High Court of Australia Transcripts

Jensen & Ors v Brisbane City Council [2006] HCATrans 344 (21 June 2006)

--

Jensen & Ors v Brisbane City Council [2006] HCATrans 344 (21 June 2006)

Last Updated: 5 July 2006

[2006] HCATrans 344

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane No B4 of 2006

B e t w e e n -

STUART WILLIAM JENSEN AND WILLIAM LLOYD KIRKPATRICK AND ROSS WALTER SANDERSON AND NORMAN GEORGE SHARPLES AND STANLEY THOMAS THRUSH AS TRUSTEES FOR GOSPEL TRUST NO 1

Applicants

and

BRISBANE CITY COUNCIL

Respondent

Application for special leave to appeal

GUMMOW ACJ
CALLINAN J
CRENNAN J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON WEDNESDAY, 21 JUNE 2006, AT 3.45 PM

MR D.F. JACKSON, QC: If the Court please, I appear with my learned friend, **MR P.J. DUNNING, SC**, for the applicants. (instructed by Hemming & Hart)

MR J.A .LOGAN, SC: May it please the Court, I appear with my learned friend, **MR E.J. MORZONE**, for the respondent. (instructed by Brisbane City Legal Practice)

GUMMOW ACJ: Yes, Mr Jackson.

MR JACKSON: Your Honours, as the Court will have seen from the materials this application gives rise to two questions; one of more general application, the other relating to the propriety of the Court of Appeal setting aside the decision of the primary judge in any event. May I come to the issue of general application and that is the test to be applied in determining whether the premises in question were used for public worship. The issue, your Honours, arises in the context of the resolution which appears at page 41 of the application book. It is set out in footnote 44. Your Honours will see "EXEMPTIONS FROM GENERAL RATING" between lines 25 and 30:

> Any land used for public, religious or charitable or educational purposes identified in the Schedule is exempt from rating.

Then if one goes to the Schedule, paragraph (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 -

Now, your Honours, the issue thus was whether in terms of clause 4(c) the land was used for public worship and if I might take your Honours for just one moment to the findings of the primary judge at page 15. In paragraphs [64] to [66] of her Honour's reasons, what appears from that is that in the course of an ordinary week some congregations, very large, often 800 persons, sometimes up to 1,200 persons or perhaps down to 40 for some occasions, attended the premises, the Bolan Street meeting room. Despite so many members of the public coming together to worship at the meeting room as the congregation it was held that - - -

GUMMOW ACJ: The exemption speaks of a church, does it not?

MR JACKSON: Your Honour, the exemption, your Honour, speaks of:

> 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 - - -

GUMMOW ACJ: Whether or not?

MR JACKSON:

> whether or not that land has other buildings on it that are utilised in conjunction with the

church.

Yes, your Honour. So that the meeting room in question is a meeting room of the church, in our submission.

GUMMOW ACJ: Yes.

MR JACKSON: It does not seem to have been a point in issue that it was a church. The question was whether it was used for public worship. Your Honours, it was held by the Court of Appeal, though not by the primary judge, that it was not used for public worship and that was because in the view of the Court of Appeal the expression "used for public worship" required that the premises be open to the public, apparently in the sense that any member of the public, albeit not an adherent of the religion, not only could attend but was invited to attend. Now, your Honours, that appears from some paragraphs in the Court of Appeal's reasons. They commence at page 40 and may I take your Honours to the parts where they deal with the issue most exactly. First of all, paragraph [31] where the first line says:

> suggest that the real issue is not whether it can be said 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".

Your Honours, at paragraph [35] on page 42 the commencement of that paragraph, they say in the second line:

> the issue is whether the Brethren can be said to have issued 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 of the meeting room.

At paragraph [44] on page 44 they said 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" . . . It may be accepted that the facts of the present case can be distinguished from the facts of *Joyce's Case* –

to which they had earlier referred. They went at the top of page 45 to say:

> 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", 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".

GUMMOW ACJ: What was *Birch's Case* about, Mr Jackson?

MR JACKSON: Your Honour, *Birch's Case* was again in relation to a similar body but what was the position in *Birch's Case*, apart from anything else, was that the, I think, various criteria referred to in it included the absence of the fact that there were any signs outside saying that it was a place of public worship and how people could get to it, whereas in the present case that was not the position and there had been for quite some long time signs outside saying that it was a place of public worship and that people could find out the times and so on by – your Honours will see that at page 32 the sign is set out there giving the telephone numbers that could be contacted to find out information about meetings.

CALLINAN J: Was there any evidence, actual evidence apart from, I think, the fact that they locked the doors on occasions, but was there any evidence apart from that, Mr Jackson, of exclusion of the public?

MR JACKSON: No, your Honour. The position was they locked the doors but the doors were locked against members as well as anybody else - - -

CALLINAN J: You could ring the bell anyway, could you not?

MR JACKSON: Ring the bell and someone will open the door. Then, your Honours, the two - - -

CALLINAN J: The public were not excluded. There was no sign that said "No coming here unless you are a member of the church or - - -

MR JACKSON: Not at all, no.

GUMMOW ACJ: Is there evidence about the particular tenants of this sect?

MR JACKSON: Yes, there was, your Honour.

CALLINAN J: It is at page 3, is it not?

MR JACKSON: Yes, there was. You will see that referred to as your Honour said at page 2, I think it commences, paragraph [2]. Your Honours, that goes on through to, I think, paragraph [10] on page 4. I should also say that as you will see from the primary judge's reasons at page 13, paragraph [52], one of the members of the applicants was a most impressive witness, Mr Cooper, and he gave evidence about a number of things and you will see in particular paragraph [63] of page 15 towards the – his telephone number was one of the numbers on the sign and:

> He adopted the practice of giving to an inquirer details of meetings which the inquirer might find suitable.

Your Honours will then see in paragraph - - -

GUMMOW ACJ: Yes, but is there any evidence here of a tenant of this sect which indicates its attitude to proselytization, for example?

MR JACKSON: Yes, there was, your Honour. I just do not have the actual paragraph at the moment. Can I give your Honours a reference to that in just a moment - - -

GUMMOW ACJ: Well, I was looking at line 45 on page 3 which speaks of "separation from evil".

MR JACKSON: Yes, but, your Honour, at the same time - - -

GUMMOW ACJ: What is the evil?

MR JACKSON: Your Honour, that is dealt with at paragraph [9] on page 4 and I should also say that there was, however, evidence that there were occasions when there were persons who were part of the Brethren who were in the street and were persons available to give information about it, but the - - -

CALLINAN J: If a member of the public turned up who had been to a picture theatre, would he or she be denied admission?

MR JACKSON: Well, your Honour, that is dealt with at page 14, paragraph [56], the second line of that paragraph:

> If a visitor attends - - -

CRENNAN J: Then that would have to be read with paragraph [64], would it not, Mr Jackson?

MR JACKSON: Yes, your Honour.

CRENNAN J: The answer is really it would depend on what service was being held whether or not a visitor would be permitted to enter.

MR JACKSON: Yes. Your Honour, that is so. The service known as the "Lord's Supper", the one referred to in paragraph [64], was one having a relatively small average attendance, 40 persons, and that was the only one, I think, in which as a service as such, as distinct from some other meetings of persons, the only persons who were there were necessarily members of the Brethren, but paragraphs [65] and [66] demonstrate the very large numbers who might attend other features going, as I said, up to 1200 people. Your Honours will see in paragraph [67] that there is a reference to the monthly meeting, financial and business matters, which hardly surprisingly was only of members of the Brethren. Also paragraph [68], but generally speaking, your Honour, there is nothing to stop people who are sufficiently well disposed in terms of their behaviour being at the major activities of the week, to put it shortly.

Now, your Honours, the view for which we contend is that the term "used for public worship" refers to premises which are premises where adherents of a religion gather to worship, that is premises which are not private in the sense of a private home or office or something like that but a place like this where adherents of a religion gather to worship as a congregation as distinct from requiring that the actual meeting be held in public in the sense in which it was determined - - -

GUMMOW ACJ: This phrase has a long history.

MR JACKSON: Well, it has a history, your Honour, but if I may say so, with respect, our learned friend says this goes back to (1896) 7 QLJ. In fact, if one looks at that case it was a meeting in the open air at South Brisbane so the issue did not arise. The phrase has a long history but the cases on it do not. The point I would seek to make about it, your Honours, is this. The competing views as to the meaning of it were adverted to by this Court in –and the issue not decided because it did not precisely arise - in *Canterbury Municipal Council v Moslem Alawy Society* 162 CLR 145, which is in both of the volumes, I think, that your Honours have.

Your Honours, so far as that case is concerned the competing views can be seen in that case in a passage which commences at the bottom of page 148 and goes through to the top of page 149. Your Honours will see at the bottom of page 148, the third line of the last paragraph:

> The consequence of that is that there is a degree of latent ambiguity in the phrase . . . On one approach, "public worship" means worship carried on in a place which is open to the public generally . . . Another approach is to construe the words "public worship" as referring to worship that is not private or domestic in the sense of not being within the privacy of "the closet" or within the confines of close family.

Your Honours will see that through the remainder of that paragraph.

CALLINAN J: It seems a rather unlikely construction at first blush that you do not answer the definition if you exercise any right of exclusion at all and that would tend to stem from the Court of Appeal's decision.

MR JACKSON: Well, it seems to, your Honour, yes.

CALLINAN J: One would think most religions would have a reservation about the admission of some people, no matter how good they thought their capacity to persuade or influence people to join might be.

MR JACKSON: Your Honour, not every person who has had a pleasant Christmas Eve would be welcome at midnight at some of the more established churches.

CALLINAN J: We would have to assume reasonably good conduct of any proposed admittee, I would think.

MR JACKSON: Yes, your Honour, but that is – and not every church, one would expect, would want to have people there who say they have no interest or just want to sit there for some reason.

GUMMOW ACJ: This is a zoning case.

MR JACKSON: Yes, of course it is, your Honour, but the point I am seeking to make about it is that in the case what the Court said was they would indicate that the cases that are the ones dealing with rating do not seem to rest on a particularly sound basis without expressing a concluded view and your Honours will see that at the bottom of page 149, last five lines, they refer to the rating cases and then on page 150 say, in the fourth line:

> It is strongly arguable that, except to the extent that they do little more than follow previous authority . . . those cases are to be explained either by reference to the special situation of worship in the domestic premises used by the members of a closed religious community or as reflecting an approach that, in a country where (unlike Australia) there is an established religion, it is permissible to look to the practices of the established Church to determine what constitutes public worship -

Then they go on to deal with the fact that this was a rating case. But, your Honours, could I just add one further reference to that decision and it is at page 149 in a passage at about point 7 on the page where one observation is made which is, in our submission, of some relevance to the present case:

> Moreover, the effect of such a construction of "public worship" would be to give to the Ordinance an operation which discriminated against any group or sect whose rites of worship are, for any of a variety of possible reasons, closed to the general public . . . and reflected an approach that would lie ill with currently accepted standards of religious equality and tolerance in this country.

CALLINAN J: Most of these provisions, and they are of a kind to be found in other taxing statutes, are really intended to prevent people from taking advantage of what is not really true religious - - -

MR JACKSON: That is so, your Honour. Yes.

CALLINAN J: I mean I think King O'Malley started the Order of Eagles in the United States and there were all sorts of taxing advantages there.

GUMMOW ACJ: But there is a strong streak, is there not, of public benefit through observance of religious rites through the law of charities?

MR JACKSON: Well, your Honour, there is a - - -

GUMMOW ACJ: It is not all religious purposes that are charitable.

MR JACKSON: No, I am conscious of that.

GUMMOW ACJ: Anything but.

MR JACKSON: But having said that, what one does see is that what has been made the subject of an exemption - - -

GUMMOW ACJ: All I am saying is that that last passage you referred to seemed to be somewhat overstated. It is not a question of religious tolerance. It is a question of obtaining a special status under a tax law, from other ratepayers.

MR JACKSON: Your Honour, if I may say so, the question really - - -

GUMMOW ACJ: And the question then is, what is the policy behind this rating exemption?

MR JACKSON: The policy behind the rating exemption, in our submission, is one that one sees really - - -

GUMMOW ACJ: It cannot be any religious purpose.

MR JACKSON: No, your Honour, it does not say that. What it says is in relation to premises that are used for public worship.

GUMMOW ACJ: What is the significance of the "public"?

MR JACKSON: It is a question of what it means, your Honour.

CALLINAN J: You would say, among other things, as opposed to domestic worship.

MR JACKSON: Yes. Your Honour, what we would say is that public worship means worship by persons who gather together in a place, out of their own homes - - -

GUMMOW ACJ: The opposite of public is not domestic, it seems to me. It is private.

MR JACKSON: It is private, your Honour, yes, I accept that, but again it is a question of what "private" means. I do not mean to be answering your Honour with questions of – putting questions of course but I am simply saying that it is a question of definition, and the question ultimately is whether "public" means open to the public or whether it means not private, if I can put it that way. It is very difficult, we would say, to regard premises like these as not being used in a public sense when you get 1,200 people there and other people are able to come in. Your Honour, if one is saying that under various laws it is desirable that people do not meet privately in this sense, but their affairs are open to the public, then in the particular case they are, and that is the second point we would seek to make.

Your Honours, could I just say that there is nothing in the decisions to bind this Court and, in our submission, since the *Moslem Alawy Case* the issue has clearly been one that is open.

GUMMOW ACJ: There is nothing in any of the *Joyce Cases*. One of them got to this Court at least, I remember.

MR JACKSON: Yes, the *Joyce Cases*, your Honour, do turn on different facts, and that is apparent from the facts of them and a very significant difference was that there was nothing to indicate what was going on. They were closed, in effect, and different from this case and specifically found to be different by the primary judge – different in the sense that there was a difficulty about actually getting in; that one might be stopped, in effect.

GUMMOW ACJ: Is it the same religious body or a different group?

MR JACKSON: The same body, your Honour, but different practices have been adopted, so different practices from those found, and your Honours will see that is referred to in the primary judge's reasons.

GUMMOW ACJ: Where do we see that?

MR JACKSON: It is at page 21. It is the paragraph commencing at the bottom of page 20.

GUMMOW ACJ: Yes, thank you.

MR JACKSON: Your Honours, I see my time has expired.

GUMMOW ACJ: Mr Logan.

MR LOGAN: As your Honour the presiding Judge has observed, these words have a long history and this case, in our submission, is nothing more than - - -

GUMMOW ACJ: But it is said that the cases do not.

MR LOGAN: They have a very long history - - -

GUMMOW ACJ: Yes, the words do, but it is said the cases do not.

MR LOGAN: The cases in Queensland go back to the late 19th century in terms of application of earlier understanding, in any event, by our Full Court here, so that our submission is it is highly unlikely indeed that in the rating context in which the words are used that that history has been ignored throughout the country where the words appear. We do not gainsay for one moment that one finds them commonly in rating exemption provisions as part of or sometimes the only criterion for exemption. But in terms of the case itself, our submission is that it is just an application of a settled meaning to particular facts and would not attract a grant of special leave - - -

GUMMOW ACJ: What is that 1896 case, *South Brisbane*?

MR LOGAN: Yes, that is right. We have not particularly troubled the Court with that for the special leave. It is a case in the Queensland Law Journal where there was worship by Wesleyans in an open space really designed to try and preserve a rating exemption and that was regarded as preserving it because it was public. But the rationale for the case does seem to be that that was on any view public worship, no matter how many were there, because it was the paradigm case of public worship. It was in the open, whereas this case is rather at the other end in the sense that the very act of worship is performed behind locked doors.

GUMMOW ACJ: Words to the effect of this particular exemption, are they words that have been

found in one way or another in the Queensland legislation since the *City of Brisbane Act* was enacted in 1924?

MR LOGAN: If you go back in time, that is right. In one way or another they are very – they have got a long history and the point, if anything, of that Queensland case from the late 19th century is to exemplify that from colonial times. So the submission is then that what one is seeing here is nothing more than particular facts yielding a particular outcome according to a received understanding of the meaning of those words.

CALLINAN J: Except you have "building" in the definition or in the exemption in the 1896 case. It was a clear case and you did not have to consider whether there a building and what would happen if there were a building.

MR LOGAN: Yes. The point that is sought to be agitated is one that was not regarded as one worthy of attracting leave in *Birch's Case* for appeal to the House of Lords, the view apparently being taken there that it was just an application of particular facts to settled principle. If the Court were minded to grant special leave in this case on the basis of the particular dictum to which your Honours' attention has been drawn by our learned friends from - - -

GUMMOW ACJ: This is in the *Moslem Case*?

MR LOGAN: Yes. Then, in our submission, the grant would be restricted to ground 1 in the proposed notice of appeal. The other grounds really seek to revisit what we have termed application of received understanding to particular facts, as opposed to seeking to agitate the wider question as to whether corporate or congregational worship is to be regarded as public worship.

GUMMOW ACJ: What do you say about the two views that seem to be put in the *Canterbury Council Case*?

MR LOGAN: With the greatest of respect, it is one of those particular observations that was unnecessary for the decision in that case. That case was quite explicable on the town planning context in which the same term appeared, but it had a radically different meaning from context, and the observation about strongly arguable with established church seems to have been made without the exploring, because it was unnecessary, of the history of the rating cases in England where it was only ever a touchstone that was used, and it is that touchstone which we have imported.

It is highly unlikely again, in our submission, that there has been some particular colonial aberration that has led to a different understanding in a rating context of what that term meant. It would be idle for us though to try and make anything more of it than that on a special leave context. There has plainly enough been a concern voiced by this Court at that stage. But it does have a particular meaning, in our submission, than in terms of the extent to which one would be minded to grant special leave if one were disposed that way.

CALLINAN J: Or if special leave were granted only in relation to ground 1, what would follow then? Would Mr Jackson's client win?

MR LOGAN: Yes, the agitation then would be about whether effectively what was - - -

GUMMOW ACJ: It would become a matter of fact then, would it not?

MR LOGAN: It would be still whether the meaning was corporate worship. A lot of people would be

enough.

GUMMOW ACJ: Yes.

CALLINAN J: Well, the facts are settled, are they not? The trial judge's reasons, there is no contest as to the facts. It is only what conclusion her Honour drew from the facts and what the principle was and how it should be applied.

MR LOGAN: Where the trial judge's error was found was really in the way she applied the existing understanding of the term faced with the finding of fact that she had made that the worship was behind locked doors.

CALLINAN J: In any event, you would accept that if Mr Jackson were to succeed if special leave were granted on ground 1, then the appeal would succeed entirely. The matter would not have to go back for any purpose.

MR LOGAN: It would not have to go back because there are facts that are found there that really are not challenged in any way. In terms of principle then, if the Court is wishing to look at a case which allows one to go into what public worship means, well, this is as good a vehicle as any. But there is a point of distinction nonetheless which is between the two competing schools of thought as to whether corporate or invitational worship, as they have been termed, or congregational worship is the test.

GUMMOW ACJ: Congregational worship, what does that mean?

MR LOGAN: It is a term which has gained a currency which means worship by a lot of people, more than just the one - - -

GUMMOW ACJ: Who may or may not be in public.

MR LOGAN: In a town planning context, *Moslem v Alawy* says it is public because it is not just a man worshipping in the privacy of his home, but a group of more than one person coming together to worship.

GUMMOW ACJ: Yes, but the question there is whether the people in that case can use the premises in a particular area in this way.

MR LOGAN: That is right.

GUMMOW ACJ: Here the question is, can they can get a tax exemption.

MR LOGAN: Quite different context with, as we have submitted, a quite well-received meaning as to what that context dictates. If the Court pleases, unless there are particular questions it would be repetitious to go further. There is an affidavit which has not been referred to by our learned friends to which we - - -

GUMMOW ACJ: Well, do not.

MR LOGAN: We did have a particular objection to it, but as it has not been referred to - - -

GUMMOW ACJ: Well, it has not been read.

MR LOGAN: We will not press that.

CALLINAN J: It does not rely on it, obviously.

GUMMOW ACJ: Let us not go into that. Yes, Mr Jackson.

MR JACKSON: Your Honour, first of all, in relation to what is meant by congregational worship, your Honours will see it is referred to in an extract from Lord Pearce quoted by Justice McHugh when on the Court of Appeal in the *Moslem Alawy* Case which is behind tab 1.1 of our materials. It is page 538 of the case, and it is the quotation at the bottom of that page commencing about letter F, and it goes over to the top of the next page.

GUMMOW ACJ: Yes, it is the Act of 1833 I had in mind. It is the time of the changes by the Whig Government to the position of the Church of England.

MR JACKSON: Yes. Your Honour, the decision or some of the speeches in the House of Lords seem to rely upon the adoption in the United Kingdom of the practices there that have been those of the Church of England and then one sees a discussion of the different Australian history by Justice McHugh in that case in the Court of Appeal, and you will see that, your Honours, at pages 536 through to 541. I will not take your Honours to the detail of it.

CALLINAN J: At page 543 his Honour says:

> A further ground for distinguishing the reasoning in *Henning's case*, is that Lord Pearce was influenced by the fact that the Church of England worshipped with open doors and that it was unlikely in 1833 that the legislature intended to give other denominations greater rights - - -

MR JACKSON: No, and he refers particularly to the fact that in Australia there had always been a multiplicity of religions.

CRENNAN J: It was really about giving the same privileges as the Anglican Church had to the dissenting churches in 1833.

MR JACKSON: And, your Honours, to other churches as well.

GUMMOW ACJ: And to the Roman Catholic Church, too?

MR JACKSON: And the Catholic Church, yes. Your Honours, the second thing is if your Honours wish to see copies of the decision in the Queensland Law Journal that my learned friend referred to, *Municipality of South Brisbane v Gillibanks* (1896) 7 QLJ 29 and the judgments commence at page 30, Justice Real and Chief Justice Griffith on the page in the right column, your Honours will see from about two-thirds of the way down the left column:

> It is therefore open land, vacant and unused, unless it has been used for religious purposes . . . I think it was open to the magistrate to find that it was used for religious purposes . . . If they said that that was one of the objects, they also said another was to hold public open-air services, and it was for him to say whether he thought their object was to hold divine service.

Your Honours, it does not really throw a great deal of light on the matter, with great respect.

The third feature, your Honours, is this, if the Court were minded to grant special leave, we would submit the case is one where it would be appropriate to allow us to proceed on the other grounds of appeal, or at the least, your Honours, to allow us to move for special leave on those grounds when the matter came on for hearing. The reason for that is that one can see a different perception as to what the test might be, but in each case we would submit whichever test be applied, the right answer was that arrived at by the primary judge and it is appropriate to leave that issue open. Your Honours, those are our submissions.

GUMMOW ACJ: We will take a short adjournment.

AT 4.18 PM SHORT ADJOURNMENT

UPON RESUMING AT 4.28 PM:

GUMMOW ACJ: By majority the Court is not persuaded that, having regard to the facts found and to the nature of the legislation here, being rating legislation, there are sufficient prospects of success in demonstrating error in the decision of the Queensland Court of Appeal to warrant a grant of special leave. Special leave is refused with costs.

We will adjourn to 9.30 am tomorrow morning.

AT 4.29 PM THE MATTER WAS CONCLUDED
