

[1998]

payment. That is also inconsistent with the fiduciary duty set out in cl 10.3, which taken literally would require the buyer to retain separately identifiable either the products themselves or the proceeds of sale, for such time as any indebtedness up to their value remained. Thirdly, ownership of the new product does not relate to the price of the goods used to manufacture the individual product, nor does it transfer to the buyer when proportionality is reached. In the latter case, all that happens is that ownership of further new products will not vest in the seller.

Viewed as a whole, we are satisfied that the true meaning and effect of cl 10.2 is to create a floating charge over the new product. As Mr Turner pointed out, if the buyer continues to purchase on credit the seller would never "receive payment in full of all sums owing", and the buyer would never obtain title to the new product it manufactured and sold. That cannot have been the true intention of the parties. The security effected by cl 10.2, being unregistered, is therefore void as against the liquidator.

#### Proceeds of sale

It is accepted that this ground of appeal would only arise if the new products were covered by cl 10.1, or if the seller obtained title to them under cl 10.2. As neither argument succeeds, it is unnecessary to consider this aspect further.

#### Conclusion

For the above reasons, which are largely those enumerated by Salmon J in the High Court, the appeal is dismissed. The respondents are entitled to costs in the sum of \$5000, together with disbursements including reasonable travelling and accommodation costs for one counsel, as fixed by the Registrar.

*Appeal dismissed.*

Solicitors for the appellant: *Bell Gully* (Wellington).

Solicitors for the respondents: *Buddle Findlay* (Auckland).

*Reported by: James Kirk, Barrister.*

3419

B. Blair v

## Hutt City Council v Aged-Care Hospitals Ltd

10 Court of Appeal Wellington

4, 12 March 1998

Thomas, Keith and Blanchard JJ

15 *Local government - Rating - Differentials - Interpretation of differentials based on use - Whether rest-homes were used primarily for commercial or residential purposes - Rating Powers Act 1988, s 81.*

Hutt City Council had a system of differential rating under s 81 of the Rating Powers Act 1988 which included as two of its categories properties "used primarily for residential purposes" and properties "used primarily for commercial purposes". The respondents ran rest-homes in the council's district. The rest-homes served as the permanent home of their residents but operated as commercial undertakings from the perspective of the respondents. For rating purposes, the council treated the respondents' properties as "used primarily for commercial purposes". It was common ground that the relevant criterion on which the council had based the differential categories was that in s 81(1)(a) of the Act: "The use or uses to which a property is put". The respondents claimed that the properties were used primarily for residential purposes and the High Court agreed on the basis that it was the use of the land rather than the purpose of the owner or occupier which was definitive. The council appealed.

30 **Held:** For the purposes of differentiating under s 81(1)(a) of the Rating Powers Act, it was use by the occupier (as defined in s 2 of that Act) which was determinative. The occupiers were the owners of the rest-homes and not their residents. Accordingly the properties were "used primarily for commercial purposes" (see p 139 line 35 - p 140 line 2).

*Declaration accordingly.*

35 **Cases mentioned in judgment**

*Moon v London County Council* [1931] AC 151.

*Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA).

**Appeal**

40 This was an appeal from an order of the High Court declaring a rating scheme to be unlawful.

*Michael Doogan and Jonathan Salter* for the appellant.

*Stephen Brown* for the respondents.

The judgment of the Court was delivered by  
**BLANCHARD J.** The issue in this case is whether for the 1995 – 1996 and 1996 – 1997 rating years of the Hutt City Council (the council) the rest-homes run by the respondents are to be rated as commercial or residential uses, as the parties respectively contend.

In *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 at pp 540 – 545, this Court comprehensively described the powers of a local authority to levy rates on a differential basis. It is therefore necessary to refer only to the central provision, s 81 of the Rating Powers Act 1988, which sets out the basis upon which properties may be distinguished for the purposes of differential rating. The type or group of property may be determined in accordance with any one or more of the following criteria:

- (a) The use or uses to which a property is put;
- (b) The activities that are permitted, controlled, or discretionary activities for the area in which the property is situated, and the rules to which the property is subject under an operative district plan under the Resource Management Act 1991;
- (c) The activities that are proposed to be permitted, controlled, or discretionary, and the proposed rules for the area in which the property is situated under a proposed district plan under the Resource Management Act 1991 that has been publicly notified under that Act; but only if –
  - (i) No submissions have been made by any person under clause 6 of the First Schedule to that Act concerning the activities proposed to be permitted in the area in which the property is situated, and the time for making of such submissions has expired; or
  - (ii) All such submissions have been determined by the local authority;
- (d) The area of the land comprising a property;
- (e) The situation of the land in any specified part of the district or any special rating area;
- (f) Such other distinctions in relation to the characteristics of a property as the local authority thinks fit.

The four respondents between them run five rest-homes in the council's rating district, the smallest having 14 bedrooms (with maximum resident capacity of 20) employing 46 staff and the largest having 58 bedrooms (maximum capacity of 58) and employing 29 staff. None of the rooms contains any cooking or laundry facilities. All rooms depend on central facilities for kitchen, dining, laundry and recreation services.

It is common ground that the rest-homes are not charitable in nature but operate as commercial undertakings from the owners' point of view. But they are the residents' permanent home. The residents are fee-paying either privately or on a government-subsidised basis.

The differential rating special order made by resolution of the council contains a number of categories but for present purposes can be summarised in the following extract:

"Residential HV (Hutt Valley)

All separately rateable properties in any ward of the City . . . , which are –

- (i) Used primarily for residential purposes, and on which there are situated one or two units occupied or capable of being occupied as separate dwellings . . .

**Business L1 (Lower Hutt)**

All separately rateable properties in the area of the City . . . , which are used primarily for commercial purposes . . . ."

There was also a provision purporting to enable the city, subject to the right of objection set out in s 116 of the Rating Powers Act, at its sole discretion to determine the use or primary use of all separately rateable properties in the district, but no reliance has been placed on that provision in relation to the subject properties.

The question is whether the rest-homes are used primarily for residential purposes or primarily for commercial purposes. In the High Court (Wellington, CP 115/96, 20 June 1997) Ellis J said that the only possible basis for the different categories was para (a) or (f) of s 81(1). In para (f) the council can differentiate on the basis of the "characteristics of a property", the focus being not on the ratepayer's purpose but on the property itself. The Judge thought that the characteristics of each property in the present case would reflect the purpose of the respondent in question up to a point but it would not be obvious if the owner or occupier was operating a business or a charity. If para (a) was the basis of differentiation, and the Judge recorded the agreement of counsel that it is, it was again the use of the property not the purpose of the owner or occupier that was determinative, though one may reflect the other. The statutory emphasis was on the use of the property.

After considering various dictionary and statutory definitions of "residential", "business" and "commercial" the Judge came to the following conclusion at p 14:

"In my view the plaintiffs' properties are used primarily for residential purposes because that is their primary use. Their use is to provide a home, a dwelling, a residence for the occupants. As I have said, the purpose of the ratepayer may well be a business one or a commercial one, but it is the use of the land that is definitive. It follows from the express wording of the definition of 'Business L1 (Lower Hutt)' that the land cannot be rated in that category."

With respect to the Judge and to the well-presented argument of Mr Brown, for the respondents, we find that the correct answer emerges once attention is given to whose use is being referred to in the special order and in s 81(1)(a). (We agree with the Judge and counsel that this is the paragraph upon which the council seems to have relied in adopting its differential basis.) Although rates are levied on properties, not on ratepayers, the use of a property for this purpose must surely be that of the occupier, ie of the person primarily liable for rates: s 121. An occupier is defined in s 2, in relation to any land, as the owner thereof except where a person other than the owner has a right to occupy the land by virtue of a tenancy granted for a term of not less than 12 months certain, in which case the term "occupier" means that other person.

While the residents of a rest-home, who are not occupiers as so defined, certainly can be said to use the properties for their residential purposes, it is not their use which determines the matter. The use made of the properties by the occupiers is for the operation of commercial enterprises, the running of their

rest-homes. Thus the properties are "used primarily for commercial purposes" by the occupiers – in the present case the owners.

Mr Brown urged upon the Court the view that a use must be a physical land use – one which is apparent from objective observation. He proposed the test of what a bystander would understand from looking at what was occurring on a property. It is perhaps possible that that might be a workable approach in distinguishing between residential and commercial uses although the present case itself throws doubt upon it, for an observer of a rest-home would see both residents and also the staff engaged to look after them, along with the commercial scale facilities. But the proposed test would certainly break down if the council were to exercise power under s 81(1)(a) to differentiate between specific types of businesses, for often it would not be possible to tell exactly what business was being carried on without making inquiry of the occupier.

Mr Brown referred to *Moon v London County Council* [1931] AC 151 for the submission that the correct inquiry is as to what he called the immediate use of the property but that case involved a different point: that the use of a factory is its actual use, not the use to be made of products manufactured therein. We cannot see that this helps counsel's argument.

In this case it is plain that the council intended to differentiate depending upon whether or not a property was being used for a commercial purpose by its owner (including a lessee "occupier" as defined). It was entitled to do so: *Woolworths* at p 542. The rest-home owners were carrying on commercial operations.

Reference was made in argument to the position of landlords of residential flats in the Hutt City. We understand that the council in the years in question exercised its discretion so as to treat those properties as being primarily used for residential purposes. The Court is not called upon to resolve any apparent anomaly in respect of them.

The declaration made in the High Court is set aside and instead there will be a declaration that the separate rateable properties owned and occupied by the plaintiffs are used primarily for commercial purposes.

The respondents are to pay the appellant costs in the sum of \$8000 in respect of the hearings in both Courts, together with reasonable disbursements in relation to the proceeding in each Court as fixed by the respective Registrars.

*Declaration accordingly.*

Solicitors for the appellant: *Simpson Grierson* (Wellington).

Solicitor for the respondents: *Stephen Brown* (Wellington).

*Reported by: Graeme Palmer, Barrister and Solicitor*