitors dated 21 January 1999 the respondent wrote:

> "To be eligible for General Rate Exemption the property in question must satisfy certain criteria. Under the Exemption from General Rating schedule part (e) it clearly states that the land must be used entirely *for* a school. The property cannot be considered as being used *as* a school until the building has been opened and classes are being undertaken. Prior to this, the Council considers the property to be a construction site." [italics added]

As will be immediately apparent, the writer seems to regard "for" and "as" as interchangeable which they very clearly are not. The respondent granted the applicant a general rate exemption from 1 January 1998.

[9] The issue is a narrow one, namely, whether the land was "used entirely for a school" during the construction and fit out of the classrooms and before classes commenced. If the applicant is correct in its contention that the land was being used for a school during this period then the decision was not authorised by the enactment under which it was purported to be made, s 20(2)(d) *Judicial Review Act* 1991. Notwithstanding the reference to the other grounds in s 20 of the *Judicial Review Act* in the application there is no room for a discretionary exercise of power. Either the land falls within the description in the resolution to exempt it from the payment of rates or it does not.

The facts

[10] The applicant was formerly known as Forest Lake College Limited, a company limited by guarantee and registered in July 1993. Pursuant to its Memorandum and Articles of Association the principal object of the corporation was to establish a co-educational school to be operated in general accordance with both Anglican and Uniting Church principles and tradition and as further set out in a schedule to the Memorandum. The school was to be known as the Forest Lake College and would be a Pre-Year 1 to Year 12 co-educational day school on two adjacent campuses.

[11] In about May 1993 the construction of the Forest Lake College commenced at Alpine Place, Forest Lake. That land was acquired in or about October 1993 and teaching of primary school students commenced there in 1994.

[12] Forest Lake is a planned community, the development of which is regulated by the respondent's Forest Lake Development Control Plan which forms part of the Town Plan for the City of Brisbane. The Structure Plan dated January 1994 which forms part of the Forest Lake Development Control Plan designates the land as a site for a proposed secondary school.

[13] The applicant desired to extend the College by the construction of a dedicated secondary school on another campus. Land was identified as a suitable site after negotiations with the developer. This became known as the "College Avenue Campus". Town planning approval was given by the respondent in June 1997 subject to conditions not presently relevant. The applicant then entered into a contract with a subsidiary of the developer to purchase the land. The contract provided in cl 51.1 that the applicant was to construct a secondary school on the land to comply with certain specifications. By cl 53.1 the applicant was not to permit the land to be used or any building on the land to be used for any purpose other than for educational and religious use. Settlement on the purchase was effected on 30 June 1997.

[14] By a statutory declaration made on 7 July 1997 the chairman of the applicant, Mr John Braithwaite, declared that the land had been purchased for the general educational purposes of the applicant "… and in particular for the construction of school buildings including classrooms, library, staff rooms and so on". The purpose of that statutory declaration was to obtain a stamp duty exemption which was granted by the Office of State Revenue.

[15] Construction of the new campus commenced on or about 30 June 1997 and was completed on or about 21 November that year, at which time classroom facilities were made available and the preparation for classroom activity commenced. This included fitting out the classrooms which was completed by 19 January 1998; an orientation evening held for students on that evening; the installation of computer equipment for the use of students and staff and the use of the premises in anticipation of the commencement of the 1998 school year with the school year commencing on 27 January 1998.

[16] From 9 April 1998 the applicant received a number of rate accounts from the respondent which included an amount for general rates assessed with respect to the land from the date the applicant acquired the land shortly before the date on which the College Avenue Campus opened, that is, for the period beginning 1 July to 31 December 1997. Thereafter it was not required to pay the general rate in respect of that land.

[17] On or about 8 May 1998 the applicant's solicitors informed the respondent that the land was used for a school during the period 1 July to 31 December 1997 and claimed exemption from the general rate. Communication ensued and on 5 January 1999 the applicant's solicitors requested a written statement from the respondent setting out the reasons why it considered that the land did not qualify for the general rate exemption. The response has been set out above in which the respondent maintained that the land was not being used for a school but was a construction site.

Was the land used entirely for a school?

[18] The only issue is whether, during the relevant period, the land was "used … for a school". The respondent accepts that the applicant otherwise qualifies for the exemption. The applicant concedes in the written outline that the land was not being used *as* a school during the relevant period but contends that the expression "*for*" a school when it appears in the resolution is of wider meaning and encompasses the construction of school buildings during that period.

[19] Both Mr Hinson SC and Mr Logan SC, counsel for the applicant and respondent respectively, take as their starting point the Court of Appeal's decision in *Needham v Commissioner of Land Tax* [1999] 2 Qd R 611. By s 13(1)(g)(i) of the *Land Tax Act* 1915 all land owned by or in trust for any society and

> "used or occupied by that … society solely as a site for –
>
> (i) a building owned and occupied by a … club … not carried on for pecuniary benefit"

was exempt from the payment of land tax. The appellants were the trustees of Tattersall's Club not carried on for pecuniary profit. With the intention of extending the existing facilities of the Club adjacent land was purchased, demolition of existing buildings thereon completed, financial and all necessary town planning consents and building approvals obtained and tenders for the construction of the facilities called as at 30 June 1995. The land was assessed to tax as at 30 June 1995. A case was stated for the opinion of the Court of the Appeal. The Court concluded at p 613 that the expression "as" a site "for" rather than "as the" site "of" contained an element of futurity as well as an element of present use. The respondent had

argued for a narrower meaning, that is, that there needed to be on the land a building which was owned and occupied by the Club to attract the exemption. This argument, the Court noted, would require the words "site for" to be replaced by the words "site of".

[20] The Court was referred to observations of Gibbs J, with whom Mason J agreed, in *Commissioner of Land Tax (NSW) v Joyce* (1973-1974) 132 CLR 22. In that case land was exempt from tax if it was "used or occupied … solely as a site for a place of worship …". His Honour said at 29:

> "The word "site" can refer to a piece of ground intended for building purposes, as well as to one on which a building is constructed. When one speaks of "a site for a church", rather than of "the site of a church", the words naturally suggest that the church is to be built, but has not yet been built, on the site mentioned … .
>
> I am disposed to think that the exemption conferred by s 10(1)(g) is not restricted to land on which something of the kind mentioned in the paragraph is already built or constructed. For example, if the other conditions laid down by the paragraph were fulfilled, land on which a church was in the course of erection, as well as land on which a church had been erected, would be exempt from the tax."

[21] Here, similarly it can be said that there is an element of futurity in the use of the expression "used … for". Further, the respondent chose not to use the expression "used … as" in its resolution. "For" does, however, take colour from "used" which precedes it. In *Council of the City of Newcastle v Royal Newcastle Hospital* (1956) 96 CLR 493 Taylor J said at 515:

> "The word "used" is, of course, a word of wide import and its meaning in any particular case will depend to great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute "use" will depend to a great extent on the purpose for which it has been acquired or created. Land, it may be said, is no exception and s 132 itself shows plainly enough that the "use" of land will vary with the purpose for which it has been acquired and to which it has been devoted. … But where an exemption is prescribed by reference to use for a purpose or purposes it is sufficient, in my opinion, if it be shown that the land in question has been wholly devoted to that purpose even though, the fulfilment of the purpose does not require the immediate physical use of every part of the land."

In that case "land which belongs to any public hospital … and is used or occupied by the hospital … for the purposes whereof" was exempt from the payment of rates. The hospital which treated patients with diseases of the chest owned 327 acres of land of which 291 were rough bushland comprising stony ridges and deep gullies which was heavily timbered and substantially in its wild natural condition. The buildings of the hospital and surrounding land of 36 acres had not been rated by the council but rates were levied on the 291 acres since the council concluded that it was not used or occupied by the hospital. While no physical use was made of the area in dispute it was proved that that area ensured a clear atmosphere for the proper treatment of patients of the hospital.

[22] In the Privy Council, Lord Denning had no doubt that all the land had been acquired for the purposes of the hospital. The issue was whether it *used* or *occupied* the land for those purposes. The evidence that it was beneficial for the patients of the chest hospital to have clean air and a quiet ambience was sufficient use of the land for hospital purposes to bring it within the exemption.

[23] The Full Court in *The Council of the Town of Gladstone v The Gladstone Harbour Board* [1964] Qd R 505 considered rating legislation which exempted from rates "Crown land which … is used for public purposes". The Gladstone Harbour Board held the subject land for the extension or development of harbour works although it had not been physically used for any purpose during the two years for which it had been charged with rates. It was submitted that land is used when it is held for the purpose of using it in the future relying on *Newcastle City Council v Royal Newcastle Hospital*. Gibbs J at 525 distinguished that case on the ground that the hospital derived actual and present advantages by keeping the land in its virgin state and concluded that it was an unwarranted extension to suggest that land available for use in the future, if required, was being "used".

> "In ordinary speech, there is a difference between using land and intending to use it … Nothing … compels me to decide that to hold land with the intention to use it must be regarded as equivalent to using it."

[24] His Honour quoted with approval the statement by Lowe J in *The Association of the Franciscan Order of Friars Minor v City of Kew* [1944] VLR 199 at 201

> "What is exempted from rateability is land which is *used* for the excepted purpose and neither dedication therefore nor intention to use it for such purpose is in itself sufficient."

This seems at odds with *obiter dicta* in *The Roman Catholic Bishop of Perth v Perth Road Board* (1933) 49 CLR 37 although land there was to be used or *held* and demonstrates that close attention to the words of the legislation is essential if reliance on analogous cases is to be of assistance. In that case the relevant rating Act provided that land was to be rateable save for

> "[l]and belonging to any religious body, and used or held exclusively as or for a place of public worship, a Sunday school, a place of residence of a minister of religion …".

The land was vested in the Catholic Bishop of Perth, a statutory corporation, and had been purchased for the purpose of erecting at a future date a place of public worship and for a place of residence for an officiating priest. At the time of the assessment of tax the land continued to be held for that purpose but had not been used for any purpose and remained vacant and unfenced.

[25] The appeal was dismissed but it is clear from the judgment that had there been some further facts advanced, for example, a resolution of the church that the land was to be used for the purposes for which it was purchased, there may have been a different result. Rich J at 43 said:

> "'Use' goes to use in fact, and depends in no way upon legal and equitable obligations. If the body in actual practice during the time relevant to the rate confines the use of the land to public worship the condition is satisfied. The expression "held as or for" includes a present holding for a future purpose. The real difficulty in the case

> lies in the necessity that the present holding shall be "exclusively" for that purpose. … there must, I think, be some immediate exclusion operating upon those controlling the enjoyment of the land. … If a requirement exists cognisable at law confining the use of the land to public worship, I should think it was sufficient for the purposes of the exemption although it did not amount to a trust or limitation or condition affecting title, but arose only from the exercise of an authority vested in a ecclesiastical body, but it must be expressed in some resolution, decree of order recognised as binding, while it remains unrepealed, those in a position to control the use of the land, including the person or body who or which is the repository of the legal title."

To similar effect Starke and Evatt JJ at 45 and Dixon J at pp 46-7.

[26] Gibbs J referred to *Municipal Council of Sydney v Prince Alfred Hospital* (1949) 66 WN NSW 87 in *Joyce*. The exemption from liability to pay rates under the *Sydney Corporation Act* 1932 was in respect of a "hospital, benevolent asylum or other building used for charitable purposes". The hospital owned land within the council's municipality and had commenced to erect a building to be used as a hospital. It was levied with rates before the building had been completed. In a brief judgment Jordan CJ, with whom Street and Maxwell JJ agreed, concluded that a building could not be regarded as a hospital within the meaning of the subsection unless it was, at least, in a state capable of being used as a hospital.

[27] Lord Ratcliffe in *Arbuckle Smith & Co. Ltd v Greenock Corporation* [1960] AC 813 at 828 said:

> ""Use" is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed."

[28] Of some assistance is *Warringah Shire Council v Raffles* [1979] 2 NSWLR 299 referred to with approval in *Lewiac Pty Ltd v Gold Coast City Council* (1993) 81 LGERA 219. The defendant owned a light helicopter which he operated from a helipad on land part of the curtilage of his dwelling house in the conduct of his profession as a doctor and for social purposes. He did so without having obtained development consent from the council for such a use of the land. Waddell J drew a distinction between the nature of a "purpose" and the nature of a "use". Here the use was ancillary to the purpose for which the land was used, as a dwelling house and there was no reason to treat the use of a helicopter as being for town planning purposes different in principle from the use of a motor car.

[29] In this case the applicant conducted a school, the Forest Lake College, and had done so since 1994. Since its inception, as enshrined in its memorandum and articles, it intended to have two campuses but there was only one school. The land acquired in 1997 was the realisation of that plan. From its acquisition by the applicant the land was for a school, that is, for the purposes of a school which was already established. "Conducted" does not add anything to the expression "used … for a school" in temporal terms. It governs or describes the school and is, for example, to be contrasted with a school operated by the State. The town plan for Forest Lake and the terms of the contract for the sale of the land and the planning approval for it as a school make plain that this land was used entirely for a school. To emphasise the

point, if "for the purposes of" were inserted before "a school" there could be no doubt about the exemption. Bowen JA said in *Commissioner of Land Tax v Christie* [1973] 2 NSWLR 526 at 533 "'use' has regard to the purpose to which the land is put". The respondent was wrong in characterising the use to which the land was put as a construction site. That activity was ancillary to its use for a school.

[30] The respondent was not authorised by s 47(1)(d) of the *City of Brisbane Act* 1924 and the resolution made thereunder to impose general rates upon the applicant for the period 1 July 1997 to 31 December 1997. The orders are:

(1) The respondent's decision, communicated by letter dated 21 January 1999, refusing to grant the applicant an exemption from general rates with respect to the land described at Lot 1 on RP 911369 and Lots 2 and 3 on RP 911370 for the period 1 July 1997 to 31 December 1997 be set aside.

(2) It is declared that the land described as Lot 1 on RP 911369 and Lots 2 and 3 on RP 911370 is exempt from general rates for the period 1 July 1997 to 31 December 1997.

(3) The respondent:
a) repay to the applicant the sum of $19,744.08 being the sum paid by the applicant to the respondent for general rates in respect of the land described as Lot 1 on RP 911369 and Lots 2 and 3 on RP 911370 for the period 1 July 1997 to 31 December 1997;
(b) pay the applicant interest on the sum of $19,774.08 from 7 January 1999 to 19 November 2002 at the rate prescribed from time to time by the practice direction made for the purpose of section 47 of the Supreme Court Act 1995.

(4) The respondent pay the applicant's costs of an incidental to this application, including reserved costs, on the standard basis.