Supreme Court of Queensland - Court of Appeal

[Index] [Search] [Download] [Context] [No Context] [Help]

Jensen & Ors v Brisbane City Council [2005] QCA 469 (14 December 2005)

Last Updated: 14 December 2005

SUPREME COURT OF QUEENSLAND

CITATION:	*Jensen & Ors v Brisbane City Council* [2005] QCA 469
PARTIES:	**STUART WILLIAM JENSEN, WILLIAM LLOYD KIRKPATRICK, ROSS WALTER SANDERSON, NORMAN GEORGE SHARPLES and STANLEY THOMAS THRUSH AS TRUSTEES FOR GOSPEL TRUST NO 1** (applicants/respondents) **v** **BRISBANE CITY COUNCIL** (respondent/appellant)
FILE NO/S:	Appeal No 3100 of 2005 SC No 5677 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2005
JUDGES:	McMurdo P, Keane JA and Mackenzie J Judgment of the Court

ORDER:

1. The time in which the respondents were required to file their notice of contention is extended to 9 June 2005
2. The appeal is allowed
3. The orders made by the learned primary judge are set aside and, in lieu thereof, it is ordered that the application made by the respondents is dismissed with costs to be assessed on the standard basis
4. The respondents are to pay the appellant's costs of the appeal to be assessed on the standard basis

CATCHWORDS:

REAL PROPERTY - RATING OF LAND - RATES UNDER LOCAL GOVERNMENT LEGISLATION - RATABLE LAND - EXEMPTIONS - CHURCH LAND - EXCLUSIVE USE FOR PUBLIC WORSHIP - where the respondents were trustees of a trust that owned land on which was located a "meeting room" used for religious purposes by a religious fellowship known as **the Brethren** - where the appellant was the relevant local government - where land that fell within the appellant's jurisdiction that was used "entirely for public worship" was exempt from rating pursuant to a resolution contained in the appellant's annual budget - where the appellant refused to accept that the meeting room was used for public worship and sought to levy rates - where the meeting room was the venue for a number of religious services every week - where the doors to the meeting room were locked after the commencement of each service - where a call button allowed a person who arrived after the doors had been locked to seek admission from members of the congregation who were already inside - where a sign placed outside the meeting room informed members of the public that details about the services held therein could be obtained by contacting members of the congregation by telephone - whether there was some objective manifestation that members of the public had permission, whether express or implied, to go to the meeting room and worship there - whether the learned primary judge had been correct to conclude that the meeting room was used for "public worship"

City of Brisbane Act 1924 (Qld), s 47

Uniform Civil Procedure Rules 1999 (Qld), r 757

Attorney-General (Vic); ex rel Black v The Commonwealth (1981) 146 CLR 559, cited

Broxtowe Borough Council v Birch [1983] 1 All ER 641, applied

Canterbury Municipal Council v Moslem Alawy Society Ltd (1987) 162 CLR 145, distinguished

Canterbury Municipal Council v Moslem Alawy Society Ltd (1985) 1 NSWLR 525, cited

Church of Jesus Christ of Latter-Day Saints v Henning (Valuation

Officer) [1964] AC 420, considered
Joyce v Ashfield Municipal Council [1975] 1 NSWLR 744, considered
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355, applied
Rogers v Lewisham Borough Council [1951] 2 KB 768, cited
The Association of the Franciscan Order of Friars Minor v City of Kew [1944] VLR 199, cited
The Council of the Town of Gladstone v The Gladstone Harbour Board [1964] Qd R 505, cited

COUNSEL: J A Logan SC for the appellant
G J Gibson QC, with P J Dunning SC, for the respondents

SOLICITORS: Brisbane City Legal Practice for the appellant
Hemming & Hart for the respondents

[1] **THE COURT:** The respondents are the trustees of the Gospel Trust No 1 ("the trust") which was constituted by deed on 27 February 1975. Pursuant to the provisions of the trust, the respondents are the registered proprietors of the land situated at 91 Lytton Road, Bulimba ("the land"). In 1980, a building described as the "meeting room" was erected on the land. The meeting room has since been used for the conduct of the services of the religious fellowship known as **the Brethren**.

[2] Within the City of Brisbane, land "having a building thereon and used entirely for public worship" has been exempt from general rating in the financial years 1996 - 1997, 1997, 1998, 1998 - 1999 and 1999 - 2000 ("the relevant period") pursuant to resolutions passed by the Brisbane City Council, who is the appellant in this matter. The respondents applied to the appellant for the benefit of this exemption during the relevant period in respect of the land on which the meeting room is situated. That application was refused because the appellant decided that the meeting room was not used "for public worship".

[3] The respondents sought judicial review of that decision. The learned primary judge acceded to the respondents' application, set aside the appellant's decision and declared that the meeting room was used for public worship during the relevant period.[1]

[4] The appellant's challenge to the orders of the learned primary judge focuses upon the learned trial judge's finding of fact that the external doors of the meeting room are locked when **the Brethren**'s services are in progress. The appellant contends that the meeting room cannot be said to have been used for public worship because it was not open to the public while worship was in progress. The appellant's contention is that the services in the meeting room were congregational religious worship conducted in private, not "public worship". The respondents, for their part, resist the appellant's argument, and, by way of a notice of contention, contend further that "public worship" means "congregational worship" as distinct from private or domestic worship. To enable a proper appreciation of these arguments, it is necessary to set out the legal background to the case and the learned trial judge's relevant findings of fact. It will then be possible to summarise and discuss the arguments advanced on

the appeal.

The legal background

[5] The *City of Brisbane Act* 1924 (Qld) ("the Act") provides by s 47(1) that all land is rateable land other than the categories of land described in paragraphs (a) to (e) of that section. Under s 47(1)(d), land used for religious, charitable or educational purposes that is exempt from rating under a resolution of the appellant is not rateable land.[2] During the relevant period, the appellant resolved, by way of the "Resolution of Rates and Charges" contained in its annual budget, to exempt from rating "[a]ny land used for public, religious, charitable or educational purposes identified in the Schedule". The Schedule identified, inter alia:

> "(c) Any land not exceeding 2 hectares in area and having a building thereon and used entirely for public worship or for public worship and educational purposes whether or not that land has other buildings on it that are utilised in conjunction with the church".[3]

[6] It is common ground that the land meets the requirements of the resolution so far as its area is concerned. It is the application of the expression "public worship" to the services conducted in the meeting room by **the Brethren** which is controversial. The nature and circumstances of those services may be understood from the learned primary judge's findings.

The facts

[7] The purposes of the trust were relevantly defined in cl 1(1)(c) of the trust deed as:

> "(i) the carrying on of the service of God including the celebration of the Lord's Supper Gospel Preachings and Bible Readings and Addresses on the Word of God and other meetings of a Christian religious character according to the injunction contained in the Holy Scriptures for those Christians forming part of a world-wide fellowship, variously known and hereinafter referred to **as Brethren**, who hold and practise the teachings of Christ and his Apostles contained in the Holy Scriptures as expounded by His servants the ministers of the Lord in the Recovery, Mr. J. N. Darby, Mr. F.E. Raven, Mr. J. Taylor Sr., Mr. J. Taylor Jr., and Mr. J.H. Symington and Mr. J.S. Hales and their successors ...
> (ii) any other religious purposes of or connected **with Brethren**."

[8] According to the evidence accepted by the learned trial judge, the practices of **the Brethren** "include, importantly, separation from evil which is our bond and the celebration of the Lord's Supper,

which is the key occasion upon which our fellowship is based".[4] The principle of separation from evil means that it is unusual for **the Brethren** voluntarily to associate socially with people who are not in fellowship with **the Brethren**.[5]

[9] The learned primary judge rejected the appellant's contention that the exclusivist thrust of **the Brethren**'s adherence to the principle of separation from evil was inconsistent with permitting visitors to attend services other than those to which reference has been made. Her Honour found that signs outside the meeting room notified passers-by that the public was permitted to attend the meeting room for religious worship with **the Brethren**.[6]

[10] Her Honour found that the doors of the meeting room were locked when services began, but held that this did not "require the conclusion that the public were discouraged from attending".[7] The evidence which the learned primary judge accepted was that, while there was "an element of security involved" in locking the doors, the principal reason was "to facilitate the assembly being together free of distraction or possible distractions".[8]

[11] Outside the meeting room on the land were signs, easily read from the footpath, in the following **terms:**

> **"BRETHREN'S**
> **MEETING ROOM**
> **PLACE OF PUBLIC**
> **RELIGIOUS WORSHIP**
> **According to Brisbane City Council**
> **By-Law: Ch.3. Part 4-1g.**
> **INFORMATION ABOUT MEETINGS**
> **MAY BE OBTAINED BY CONTACTING**
> **THE TRUSTEES BY TELEPHONE**
> **[telephone number] OR [telephone number]"**

[12] The service referred to as the Lord's Supper is held at 6.00 am on Sundays. It is not open to persons who are not in the fellowship of **the Brethren**. The average attendance is 40 people.[9] A number of other events that are open to the public are also held on Sundays but not always at this meeting room. The Reading of the Scriptures commences at about 9.30 am and lasts for about one hour. It is followed by the Preaching of the Gospel which lasts 30 to 45 minutes. The average attendance at both these meetings is about 800 people.[10] In a typical week, a Prayer Meeting will occur at the meeting room on Monday at 7.30 pm. It takes less than one hour and is attended by about 40 people. On Tuesdays at 7.30 pm, there is the Meeting for the Prophetic Ministry which takes approximately one hour and is attended by about 650 people. On Wednesdays at 7.30 pm, there is a Reading of the Scriptures attended by about

800 people for approximately one hour, which also occurs on two out of three Saturdays when it is combined with other assemblies, the congregation varying from 650 to 1200 people.[11] Members of the public may be admitted to attend these gatherings. There is also a monthly meeting called a Care Meeting at which financial matters and matters of pastoral care are addressed. These Care Meetings are attended only by members of **the Brethren**.[12]

[13] From time to time, a Special Meeting is held for the consideration of church doctrine. Attendance is by invitation only to certain members of **the Brethren**. Such meetings occur only annually or even less frequently.[13]

[14] The learned trial judge found that "the doors to the meeting room are locked during meetings". As a result, members of the public must seek admission. There is a call button at the main entry doors with a notice stating "For Assistance Please Use Call Button" which "allows a person to notify members of the congregation that he or she is outside, so that a congregation member can attend to the person and admit the person, if that is the request".[14]

[15] The learned primary judge found that, as a matter of practice, the members of the congregation of **the Brethren** "would welcome a visitor to attend any meeting ... (other than a Care Meeting, the infrequent Special Meeting or the Lord's Supper) provided the visitor appeared to be well disposed, in the sense that his or her purpose was to participate in or to observe worship, was not obviously looking to make trouble or affected by alcohol and was not inappropriately dressed ...".[15]

[16] Her Honour also found that admission to services was not limited to "those who were known to **the Brethren**. There was no requirement that visitors identify themselves with a letter of commendation or by naming somebody they knew in the fellowship ...".[16] The meeting room was open as people gathered for a service. The doors were locked to the meeting room when the service began but remained open for latecomers and visitors in the sense that a means of access was provided through the use of the call button. This was consistent with **the Brethren** endeavouring to worship without distraction.[17] Her Honour found that the questioning of visitors to the meeting room was merely to ascertain that they were well disposed to attending the service[18] and was not an interrogation as in *Joyce v Ashfield Municipal Council*,[19] a case involving premises owned by **the Brethren** in New South Wales.

The decision at first instance

[17] The learned primary judge held that the circumstance that members of the public were denied attendance at the Lord's Supper "should not preclude the characterisation of the premises as being used for public worship".[20]

[18] The learned primary judge concluded:

> "The evidence in this matter is very different to that which was adduced in *Joyce*. I am satisfied that the evidence supports the conclusion that during the relevant period the [meeting room] was used for public worship, despite the exclusion of the public from the Lord's Supper, the Care Meetings and the Special Meetings.
> The respondent's delegate's conclusion that the [meeting room] was not a place of public worship was contrary to the evidence that had been placed before the delegate. The delegate failed to take into account a number of relevant considerations including the beliefs of the members of **the Brethren**, the nature and the extent of the services conducted at the [meeting room] and the opportunities available for members of the public other than **the Brethren** to attend such services."[21]

The appellant's arguments

[19] It might be thought that, having regard to the primary importance of the Lord's Supper to the religious observance of **the Brethren**, the circumstance that no outsider may be permitted to attend that rite in any circumstances would constitute a strong indication that the meeting room is not a place used "entirely for public worship". This was not an issue that her Honour was asked to determine. The appellant conceded at first instance that:

> "some minor private use of the [meeting room] during the relevant period would not preclude the characterisation of what predominantly took place in the meeting room as public worship, if that were otherwise the case..."[22]

[20] The appellant did not seek to resile from this concession on appeal. There is authority that would seem to support the reasoning underlying this approach. In *Rogers v Lewisham Borough Council*,[23] Jenkins and Birkett LJJ said that:

> "... although s. 1 of the [legislation before the court] only exempts premises or parts of premises exclusively appropriated to public religious worship, it cannot reasonably be construed so strictly as to make the use for purposes incidental to such appropriation a disqualifying factor. Examples were given, such as the boiler rooms, vestries, cloakrooms, and storerooms for cleaning materials and so forth, commonly included in the premises of a church or chapel; and it was agreed on both sides that the exemption would not be lost merely on account of the use of such ancillary conveniences for purposes in themselves secular. This indeed is no more than is demanded by

common sense in order to given practical effect to the section."

[21] Further, in *Joyce's Case*[24] Hutley JA, with whom Reynolds JA and Samuels JA agreed, considered that the fact, that at the time when **the Brethren** were performing the ceremony of breaking bread the doors to the meeting house were closed to all but those admitted into the circle of the church, would not be sufficient to hold that the character of worship was not public: "The building does not cease to be ... 'used or occupied for public worship' because there are ceremonies of a purely private nature also performed on the premises."[25]

[22] The concession made by the appellant meant that in order for it to succeed it needed to demonstrate that the religious services held by **the Brethren** at which attendance by members of the public was not expressly prohibited still failed to meet the definition of "public worship". In this regard, the appellant contended that, since the learned primary judge found that the doors of the meeting room were locked when all services began, her Honour should have concluded that the meeting room was not used for public worship at all. The appellant emphasises that worship performed behind locked doors cannot be described as "public worship".

[23] The appellant relies upon a long line of authority which commences with the observation of Lowe J in *The Association of the Franciscan Order of Friars Minor v City of Kew*[26] that "worship to be public must not only be open without discrimination to the relevant public, but also be performed in public".[27]

[24] In *Joyce's Case* the New South Wales Court of Appeal adhered to the view that religious services and exercises conducted in a meeting room by **the Brethren** in circumstances where participation in, and observation of, such worship was open only to a select and approved class of persons was not public worship.[28] The basis for the decision in *Joyce's Case* was founded in the views expressed by members of the House of Lords in *Church of Jesus Christ of Latter-Day Saints v Henning (Valuation Officer)*[29] that "the conception of public religious worship involves the coming together for corporate worship of a congregation or meeting or assembly of people, but I think that it involves that the worship is in a place which is open to all properly disposed persons who wish to be present",[30] that "the admission of the public means ... the admission of those members of the public who are reasonably suitable, who come in reverence, not mockery, and who are prepared to behave in reasonable conformity with the requirements of the religion which they are visiting"[31] and that "worship to be public must ... be open without discrimination to the relevant public", the determination of the "relevant" public being a question of fact.[32]

[25] In *Joyce's Case*, the evidence showed that persons unknown to the members of the congregation of **the Brethren** were required to identify themselves as someone known to another member of **the Brethren** or as a person genuinely interested in getting help from the Scriptures in order to

gain admission to the services.[33] In the present case, the learned primary judge found that there was no requirement that a visitor be able to identify himself or herself by any form of commendation from other members of **the Brethren**.[34]

[26] In *Broxtowe Borough Council v Birch*,[35] another case concerned with the rateability of land used by **the Brethren** as a meeting room, the members of the Court of Appeal of England and Wales emphasised that the notion of public worship involves an invitation to the public to join in the worship conducted on the premises.[36]

[27] In *Birch's Case*, Slade LJ said:[37]

> "... the following crucial facts seem to me to emerge indisputably from the decision. (1) **The brethren** do not think it right to exert any positive encouragement to other persons to come to their meetings. They do not advertise either themselves or their meetings. Their belief is that those attending their meetings should be inspired by the example of the way of life of **the brethren** and brought to the meetings by the hand of God. (2) They do not tell an inquirer the place or time of their meetings unless he specifically asks. (3) There is nothing in the external appearance of either meeting hall to indicate the use to which the building is put. (4) No notice-board is in position outside either meeting hall indicating the use of the building. When the Hillside Road premises were erected in about 1967, there was a board which stated that the Word of God would be preached at certain times on Sunday, or words to that effect, but this notice was removed many years ago. No notice-board has at any time been in position informing the passer-by of the use to which the Cyprus Avenue premises is put. (5) Apart from the attendance at the Hillside Road premises of representatives of the rating authority, there has been no more than one newcomer at either hall in recent years.
> Despite all these facts, counsel for the trustees in his attractive argument has submitted that the nature of the religious worship at both halls can still be properly described as 'public' within the relevant definition, on the grounds that the meetings of **the brethren** with certain exceptions (the breaking of bread meetings and the care meetings) are open to all properly disposed persons who wish to be present.
> Lord Morris in his speech in *Church of Jesus Christ of Latter-Day Saints v Henning (Valuation Officer)* [1963] 2 All ER 733 at 738, [1964] AC 420 at 435 certainly made it clear that in his view religious worship cannot properly be described as 'public' within the relevant definition, *unless* it occurs in a place which is 'open to all properly disposed persons who wish

> to be present'. Lord Pearce said much the same thing ([1963] 2 All ER 733 at 739, [1964] AC 420 at 437). But I do not for one moment think that either of them would have intended to suggest that a group of persons who meet together for corporate religious worship outside their homes can render the nature of such worship 'public' for rating purposes, merely by establishing an unannounced convention that properly disposed persons who turn up and seek to attend their meetings shall not be refused admission. The 'openness' or otherwise of the meeting cannot, in my view, be tested simply by reference to what is passing through the minds of the persons present.
>
> What more then is required? In no case to which we have been referred has the court attempted to lay down any comprehensive and exhaustive definition of the phrase 'public religious worship' and I would not attempt one. With Stephenson and Oliver LJJ, however, I am of the opinion that it does necessarily involve at least the element of some invitation, express or implied, to members of the public to attend the meeting in question. This conclusion is supported by the judgments of Maugham J in *Stradling v Higgins* [1932] 1 Ch 143 at 151, [1931] All ER Rep 772 at 775 and of Lowe J in *Association of the Franciscan Order of Friars Minor v City of Kew* [1944] VLR 199 at 204, which was referred to with apparent approval by Lord Pearce in the *Henning* case. Furthermore, it seems to me to accord with common sense and the ordinary use of language.
>
> In my judgment a meeting of a group of persons which takes place on private premises cannot be said to be 'public' within the ordinary meaning of words, unless members of the public, or of the particular section of the public who are most concerned, are given some notice that they will not be treated as trespassers or intruders, if they seek to enter the premises and attend the meeting. The forms which such notice may take are many and various. In some cases the external appearance of the relevant building might perhaps even by itself be said to give members of the public sufficient notice that they will be welcome. That some such notice is necessary, however, I feel no doubt.
>
> Reverting to the five crucial facts to which I have referred earlier in this judgment, I do not say that any one of them in isolation would inevitably have disqualified **the brethren** from obtaining the relief from rates which they seek in respect of these two meeting halls. Cumulatively, however, in my opinion they make it impossible to say that the member erred in law in his conclusion that the two halls are not 'places of public religious worship' within the relevant exemption."

[28] One may pause here to note that the only real differences between the facts found by the learned primary judge in this case and the "five crucial facts" adverted to by Slade LJ in *Birch's Case* are that the external signage identifies the meeting room as such, and there was no finding of fact at all in the

present case as to the attendance of any newcomers at services conducted in the meeting room.

[29] In *Birch's Case*, Stephenson LJ, with whose reasons Oliver LJ and Slade LJ agreed, said:[38]

> "There is nothing, in my judgment, to help solve the problem raised by this appeal in the exemption of public parks, highways and bridges or in the rating of public car parks, public libraries, public houses and public conveniences. For the appeal is concerned not with the question whether these halls are public places but whether they are places of public worship. They are in fact private places and in that fact lies, in my judgment, the key to the right answer and the correct test to apply.
> **A building on private property must somehow declare itself open to the public if activities which are carried on inside it are to be public, and the nature of those activities must be brought to the notice of the outside world if they are not to be private activities. As it was variously put from the Bench: the worship must be made public; the doors of the place of worship must be open not merely subjectively in the minds and hearts of the worshipping community but objectively in some manifestation of their intention that it should be open; there must be signs to indicate at least that the place is a place of religious worship, perhaps also that acts of such worship are performed there at particular times, and that the public would not be trespassers if they entered but have permission, express or implied, to go there and to attend worship there**.
> Such signs may be given by the building itself. That the doors are really open to the public in fact and not only in theory may be indicated by numbers of people entering the building or of motor cars and cycles parking outside it. Many, if not most, churches and chapels indicate their nature and the nature of what goes on inside them by their style of architecture or religious symbols or the ringing of a bell, as well as by notices of services on a notice-board, or in leaflets or newspapers, or by speakers preaching and appealing to the public in the open air or by house to house calls. There may be places of religious worship which without any of these attractions are in fact used for worship by members of the public at large. If there are such, they would qualify by the fact that their services were 'performed in public'. On the other hand there may be places of religious worship advertised as such by some or all of the means I have enumerated, where nevertheless no member of the general public ever attends the services or meetings. Such a church or meeting hall also would qualify by being open to the public. But I agree with counsel for the valuation officer that one or other mark must be present to make a place of worship public, and here there is neither any outward and visible sign that these halls are used for meetings for religious worship, nor any evidence of attendance at them by

members of the public, except rarely by one or two. The 'invitation' test is the right one and there is no evidence of invitation.

The picture presented by the evidence is very different from the picture of a place of public religious worship, as the ordinary person would, I think, derive it from such obvious places of public worship as churches and chapels. But the courts of a country with an established church must be careful not to assume that all meeting places of other faiths are readily identifiable or even that all places of Christian worship still bear the recognised, and recognisable, style and features of earlier ecclesiastical buildings. Nor must our courts deny to other religions an element of spiritual benefit to the general public, to which Lord Pearce referred in a passage I have already quoted, or restrict unfairly the extension which Parliament has granted of the privilege originally reserved to Anglican church buildings. On the other hand, that extension must not go beyond the limits defined by Parliament in the statutory exemption which is the subject of this appeal. The question is whether in all the circumstances disclosed by the evidence before the tribunal the exemption extends not necessarily to this sect but to these buildings of theirs.

The evidence of the beliefs and practices of  **the brethren**  **is, of course, relevant, but it is the nature and use of these two halls which is of decisive importance**. Other meeting halls of other branches of  **the brethren**  may have notice-boards or attendance figures which might make them places of public religious worship. But in considering whether their worship in these halls is public  **the brethren**  must be judged, like all others who have to prove facts in our courts, not by what they believe or intend but by what they do. According to Mr James Taylor junior, their gospel meetings are not private but open for anybody, and  **the brethren**  want all men to come into the place of testimony. And in this connection counsel for the trustees called our attention to two passages in St Paul's Epistles in Mr Darby's translation (1 Cor 14: 23–25 and 1 Tim 2: 1–4) supporting the Christian belief that God desires that all men, including unbelievers, should come to the truth. But it is for the courts, not for Mr Taylor, to say whether the meetings held in these halls are private or public, and his ipse dixit cannot conclude the matter in favour of their publicity if on the evidence they are private, and made or kept private by his own teachings. For that on the evidence is the position. Men and women must come to these meetings by the example of  **the brethren**  or by the will of God, not by any form of advertising. Hence the notice-board was removed from outside the Hillside Road hall. Persons of different faiths, or of no faith, can understand and admire such a belief, but its effect is to deny publicity to the prayer meetings, ministry meetings, scripture readings and preachings which take place in these halls. The practice of not

> advertising or issuing invitations to the public may not be calculated to keep them out in the sense that it may not be designed or intended to do so, but it has that effect and that is what matters. I agree with the submission by counsel on behalf of the rating authority that it does not matter why **the brethren** act as they do but what matters is how they act; and their practice, explained by the beliefs on which it is based, has resulted in the meagre attendance of outsiders attested by the evidence.
> The subsidiary submission of counsel for the trustees was that if his main submission failed and the member was right to apply the 'invitation' test, he was wrong to hold that it had not been satisified [sic] because there was evidence of invitation to these meetings.
> In the end he relied on the evidence of open-air meetings held in the streets on Saturdays. There was no evidence that **the brethren** who spoke at them identified their sect by banners or distributed leaflets advertising their meetings in the halls: if a listener asked for information he would be given it and he might be invited to the home of a brother and thence to a meeting. **Even if there were instances of such inquirers being informed of the time and place of meetings, and even if some sort of testing or vetting was not an object of inviting them to a member's household, these invitations to individuals, as it were man to man, are not in my opinion, the sort of invitation to the public at large which is required to satisfy the test and make these halls places of public worship**.
> I come, therefore, to the conclusion that the effect of what was done and not done by **the brethren** in respect of these halls and the meetings and worship in them was to exclude the public and to make and keep the meetings and worship private." (emphasis added)

[30] Once again, we note the reference in the passage to the absence of external signage identifying the function of the meeting hall in the facts of *Birch's Case*; but this passage shows that the crucial issue is whether there is some objective manifestation that the public have "permission, express or implied, to go there and to attend worship there". The "beliefs of the members of **the Brethren**" which the learned primary judge regarded as a consideration relevant to her decision have less significance for the determination of this issue than evidence of an objective indication by **the Brethren** that any member of the public is welcome to attend services at the meeting room so long as he or she is respectful in his or her deportment when doing so.

[31] The reasons in *Birch's Case* suggest that the real issue is not whether it can be said that there are "opportunities for members of the public to attend ... services", but whether all members of the public can be said to have "permission express or implied, to go there and attend worship there". A similar view was expressed in *Joyce's Case* where Hutley JA, with whom Reynolds and Samuels JJA concurred, said: [39]

> "... The concept of public religious worship means that worship is something in the nature of a spectacle which persons who are interested have a right to see ...
> the essence of public worship is that it is open to the public, not in the sense that the public is entitled to participate in the worship - this would be an intolerable interference with the autonomy of religious bodies who have to be left the privilege of determining those who are properly equipped to approach the deity in the approved manner, but who cannot if they wish to retain privileges attendant upon public worship exclude the general multitude from an observing role."

In the context of exemption from rating, McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society Ltd*[40] recognised that the observations of Hutley JA in *Joyce* supported the proposition that:

> "private premises used for religious worship could only qualify for exemption if the public were invited to worship by some visible indication that the premises were used for religious worship and members of the public were welcome or if the public in fact attended the premises to worship."

Was the meeting room used for "public worship"?

[32] It is the availability of a building to the public[41] for the solace, or edification or instruction involved in religious worship which has been said to afford an important rationale for the exemption from rating.[42] In this regard, as Lord Pearce, with whom Lord Reid and Lord Devlin agreed, explained in *Henning*'s *Case*:[43]

> "... it is less likely on general grounds that Parliament intended to give exemption to religious services that exclude the public, since exemptions from rating, though not necessarily consistent, show a general pattern of intention to benefit those activities which are for the good of the general public. All religious services that open their doors to the public may, in an age of religious tolerance, claim to perform some spiritual service to the general public."

[33] Further, it is important to emphasise that the present case is concerned, in the end, with the proper construction of the Council's resolution. It is this resolution which is the basis of an exemption from rateability. In this regard, it is plainly not sufficient to attract the exemption from rating that the land be used for religious purposes: the resolution requires that there must be a public aspect to the religious use of the buildings on the land. The explanation in the authorities to which we have referred of the nature of this public aspect may be taken to have informed the language used in the resolution.

[34] Reference to the actual terms of the appellant's resolution exempting land from general rating during the relevant period confirms that the identification of land "used for public, religious, charitable or educational purposes" in the Schedule to the resolution occurs in the context of a general intention to exempt from rating land from the use of which the public may benefit. The lands which are favoured by exemption from rating in the appellant's resolution can be seen to share the characteristics of being open to use by the public or dedicated to use by the public.[44] It is immaterial that **the Brethren** might have had an intention to use the land for public worship if the land was not actually used, or available for use, in that way. As Gibbs J said in *The Council of the Town of Gladstone v The Gladstone Harbour Board*:[45]

> "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."

[35] Both on the authorities, and by reference to the context in which the term "public worship" is used in the appellant's resolution, the issue is whether **the Brethren** can be said to have issued an invitation to the public making it clear that all well-disposed and respectful persons are welcome to seek the solace, edification, instruction or other benefits to be gained from services in the meeting room. In our respectful opinion, the learned primary judge's findings of fact in favour of the respondents do not enable this issue to be resolved in their favour. We conclude that the use of the expression "public worship" in the exemption resolution means that if members of the public, who are not behaving in a manner which is disrespectful or disruptive, are generally excluded from services, and may only be admitted to a service by the specific grant of a licence to that person from the congregation, then that service cannot be described as public worship and the place where the service is conducted is not a place used for public worship.

[36] It does not assist the respondents to argue here that the learned primary judge was entitled to find on the evidence that worship was conducted at the meeting room in "an acceptably public fashion".[46] The criteria for exemption from rating are objective - they do not repose any discretion or margin of appreciation in the court. The relevant place is either used "for public worship" or it is not. In the latter case, it is not entitled to exemption from the rating regime imposed generally in respect of private land within the local authority area, that exemption being a privilege accorded to land on which buildings are used "for public worship".

[37] The respondents placed great reliance on the unanimous decision of the High Court in *Canterbury Municipal Council v Moslem Alawy Society Ltd*.[47] The issue in that case was whether a building used for prayer and the reading of the Koran by members of a religious sect and to which the public had no access was a “place of public worship” for the purposes of the relevant local government planning ordinance. The ordinance defined "place of public worship" to mean "a church, chapel or other place of religious worship or religious instruction or place used for the purposes of religious training". The purpose of the ordinance was to prevent the construction of "places of public worship" on land zoned for

dwelling-houses without local government approval. As McHugh JA had pointed out in the Court of Appeal, "[n]othing in [the ordinance], taken as a whole, indicates any legislative purpose that the use of land by the public is either necessary or desirable."[48] In light of these factors, the court held that "public worship" referred to:

> "... worship carried on openly in a place of communal worship of a local congregation whose membership extends beyond a domestic group regardless of whether the particular place be open to the public generally."[49]

[38] There is no similar statutory definition of "place of public worship" applicable in the present case. In any event, it is clear that the purpose of the ordinance in the *Moslem Alawy Case* was better served by a broader understanding of "public worship". That purpose was to ensure that any activities that were not domestic activities could only be carried out with the approval of the local government. Further, the notion that the considerations that may be applicable to the interpretation of a local planning ordinance are not the same as those that are applicable to the interpretation of an exemption from rates was recognised by the High Court itself in the *Moslem Alawy Case* when the court said that:

> "Whether the members of a local congregation who gather on premises for the purposes of religious worship restrict attendance to those initiated into the particular group or sect or, alternatively, allow any interested non-believer to attend to observe their worship seems to us to have little relevance for the purposes of a planning scheme ordinance for a Sydney suburban municipality."[50]

[39] The same point had already been made in the Court of Appeal where McHugh JA had said:

> "In the court below Cripps J also pointed out that in *Henning's* case one of the reasons given for rejecting the claim for exemption was that rating laws show a general pattern of intention to benefit activities which are for the good of the general public. But, as his Honour said, 'the same considerations do not apply to planning legislation'."[51]

[40] The features of the *Moslem Alawy Case* to which we have referred, particularly the avowedly different purpose of the planning ordinance and the scheme of the other provisions contained therein, lead us to conclude that that decision is readily distinguishable from the present case. Nevertheless, the respondents sought to argue that the decision of the High Court must be taken to have raised doubts about whether the other authorities which we have discussed, which might conveniently be referred to as the "rating cases", were correctly decided. This submission fails to take into account that the High Court expressly recognised in the *Moslem Alawy Case* that the *Franciscan's Case*, *Henning's Case*, *Joyce's Case* and *Birch's Case* are all "authorities which support the view that, at least in the context of an

exemption provision in rating legislation, a reference to a 'place of public worship' should be construed in the restricted sense of a place (of worship) which is open to the public generally".[52] There was no suggestion in the High Court's reasons that these decisions should no longer be regarded as authoritative in relation to rating exemptions.

[41] There is nothing odd or anomalous about finding that the phrase "public worship" has one meaning for the purposes of planning legislation and another meaning for the purposes of rating legislation. As McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky Inc v Australian Broadcasting Authority*:[53]

> "The primary object of statutory interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed." (citations omitted)

[42] Nor is that conclusion inconsistent with religious freedom[54] and religious equality as discussed by Mason J in *Attorney-General (Vic); ex rel Black v The Commonwealth*[55] cited with approval by McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society Ltd*.[56] It simply recognizes that in the context of a rating statute the public has an interest in ensuring rates exemptions for land used for religious purposes is limited to land to which the public can have general access without a specific invitation or permission from a gatekeeper.

[43] The central issue in the present case is the construction of a resolution allowing for land used for certain purposes to be exempt from rating. It is highly improbable that the interpretation of the resolution was not intended to be informed by the meaning of the expression "public worship" which has been previously applied in the rating cases. Whether the rationale for granting an exemption from rates for land used for "public worship" is a policy in favour of "the desirability of open and avowed rather than clandestine religious meetings",[57] or a policy in favour of rewarding the provision of the comforts of religious observance to any member of the public who is minded to seek it,[58] the meaning of the expression derived from the rating cases accords with both rationales while the view taken by the learned primary judge does not accord with either.

[44] For these reasons, we consider that the findings of fact made by the learned primary judge are not sufficient to sustain her Honour's conclusion that the meeting room was used for "public worship" as

that term was used in the exemption resolutions passed during the relevant period. It may be accepted that the facts of the present case can be distinguished from the facts of *Joyce's Case*, for example, by reason of the circumstance that letters of commendation or the like were not required, and by reason of the external signage which identified the meeting room as a place of worship and informed interested members of the public of telephone numbers at which contact could be made with members of **the Brethren**. But the position remains that, at the highest for the respondents, the facts of this case, as found by the learned primary judge, reveal that there are occasions when, to use the words of Stephenson LJ in *Birch's Case*, there are "invitations to individuals, as it were man to man",[59] person to person or one to one. These invitations are not "the sort of invitation to the public at large which is required to ... make these halls places of public worship".

The respondents' notice of contention

[45] The respondents seek to sustain the judgment in their favour by the contention that the expression "public worship" means congregational worship, as distinct from private or family devotional exercises. Their notice of contention was filed outside the time frame specified in r 757(3)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) and the respondents' apply for an extension of that time limit; it is not opposed by the appellant. In the circumstances this Court should grant the respondents' application to extend time.

[46] That contention is contrary to the authorities to which we have referred above and, in particular, to the majority opinion in *Henning's Case*.[60]

[47] The respondents submit that there is support for their contention in *obiter dicta* in the High Court in the *Moslem Alawy Case*.[61] As we have already observed, there is a clear difference between the use of the expression "place of public worship" to identify a permitted form of land use by groups of persons within a local government area, and the deployment of the expression "used entirely for public worship" as one of the qualifications for a privileged exemption from the imposition of rates otherwise payable in respect of land dedicated to private use by individuals or groups.

[48] Once again, it is, in our view, of compelling significance that this argument falls to be resolved as a matter of the construction of the exemption resolution. As we have said, the language of the resolution was plainly apt to impart the meaning given to the expression "public worship" in the rating cases; and this expression was used in a context where the theme of the exemptions was the use of land for the provision of benefits to the public.

Conclusion and orders

[49] In our respectful opinion, the judgment below cannot be sustained. Private worship by a congregation is not "public worship", at least insofar as that term is to be understood in the context of rating exemptions, and it does not become public worship because the congregation may decide to

permit particular members of the public to attend that worship. "Public worship" in the present rating context requires that the worship is in a place open to all properly disposed persons who wish to be present without vetting by a gatekeeper.

[50] The time in which the respondents were required to file their notice of contention should be extended to 9 June 2005. The appeal should be allowed. The orders made by the learned primary judge should be set aside and, in lieu thereof, it is ordered that the application by the respondents should be dismissed with costs to be assessed on the standard basis. The respondents should be ordered to pay the appellant's costs of the appeal to be assessed on the standard basis.

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[1] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005.

[2] The present form of s 47 was inserted into the Act pursuant to s 6 of the *Local Government Legislation Amendment Act* 1992 (Qld). The section has since been amended on several occasions. For example, the exemption from rating for certain types of land administered under the *Transport Infrastructure Act* 1994 (Qld) contained in paragraph (e) was only inserted in 1995: see *Transport Infrastructure Amendment (Rail) Act* 1995, s 23, Sch. Further, in 1997, a new section 47A was inserted into the Act by s 6 of the *Local Government Legislation Amendment Act (No 3)* 1997 (Qld) in order to clarify that the effect of a resolution under s 47(1)(d) was to exempt the land "from all general rates, differential general rates, minimum general rate levies and separate rates and charges" whatever the precise terms of the resolution that was passed. Importantly, the terms of s 47(1)(d) have stayed the same throughout the relevant period.

[3] The text reproduced here is taken from the resolution contained in the appellant's budget for 1996 - 1997. There were minor changes to the text of the resolution in later years but it would appear to be common ground that nothing turns on this with respect to the present appeal.

[4] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [7], [52].

[5] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [9], [52].

[6] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [83].

[7] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [85].

[8] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [58]

[9] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [64].

[10] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [65].

[11] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [66].

[12] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [67].

[13] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [68].

[14] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [57].

[15] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [78].

[16] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [78].

[17] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [85].

[18] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [87].

[19] [1975] 1 NSWLR 744 (hereinafter referred to as "*Joyce's Case*").

[20] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [89].

[21] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [90] - [91].

[22] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [88].

[23] [1951] 2 KB 768 at 773.

[24] [1975] 1 NSWLR 744.

[25] [1975] 1 NSWLR 744 at 748.

[26] [1944] VLR 199 at 202 (hereafter referred to as the "*Franciscan's Case*").

[27] In *Broxtowe Borough Council v Birch* [1983] 1 All ER 641 at 648 Stephenson LJ, with whom Oliver LJ and Slade LJ agreed, referred to these observations of Lowe J noting that "... it is conceded that the last six words do not add, or should not be allowed to add, anything".

[28] An appeal from this decision to the Privy Council was dismissed but no point was taken before their Lordships about the approach adopted by the Court of Appeal with respect to the term "public worship": see *Ashfield Municipal Council v Joyce* [1978] AC 122.

[29] [1964] AC 420 (hereafter referred to as "*Henning's Case*").

[30] [1964] AC 420 at 435.

[31] [1964] AC 420 at 437.

[32] [1964] AC 420 at 440.

[33] *Joyce's Case* [1975] 1 NSWLR 744 at 748.

[34] *Jensen & Ors v Brisbane City Council* [2005] QSC 50; SC No 5677 of 2000, 18 March 2005 at [78].

[35] [1983] 1 All ER 641 (hereafter referred to as "*Birch's Case*").

[36] [1983] 1 All ER 641 at 649 - 650, 651, 654, 655 - 656, 657.

[37] [1983] 1 All ER 641 at 656 - 657.

[38] [1983] 1 All ER 641 at 651 - 652.

[39] [1975] 1 NSWLR 744 at 749.

[40] (1985) 1 NSWLR 525 at 540.

[41] Cf *Misra v Campbelltown City Council* [2001] NSWLEC 256; (2001) 118 LGERA 301, where an important factor in identifying a building as a place of "public worship" was the distribution of a leaflet proclaiming it to be a place of religious pilgrimage for every follower of the Hindu deity Shiva.

[42] *Franciscan's Case* [1944] VLR 199 at 202 - 204 cf *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 at 543; (1987) 162 CLR 145 at 150 - 152, a case not concerned with whether land was a place of public worship for rating purposes.

[43] [1964] AC 420 at 440 - 441.

[44] The relevant part of the appellant's Resolution of Rates and Charges for the year 1996 - 1997 was as follows:

> "**4. EXEMPTIONS FROM GENERAL RATING**
> Any land used for public, religious, charitable or educational purposes identified in the Schedule is exempt from rating.
> SCHEDULE

(a) Any land that -

(i) is otherwise rateable land; and

(ii) immediately prior to 13 May 1992 was non-rateable land for the purpose of the making and levying of rates under the City of Brisbane Act 1924 or any other act; and

(iii) has since 13 May 1992 been continuously used for the same purposes for which it was being used immediately prior to 13 May 1992. Premises are continuously used for the purpose of this exemption even if the land is vacant for a period of up to 6 months; and

(iv) is in the same ownership as it was immediately prior to 13 May 1992.

(b) Any land that is vested in, or for the time being placed under the management or control of, any person under or in pursuance of any statute for the purposes of any acclimatisation society or for the purposes of a showground or for public recreation or athletic sports or games if that is, in the opinion of the Manager open to the public at all reasonable times, free of charge.

(c) Any land not exceeding 2 hectares in area and having a building thereon and used entirely for public worship or public worship and educational purposes whether or not that land has other buildings on it that are utilised in conjunction with the church.

(d) Any land that is used for the purposes of a public charity, the objects of which are met by the giving of alms or relief to the poor.

(e) Any land not exceeding 20 hectares in area that is used entirely for a school conducted by or on behalf of a religious body incorporated under 'the Religious Educational and Charitable Institutions Act, 1861', or another statute, whether or not that land has other buildings on it that are utilised in conjunction with the school.

> The Manager or the Director of the Revenue Management Branch may rule as to whether or not particular lands fall within any of the categories of exemption under this resolution as to exemptions from general rating or under any previous resolution as to exemptions from general rating."

[45] [1964] Qd R 505 at 525.

[46] Outline of Argument of the Respondents at [5].

[47] (1987) 162 CLR 145 (hereafter referred to as the "*Moslem Alawy Case*").

[48] (1985) 1 NSWLR 525 at 542.

[49] (1987) 162 CLR 145 at 149.

[50] (1987) 162 CLR 145 at 149.

[51] (1985) 1 NSWLR 525 at 543.

[52] (1987) 162 CLR 145 at 149 - 150.

[53] [1998] HCA 28 at [69]; (1998) 194 CLR 355 at 381. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

[54] Cf *Commonwealth Constitution*, s 116.

[55] (1981) 146 CLR 559 at 616 - 617.

[56] [1985] 1 NSWLR 525 at 544. See also *House of Peace Pty Ltd v Bankstown City Council* [2000]

NSWCA 44 at [22]; (2000) 48 NSWLR 498 at 504.

[57] *Moslem Alawy Case* (1987) 162 CLR 145 at 150.

[58] *Henning's Case* [1964] AC 420 at 440 - 441; *Joyce's Case* [1975] 1 NSWLR 744 at 749.

[59] [1983] 1 All ER 641 at 652.

[60] [1964] AC 420 at 435, 440 - 441 cf 430 - 434.

[61] (1987) 162 CLR 145 at 150.