IN THE SUPREME COURT OF NEW ZEALAND SC 76/2006

IN THE MATTER of a Civil Appeal

BETWEEN **ROYAL NEW ZEALAND FOUNDATION OF THE BLIND**

Appellant

AND **AUCKLAND CITY COUNCIL**

Respondent

Hearing 19 April 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel J E Hodder and MC Sumpter and T D Smith forAppellant
A R Galbraith QC and G D Palmer for Respondent

CIVIL APPEAL

10.06am

Hodder May it please Your Honours I appear with my learned friends Mr Sumpter and Mr Smith for the appellant.

Elias CJ Thank you Mr Hodder, Mr Sumpter, Mr Smith.

Galbraith Yes if the Court please I appear with Graeme Palmer for the respondent.

Elias CJ Thank you Mr Galbraith and Mr Palmer. Well Mr Hodder?

Hodder Thank you Your Honour. I suppose it's stating the obvious to say that we think there are some important issues this appeal raises and I hope not without interest, although the rating law probably has a bad law in some quarters, but as I may say again there's something of a jigsaw puzzle involved in this statutory interpretation exercise which is what this really is and it's our attempt to assist the Court with that and to suggest as gently as we can but as forcefully as we can that the Court of Appeal's piecing together the jigsaw needs to be revisited. It's obvious idle to deny there are two serious opposing lines of argument here. That's reflected in two thoughtful judgments from the Courts below and in the submissions that the Courts already had the advantage of. I think it's appropriate that we emphasise for the Foundation that this has obvious importance to it. It is an Institution of national significance, that's why it features in the way it does in the exemption provisions of the rating legislation and it's one that has an important role in relation to a significant disadvantaged part of our community. Its role has been evolving since the school was first up in Parnell in 1889 and that evolution has reflected in the various legislative evolutions that have passed through as well. It is a substantial organisation. The updating affidavit indicates that the cost of running the Foundation is something of the order of $21.7 million dollars per annum, and that's looking after something close to 12,000 members of the Foundation, and of that $21.6 or 7 million dollars something like $3.5 million dollars comes from investment property, and the issue that this appeal is obviously is concerned with are the rating implications for investment property which generates that kind of income. The particular property we're concerned is probably known to all or most of Your Honours, being the Parnell site which is probably fairly described as historic; has historic associations with the Foundation; not all of it is being directly used by the Foundation. It's being leased out and that is of course the point on which this appeal turns, but there are implications for the Foundation's other properties throughout the country. It's not limited to just the Parnell site and given the location of the site, although the sums that are referred to in the documents before the Court may not seem huge, I think the original rating demand was for $72,000 or thereabouts. That will only grow as the values of the property rise and as I say it also has implications elsewhere. We note that the Council's submissions refer to the position that the Council takes is being supported by Local Government New Zealand. I'm not quite sure what that support means but I should say as far as the Foundation is concerned, that its case relates to its own exemption. We of course recognise that others, including Universities, may be affected by a similar way in which the interpretation of the Schedule to the Act is approached by this Court, but nobody else apart from the Foundation is a party to or supporting in any active sense this appeal. In the course of the way in which this matter has evolved, the starting point is not quite where we are at the moment. The starting point

was perhaps the enactment of the 2002 Local Government Rating Act which came into force in the middle of 2003 and that then led the Council to write to the Foundation to say 'the Act has changed and your land is now rateable'. That I think is not the point that is being pursued and through most litigation the proposition has been not that the 2002 Act made a substantial change to the position of the Foundation's property, but that it had happened sometime earlier and that somehow or rather the Foundation have benefited from an oversight or error by the Council. We will contest that proposition but I think that is the way it's developed. In 2002 when that legislation was enacted the Foundation was involved, it understood there would be no change to its present position and I'll come back to that, but therefore it was somewhat surprised to say the least to discover it was on the end of a rating demand from the Council and this litigation has had an air of inevitability since that point was joined. In the High Court if was common ground as I recall it that this land was not endowment land or not held as an endowment and that part of the exemption, that is to say the exception to the exemption wasn't relevant, that position was retreated from somewhat in the Court of Appeal and no doubt aided by the Court of Appeal's judgment I think is entirely abandoned for the purposes of the current appeal. The exercise that the Courts embarked upon as a consequence of this appeal is one of statutory interpretation. We're concerned with the Local Government Rating Act, we're concerned with a rather large array of other Legislation of at least in passing interest or relevance, but it is the Rating Act which is of most relevance and so it's to that that I was proposing to turn if that's convenient. In doing that I think it is perhaps helpful to start with what the Act was not designed to do, which in our submission is it wasn't designed to change anything and if I can take the Court to our first volume of authorities, and I apologise for the volume of these authorities, but in volume 1, which is the fattest of them, volume 2 is the other one that came in at the same time and then volume 3 with again the usual apologies, is the one that was supplied yesterday. So in volume 1 there is at tab 19, and I don't intend to spend too much time on this, nor do I assume there's an issue about reference to these materials albeit way briefly on my part to give some assistance in relation to this document, but at tab 19 we have, I think we have two reports, from the Department of Internal Affairs, which was the Department who's Minister was shepherding this Legislation and these are reports on the submissions that came in on the Bill that became the 2002 Rating Act, and the central purpose that emerges

Elias CJ What are you referring to this material for?

Hodder The proposition that no change was intended by the 2002

Elias CJ Didn't we start with the text?

Hodder Oh I can start with the text. I was going to go through this to indicate no change and then go to the text.

Blanchard J I'm not sure whether reports from Departments to Select Committees have been used for the purposes of interpretation previously. I'm not expressing a view against that but I should signal that I don't remember that occurring. A different thing of course, the Select Committee's report to the House, but this is only expressing the views of Departmental Offices on what they think should be happening.

Hodder Well I was going to refer to it partly for that, but that's in Select Committee's Report, so I don't need it for that, but also to refer to the fact that this was specifically addressed by a variety of submitters, so it wasn't a matter that was done by accident. That's the only real purpose of it.

Blanchard J Did the Select Committee when it reported, make any comment of a similar kind?

Hodder Yes.

Elias CJ Why don't we start there?

Blanchard J Well that would be a better starting pointing other than the word of the Act.

Elias CJ Yes.

Hodder That's in the previous tab, at tab 18. I should say just to complete my response

Tipping J Mr Hodder may I just ask something which you may say look I wish to leave, but you may be able to clear it up immediately? The land wasn't exempt before was it; it was just that the rates fell on the occupier?

Hodder No we said the land was exempt before.

Tipping J Was it actually exempted land or was it just that your client didn't have to pay the rates?

Hodder No, we said it was exempted land from 1949 or thereabouts.

Tipping J I would like to see that demonstrated.

Hodder Yes well I will come back to that if I may, but our proposition is that there's been a consistent position where there's an exemption for it through that period consistently since I think about 1949.

Tipping J Right I understand, thank you.

Hodder On the Select Committee's Report at tab 18 the first page of it that's here summarises the basic proposition. Nothing of significance for us on page 1. On page 2 the fourth bullet point down notes the only point that arose from Select Committee's consideration of rating exemption was they introduced was is now part 2 of the Schedule which has a 50% rates remission proposition and that doesn't concern us but it was the part where the matter was looked at and that part was changed. The purposes then set out in the next part of page 2 – the three purposes are identified in the three bullet points. The next section identifies the changes. It does say as Justice Tipping has indicated the owners are liable for rates rather than occupiers. And then on page 3 the headings tell the story that they're not concerned with funding policy, they give rather wider options as to how liability of the rates are spread across rate payers. That's whether the property is rateable to start with and notes that there is a review of the Local Government Act going on, and on the next page, which is page 8 from the report, the point again that there's a shift from occupiers to owners in terms of rates liabilities and then on page 17, which is the next page in the extract, there is the point that becomes directly relevant here. Categories of non-rateable land. We recommend no substantive changes to the provision in Schedule 1. That the fiscal impact on the relevant property owners

Tipping J Where do we get that from Mr Hodder, I'm sorry

Hodder Page 17

Tipping J 17, thank you.

Hodder Noted that many councils argued strongly for all land to be made rateable. Expressed the view that it's been subsidised by general ratepayers, and then in the footnote (3) notes there's only a couple of minor amendments to Schedule 1, including a reference to hectares and acres and to modernise clause 20. So not substantive changes were contemplated.

Blanchard J Well we'd better be a little careful about that. When they say we recommend no substantive changes, I would have thought that meant that the Committee wasn't recommending any change in the Schedule as it was in the Bill as introduced.

Hodder That's a fair correction.

Blanchard J So it really doesn't help at all.

Hodder That I confess I have only been reading it in the light of the previous Departmental reports which Justice Blanchard has already indicated might be something the Court hasn't previously had to resort to, so I have misread that sentence and the context of the other material and I have to confess that the basic point I'm advancing remains that there was no intention to change this and in terms of the proposition about resort to earlier materials, I'm conscious both of the Court's reluctance to go further

Tipping J Where do you get that proposition from Mr Hodder, other than from this Departmental material that there was no intention to change not the Bill but what had been there before?

Hodder That's where it comes from Sir, yes. There were specific submissions made to the Select Committee for changes and the response was there's no policy change here and therefore no changes were made.

Elias CJ Don't you establish that by comparing the text of the earlier provision with the operative provision and referring us perhaps to Hansard?

Hodder I don't know that that is addressed in Hansard.

Elias CJ It's not addressed, no.

Hodder I don't believe so. This is not a matter of significance

Blanchard J Not even something in the explanatory note to the Bill as introduced, because that's where you might expect to find something of this kind?

Hodder I don't have that in these materials and haven't gone back to it recently to confirm that Your Honours. I'll check that and we may be able to get back to that before this hearing finishes. On the basis that there's no, well there's two things I was going to refer to these Departmental Reports, and as I said before the first is the repeated assertion that the policy intent behind it was that there would be no change to the exemptions, and so all the submissions said we want to get rid of these exemptions that came from Local Government and we've batted off in the way the report was prepared and those submissions we're looking for a change to a Bill. The Bill didn't change. The second and related point that I was going to take from this for Your Honours, or draw Your Honours' attention to was that the point was specifically addressed by a large number of submitters; Local Government submitters who wanted to change these provisions and there were responses the other way. There was also the response by the Foundation, which is referred to in our submissions, and the Foundation submission is at tab 17 which is very simple on the point. They wanted to maintain their existing exemption for their lands at para.2.2 under Tab 17. Now the comparison between what was there before and what was there

now is of course fundamental to the exercise we're engaged in, but to the extent that it is proper to inform from the policy direction that this legislation had, then our submission is that the Government advises the Select Committee and the way in which that material panned out is of assistance. And bearing in mind that Your Honours have reservations about it I should if I may though still draw your attention to what it is. If we can go back to Tab 19 for a moment and I'm conscious that I'm working my way towards the Legislation itself. There are two reports, but if one starts at the beginning of the Tab, the first discussion comes up on page 9

Tipping J Can you just remind me before we go into this any further, what issues arose in the Courts' below about reference to this material or was there none?

Hodder None. It's referred to I think in the High Court judgment and

Tipping J So Tab 19 just went in and no-one raised any

Hodder This is the same material as we used in both Courts below.

Tipping J I must say as with my brother Blanchard, I find this rather unconventional to put in what the officials wanted to achieve, or thought they wanted to achieve

McGrath J But not perhaps unique.

Tipping J It may not be unique but raises quite a serious issue of extending the normal boundaries.

Hodder Well it's an interesting question that Your Honour raises at one level if the point of going beyond the face of the Statute itself is to try and extract some meaningful and legislative history, and the Hansard words don't provide it, then there is a sort

Elias CJ Then burrow down.

Hodder Sorry.

Elias CJ Then burrow down.

Hodder Then see if there is anything else that actually does provide some

Tipping J Any old file note.

Elias CJ Why don't you take us to what you refer to. We're all now agog to see it.

McGrath J I think you're going to return to orthodox laws of interpretation very strongly very later Mr Hodder.

Hodder I feel I have no choice on that one Sir. Now after all this I feel it's going to be a disappointment to everybody, but

Tipping J It's not a king hit or is it?

Hodder It wasn't even meant to be a hit Sir, it was meant to be just a platform but as I said if one starts at the beginning of Tab 19 there is a report which identified at the top as DIA/5 and when one gets to page 9 in that sequence there is a heading 'exemptions non-rateable land' and it recites Government policy, and it simply records in the badly highlighted area 'the Government's policy decision is to retain the categories of land exempted provided for in the RPA', which is the previous Ratings Exemption Legislation, and then it goes and explains what they were, summarises the submissions at 54, where the councils are opposed to it, and 57 notes the assumption to the contrary from owners of property currently exempt amongst the options which are to maintain the proposal in the Bill; add categories or delete categories and then there's a discussion over the page on the 50% proposal. The point is picked up a little more detailed in what is effectively an addendum to that report which starts after page 12, the numbering starts again. Is it getting Local Government Rating Bill submissions on the Bill generally, and at various points which are indicated as highlighting for example on page 18, which is the next page after the first page about clause 8 which I'll come to which is the non-rateable provisions with a reference under comment and response. This is the policy decision to continue the current exemptions, and then in a series of submissions I've picked up on the following pages which are numbered through to 22. And then after 22 there's a new heading which is LGRB/DIA/6 – and I think it's 6B, which goes through and discusses the schedule, which is the non-rateable schedule which was part of the Bill

Elias CJ I'm sorry I think I'm lost

Blanchard J So am I

Elias CJ What number page?

Hodder These are extracts which makes it harder, but the first part of the extract goes off to page 12 which then has a signature at the bottom of Mr Cribb.

Elias CJ Yes.

Hodder After that

Blanchard J Has a what?

Elias CJ Cribb

Hodder The first part of the report is 12 pages and ends with the signature of the author. After that there's a new section which is extracts only which has pages 1, then goes to 18, which deals with the non-rateable land clause, and then there is 19, then there is 20, 21 and 22 and then there's a new document after 22 which has in long-hand in the top right corner LGRB/DIA/6, I think it's 6B, and that is the one that goes through and looks at the particular categories of land that was involved and has various submissions recorded in relation to it, and again the general proposition was that

Tipping J There's a key point there it seems on that page 1 of the document is only a comment isn't it? These provisions reflect an express policy decision that all current exemptions be retained?

Hodder Yes and that comment is repeated throughout this document.

Tipping J That's the high watermark of your point.

Hodder Well it's the point yes Sir and it's the comment that repeated throughout this document in relation to all of the propositions where somebody says we want to change it; we don't want to have any more exemptions, so the Local Government Bodies of the kind just at the top of that page say we want to get rid of that whole Schedule. All these people should pay rates and the response consistently is that's not the way the purpose of the Government introduced the Bill for and the Bill shouldn't change and it doesn't. Now there's a specific reference on page 8 following on from where we were, just to complete this detour

Tipping J That's specific to your client.

Hodder That's my client specifically, so we said this is the whole of the clause, it's not just relating to the Foundation because the clause relates to others as well as the Foundation as the Court will know, but that was a specific one where the Foundation's submission was noted, the Franklin District Council for whatever reason didn't like it, and the response was a standard response that comes through in this report. And over the page there is the same thing in relation to the educational exemptions on page 10. It wasn't just a way of avoiding the question of getting to the legislation; I did actually seek to use that, as what I had understood was a reasonably uncontroversial platform before where we were. That was the easy part. If I can now turn to the text of the Act. It will be simplest to start with

volume 3 of the materials that came in at Tab 7. There's no particular profound points about this but for completeness, s.3 sets out a purpose which as far as I can tell doesn't take us very far in relation to the current issue. Section 4 outlines the Act and subsection 2(b) says that there are key provisions in part 1 which states who is liable to pay rates and what land is rateable and that then takes us to part 1 which is headed Preliminary and Key Provisions, subpart 1 being the preliminary provisions and then subpart 2 commencing after section 6, I would have described as the key provisions. Then the heading 'What is Rateable'? Well the answer should be obvious no doubt but for the reader of the Statute. So the basic proposition of s.7 all land is rateable but subsection 2, unless it's non-rateable under this or any some other Act.

Tipping J This is this modern style of drafting is it Mr Hodder? State an absolute and then immediately contradict it.

Hodder We don't have the diagrams or the equations on this one though Sir. S.8 then says the land in Part 1 of Schedule is non-rateable, which is really where we start to get to the rubber meeting the road for present purposes. However s.9 goes on to clarify that non-rateable land liable for certain rates, being targeted rates. And then the next question appears after s.9 'Who is a ratepayer' – where the question makes its way into the heading of the section, and that's the person named as ratepayer in the database, etc. And then the only other thing I am inclined to mention is if I went back to the definitions. There is a definition of land, which is no great surprise; there is the definition of owner, which is of no great surprise and a definition of the person actually using the land which has a meaning given to it in s.96. Now that's only relevant to the person using Maori freehold land, but we note that in passing as being an example of the ability of the legislature to say a person actually using land that it means a person actually using land. And that then takes us to Schedule 1 and Your Honours may have a green extract which was provided I think at the outset or otherwise it's in volume 1 of the authorities at Tab 1. So the basic proposition all members rateable but all land in Schedule 1 is non-rateable. That's the equation that we're concerned with, so Schedule 1 has a range of categories, as the Court will no doubt be aware. 22 categories followed by half a dozen notes which relate to the Schedule and at the risk of being somewhat tedious it's worthwhile identifying what they are very briefly. The first part, item 1 or exemption 1 deals with Parks and Reserves. There's no reference to use, they just say 'forming part. Item 2 is land vested in the Crown and forming part of foreshore, navigable rivers etc. Item 2 is a four-part proposition land that's owned by society, used for conservation purposes, not used for profit and accessible to the public, so all of those requirements are cumulative - ownership and use. The next category is Land used by Local Authority, and then there is a variety of particular activities – the uses are identified in the balance of it. And then

we get to the one we're concerned with which is exemption 5, land owned Or used by and for the purposes of firstly the History Places Trust; secondly the QE2 National Trust; thirdly Te Papa; fourthly the Children's Health Camps and last but not least, the Foundation, except as an endowment, and the Foundation's name has changed. 6, land owned or used by for the purposes of effective Education Institutions. There's the provision that comes through there. Then Land 7, land owned or used by and for the purposes of an Institution for theological training subject to an area qualification. So any concern about rating revenue removal is limited by a particular area limitation. 8, land owned or used by a Health Board and used to provide particular services. So the formula owned or used and then again used to provide particular services. 9 is the focus on land use – places of religious worship and also with a pecuniary profit exclusion which is found in 9(b) and there's also if we go back to pecuniary profit exclusion found in exemption 3(c), and profit exemptions are also found in educational material under exemption 6 (iv) and (v). Exemption 10, another area limitation for cemeteries and burial grounds and again the profit exclusion. Maori customary land is 11. Land under Te Ture Whenua Maori Act number 12, there being status rather than use propositions. 13, another area limitation and the occupation of the land by a Meeting House. 14, Maori freehold land, suject of an Order in Council. 15, machinery - that doesn't trouble us. 16 talks about previous other Statutes. Land in 17 is that vested in the Crown for roads. 18 vested and occupied by the Crown for airports. 19, land occupied by the Railways Corporation or by railway operator. 20, land used as a wharf. 21, land used or occupied by, or for the purposes of an institution that is carried on and subject to an area limitation, and then finally the vice-regal residence occupation comes in through there. Now just carrying on through the notes, some definitions in note 1, don't particularly detain us. Definition 2 says for the purposes of clauses 1 and 2, land does not include land that is used primarily or exclusively for private or commercial purposes under a lease, licence, or other agreement. And the obvious point that Your Honours will be aware of in our submissions is that if that could be applied to exemption 5, which is the Foundations exemption, then we wouldn't be able to argue that the land we are concerned about is not rateable, but is explicitly for the purposes of clauses 1 and 2. Clause 3 concerns what is meant by pecuniary profit for the purposes of clauses 3, 9 and 10, which says the fact you make a charge doesn't make it for private pecuniary profit. Item 4 says that land is to be regarded as being used for the purposes of a school etc if it is used as a residential accommodation and is let at a discounted rent. Then 5 says land does not include land that is used for the purposes of 18 to 20 which are the airport, railways and wharf exemptions. And then item 6 is about what is meant by free maintenance and relief the requirement for open access. So that's what's there. I suppose that the three points perhaps that we take from this, as I can imagine there are only three points – the first is that there's a wide variety

of language used and our submission is that we can take it that the language was intended to be used, so when it says vested, it means vested, and when it says occupied, it means occupied. When it says used, it means used, and when it says owned, it means owned, and the words are meant to work in each particular context. So in our case is land owned or used by and for purposes, it isn't land owned or used by and used to provide something, which for example is what exemption 8 says. The second proposition is that when one looks at item 5, or exemption 5, each of those categories are relating to Institutions that can be regarded as of national significance. The Historic Place Trust, QE2 National Trust, Te Papa, Children's Health Camps and the Foundation. I'm not entirely clear in my recollection about the Children's Health Camps, but everybody else has their own Statutes, so they're not just important, they have their own statutory recognition, and we submit that this is an indication that as far as waiting is concerned these items of national significance, there is a policy that says that implicit in this that they are to be free of rates, which are at the expression of Local Government, this is a central Government decision as it were, central Parliamentary decision, that they are not going to be rated, and in most cases there's a sort of economic logic to it which is that they are funded in various ways and to various extents by Government, and so the idea of Government as paying rates has limits to it and in this particular case we would say it reflects a decision that if Government is going to fund to whatever extent these bodies, then that funding doesn't get channelled back into the Local Government that way.

McGrath J The commonness of that category relates to the Institutions of national significance partly at least funded by from public funds.

Hodder Yes.

McGrath J You can't get any more specific as to the common features of the Institutions than that I suppose?

Hodder No, only that they could be expected with the exception perhaps of Te Papa, that even then to beyond any single territorial authority, so inconsistency would be problematic if the Foundation is rated in Parnell but not rated in Wellington or Christchurch for example.

McGrath Okay, thank you.

Hodder That might be taken as well.

Anderson J What one could take from this clause 5 is that each of the Institutions is essentially acquired to use land for its core purposes. The Historic Places Trust is an obvious one. The Queen Elizabeth the Second National Trust is concerned with the obtaining preservation of open space; the Museum is

a specific site. Children's Health Camps are operated on land and the Foundation for the Blind is covered I think by those earlier ones. It's crucially significant to their operations that they hold and use land as an operational necessity.

Hodder At a minimum each of those entities will have some land that they directly use for their operations. I agree with that. It must be so.

Tipping J Is the exception of an endowment, use or ownership as an endowment attaching to your client and not to the others significant?

Hodder The endowment I think is one of the open mysteries in this particular jigsaw.

Tipping J Well I'm not sure that it is all that mysterious Mr Hodder. I think it is significant that it is contemplated that there may be circumstances with your client where the general exemption won't be appropriate.

Hodder That may be

Tipping J Never mind precisely how one determines it.

Hodder Well the words are obviously there. I say mystery and mysterious because for myself I've been able to find a way which provides a completely comprehensive explanation of how there is in the history an opaque that is different

Tipping J Well you say something is different – I don't want to anticipate the argument on endowment, but perhaps we'll just leave it at the moment that there was obviously thought that there should not be a total across the Board exemption for your client.

Hodder Yes.

Blanchard J Has there ever been or is there an endowment in the narrower sense that the Foundation benefits from?

Hodder I don't believe so, but not absolutely sure about that. There is one provision I'll come back to

Blanchard J Well it would be pretty significant if there was one.

Hodder When I get to that conversion I think the endowment language has been picked up principally because of the inter-position of the Foundation with education Institutions a point in the legislative history.

Tipping J That I think is probably right, but when you're looking at these organisations as a class I don't think you can treat the Foundation as a sort of equal member of the class because for whatever policy reasons you weren't given the full exemption that the others were. You have to live with the idea that whatever an endowment is you're not able to get the exemption in that situation. I think that has some significance both per se and consequential on the concept of endowment.

Hodder I have to accept that the latter part of what Your Honour says that we have to live with those words. I suppose I should be slightly cautious about not saying an equal member of the club if that was the first part of the proposition

Tipping J Class I think I said.

Hodder Class Your Honour. Yes, and coming back to Justice Anderson's point, again I can't disagree with what he said Your Honour but I suppose the starting point is that if there wasn't land involved there wouldn't be any need to have a rates exemption involved, so there's a

Anderson J Yes, but it's the distinction that we draw between having land which someone might operate or use for business purposes and having a core function that necessarily is carried out on land.

Elias CJ Or comprises holding that land.

Hodder It is undoubtedly the case that the operations of those trusts, those entities will have some physical land site involved in an exercise. That's undeniable.

Anderson J The benefit that they give to the community is through using that.

Hodder In part.

Anderson J Well children in Health Camps, they run around the Health Camps. Open space is land. It's quite a complex Schedule and one has to look for some explanation from different terms that are used and different qualifications that are imposed, much of which comes through the notes, but the theme that comes through is that whatever benefit is given to the public through land being owned is to be distinguished from the peccary benefit obtained by those Institutions through lean investment.

Hodder Well that's obviously the issue and that's the view

Elias CJ I wonder whether also whether the definition in respect of clauses 1 and 2 isn't wholly against you because if one is looking at an overall scheme,

that clause is necessary to make it clear that revenue-generating activity will not be exempt.

Hodder Well I understand the argument but it's obviously contrary to the argument we advance. We suggest this

Elias CJ Well what do you draw from the definition in respect of clauses 1 and 2 that you say is helpful to your argument? Maybe you don't, but are you running an expressio unius?

Hodder In part, yes.

Elias CJ Well that's why I raise the suggestion that in fact there may be a consistency there. It has to be expressed in that definitional way in respect of clauses 1 and 2 because that's clearly land that's, well it's held by the Crown.

Tipping J The proposition is it's necessarily to be expressed in those two but it's clearly implicit in the other.

Elias CJ Yes that's what I'm trying to put here.

Hodder Always the flipside in expressio unius argument I suspect. Your Honour we say that one doesn't take that from it. That when there is a requirement for pecuniary profit to be spelled out here then it's done so and the idea that it is implicit in 5, but made explicit in all the other provisions where it is explicit

Tipping J What policy reason could there be for excluding this what you might call commercial use of land in some instances but not in others?

Hodder The basic proposition that it is a matter where Government funding is coming to it in one form rather than to be taken out in another form. That was the original proposition I'm sure. Hansard tends to suggest that when one goes back to the earlier provision. So the argument that we're putting on this for the general range of inquiries Your Honours are putting to me is that this is a body of national significance. It's recognised as being entitled to income tax exemptions. This is a way of recognising it's entitled to rating exemptions. It does receive funding through contractual provision of services that work for the Government now. Traditionally it had grants and there is no sense for the Government in giving grants which then got paid out to Local Government.

Tipping J You see the same theme Mr Hodder comes through out of note 4(b).

Elias CJ And 3.

Tipping J It was thought there necessary to make plain what was thought to be by the plain or sufficiently plain in respect of the others.

Hodder Yes in terms of what 'use' meant.

Tipping J Is let at a discounted or subsidised rent. The idea being that if it was let at a commercial rent he wouldn't be entitled as a matter of policy to be exempt.

Hodder Well we simply say that note 4 is identifying what use means for the purposes of use where that becomes a relevant issue.

Tipping J That may well be so as the immediate point, but the conceptual basis of this is fairly consistent that there shouldn't be an exemption if you're using your land for generating commercial rent.

Hodder Well those are indications I can't deny that they exist.

Elias CJ Well is there anything in this Schedule, is there any entity that is explicitly exempt from the rates if they're obtaining revenue beyond the sort of recovery of cost, notion in 3 and 4? Because what's been put to you is that this is a wholly consistent scheme, so your argument would benefit if you can demonstrate that there's some other body that's in the particularly favoured position you say your Institution is.

Hodder Well the topic that isn't expressly dealt with in that way here which was discussed in I think the Court of Appeal, I can't recall it, arose in the discussion of the High Court about Universities. So Universities are picked up under Exemption 6 (c) if I recall it right and Universities in the past have had substantial land-holdings, well some of them have, they no doubt still do.

Tipping J That the University of Canterbury as an example has what is loosely called 'endowed land', or it used to, are you saying that that land, that is to say land held solely as an investment to fulfil the purposes of the University, are you saying subject to the question of endowment, that that would be owned by and used for the purposes of the University?

Hodder Yes.

Tipping J You have to don't you?

Hodder Yes it's owned for the purposes of the University. It's not used, but it's owned for the purposes of the University.

Tipping J Owned for the purpose

Hodder That's the argument. It's reasonably close parallel.

Tipping J I just wonder whether for the purposes doesn't mean directly for the purposes rather than indirectly for the purposes if you like in that the key to the whole dilemma is that that is the correct construction of for the purpose.

Hodder Well our proposition is as Your Honours are well aware is a rather more simple one. It simply says 'is the land owned by the Foundation? – yes'. 'Is the land owned for the purposes of the Foundation or for something else? – yes'. 'And is it land that's held as an endowment and we say no'.

Anderson J You have this odd situation that if the land is held to produce income and it's been derived from a gift then it will be rateable. But if it's held by them to produce income and it's derived from their own purchase, then it won't be.

Hodder Yes, yes.

Anderson J It seems extremely odd.

Hodder That's an anomaly which is undoubtedly part of the argument.

Anderson J Unless 'endowment' has a certain meaning which we'll come to in due course.

Hodder I'm sorry Sir?

Anderson J Unless 'endowment' has a certain meaning which we'll come to in due course.

Hodder Well we think that there may an historical explanation for that but on its face it's an anomaly and that's part of our argument and we can't run away from it.

Elias CJ Can you think of any policy reason though that would justify the difference in treatment according to the derivation of the property?

Hodder Only that if it's subject to endowments on terms then the control is to an extent in the hands of the donor, whereas here control of other land is in the hands of the entity itself.

Elias CJ Why would that affect whether any revenue obtained should be exempt, oh I mean whether the land should be exempt if revenue is obtained?

Hodder It may be that the purposes are narrower than the more broad purposes that are contemplated for the whole institution. So at this stage we are in the hypothetical rather than the factual, but if there is an endowment which says it's for limited purposes say in one geographical region only or something of that kind, then that may be different than one that's for the purposes of the body as a whole. It's limited to a certain category of those who are otherwise categorised as blind.

Tipping J But Mr Hodder the concept of ownership or use as an endowment doesn't leave one's mind immediately to consider issue of derivation. It's a somewhat unusual use of the word 'endowment' because it's not received or acquired as an endowment, it's owned or used as an endowment and that I have to say has puzzled me but it seems to be the only way you can reconcile that rather unconventional usage of the concept of endowment is that its purpose is to produce income, as most endowments are.

Hodder Well again the language that we rely on is treating 'owned' or 'used' as disjunctives, then is it owned as an endowment?

Tipping J Well yes, owned as an endowment, not acquired by means of an endowment.

Hodder Well we'd say that's not entirely clear and the previous legislation which has a more of a flavour of the origins of the acquisition rather than the current position.

Tipping J Well I think that can't be read into this. The focus is not on derivation, it's on the purpose if you like for which it's owned or used. It's a type of expressed purpose provision which is excluded.

Hodder Well for our purposes that may be so, but if it's owned, or even if it's used as an endowment, we accept that that's, oh I'll step back Your Honour. The previous legislation I think is the language that includes acquired and I'll come to that in a moment.

Tipping J Well they clearly must have wanted to change that because there is a material difference isn't there between the two?

Hodder That's exactly the change we're talking about between this Act and the previous Act.

Tipping J Yes, but you see endowment can be read as an exempted purpose. The drafting of this is not stellar and it never is when the matter reaches this Court

Hodder Correct.

Tipping J But we've got to try and make some coherent sense of the whole sort of philosophy of this.

Hodder Of course, and what Your Honour is putting is trying if I can say so to make the first line of the exemption, the last line of the exemption.

Tipping J Well grammatically.

Hodder Grammatically that is valid?

Tipping J It must be so, it's not a free-wheeling ungrammatical

Hodder Well unless it's a free-wheeling exception to the exemption up to that point which would also be a valid idea

Tipping J Well I just put the point out as a matter of concern to me Mr Hodder. You may wish to return to it when you talk about endowments generally.

Hodder I understand, but the short response at this stage is that the exceptions as it were stands alone doesn't have to be read with the preparatory words.

Anderson J And what is it attached to?

Hodder If you have

Anderson J Except with an endowment if the point came out with that one we'd say yes go on. What a self-sufficient sentence, or clause even

Hodder Except I suppose I'm having to imply the word 'held' which would be the normal word you'd find there.

Anderson J Then if it's held, then it's owned or used isn't it.

Hodder Well I think that I was really responding to Justice Tipping's reference to purposes, which is why it is I hadn't contemplated and I'm still not quite sure how it works.

Tipping J Well it either governs owned or used, or it governs purposes or possibly it governs both. It's a belt and braces job.

Hodder I can see how it can govern and/or use governing or relating back to purposes is a more problematic interpretation.

Tipping J I agree with you, I agree with you, it is more problematic.

Anderson J It could be held for the purpose of an endowment, meaning in effect that the reason why it is held is to produce income.

Hodder That would be a teratology wouldn't it if I can put it in rhetorical terms?

Anderson J But would it?

Hodder The difference between held as an endowment and held for the purposes of endowment is really subtle.

Anderson J Held for the purpose of producing income. I mean it's a bit of a cobble to get a clause and it's really intended to cover a range of concepts I think of a broad nature, but what comes through I would have thought is not intended to give rates relief to a commercial enterprise.

Tipping J Which can pass the rates on to its tenants.

Hodder At a price.

Tipping J Well

Hodder I mean at a price itself, you can't set the market.

Tipping J Yes

Hodder So there's a financial cost to being rated.

Anderson J Yes.

Tipping J Oh yes of course.

Hodder A financial cost to the Institution.

Tipping J If you didn't have to pay rates presumably if the tenant says no, I don't have to pay rates, you charge more rent.

Hodder Yes, correct.

Tipping J Simple as that isn't it?

Hodder Which is part of the benefit of giving a rating exemption if you accept the premise that we have that would a positive benefit

Tipping J Yes, there is a danger of being circular here, I agree.

Elias CJ Mr Hodder while you've been interrupted I've just been thinking about your indication that perhaps Educational Institutions may also mar the symmetry that I see in the Schedule. There's a lot of control over these Educational Institutions under the Education Act and indeed some schools anyway that operate for profit are exempt from this, so I'm not sure that schools don't also fulfil the scheme.

Hodder Exemption 6(b), or 6(a) and (b) deal with what we can call schools and include their own internal exceptions for those that operate for profit.

Elias CJ Yes.

Hodder As I recall it. I'll have to check this one, but I'm pretty sure that s.159, which is the subject of CA Universities which are there without qualification. Now I'm not quite sure whether that answers or responds to Your Honour's point, but there is a contrast

Elias CJ My point is, my point is, that one would have to go to the Education Act to see what restrictions there are on profit or revenue generation before you could suggest that Universities, yes and I'm sorry, you did mention Universities, might be a similar exception.

Hodder I haven't brought those materials to the Court's attention but I don't believe there's anything that restricts Universities from generating income from their own assets

Blanchard J But note 4 applies to an Institution, a University comes in under (c) as in Institution, and then there is this very strange qualification. On your argument I think you've been saying that the University was exempt on land that it was leasing out commercially

Hodder Yes.

Blanchard J Yet if it chooses to lease land for residential accommodation for a teacher it can only do so at a discounted or subsidised rent.

Hodder Yes that's an anomaly.

Blanchard J So

Elias CJ Sledgehammers and nuts.

Hodder Or have historical anomalies to deal with old cases to some extent I suspect.

Blanchard J Well it rather casts doubt on the exemption that you're suggesting.

Hodder If there were no doubts to be cast on the argument I doubt we wouldn't be here, but that's an anomaly which I have to acknowledge. What I was proposing to do if it's convenient to the Court is to take you to the 1955 Act. What I might do just to explain how I see the jigsaw is we provided to the Registrar the document in a mild green form which is meant to provide something of a map just to show how the jigsaw might hold together. I mention this at this stage because it's relevant to why I want to talk about the 1955 Act for a moment or two. This document in green has on the left-hand side in chronological sequence the legislation that's referred to, or which is relevant we say to the general side of the material concerned about. On the right-hand side there are the specific documents that relate to the Foundation and its various names, so when it refers to the Jubilee Institute I'll just call it the Foundation. Not all those are relevant and the bold ones on the right-hand side as I say relate directly to the Institute or to the Foundation. The bold ones on the left-hand column are one's which have at various stages governed the operations of the Foundation, and you'll see that it went from the Hospitals and Charitable Institutions Act, the Education Amendment Act, the Rating Act and applied it in various ways. There are as it were two streams of legislation that come together as far as the Foundation is concerned. It starts off being under the Hospitals and Charitable Institutions Act and then it gets picked up in fact in 1949 by the Education Amendment Act and is lumped in with the exemptions for Educational Institutions. And the first time that everything arrives in one place is, as it were in one statutory place is in the 1955 Act. The other thing I should just say for completeness is that the references here are to the bundles of authority, so at the very top the 1868 is the appellant's bundle of authorities, volume 3. The next one is respondent's bundle of authorities and the tab reference is given. But the good news is I don't intend to go through this material exhaustively, but the bad news is I said I do think it creates a jigsaw which requires some working through. So if I can turn to volume 1 of our authorities at tab 10 which shows us the 1955 Act. We are now two Acts on from that with the 2002 Act of 1963 and the 1963 is similar, but as I say the 1955 Act is the first time this comes together, so it's a Public Act which sets up the Foundation at that stage for the Blind and so s.3 identifies it's been constituted under the Act; its purposes are education, training and amelioration of the condition of the blind. Interesting at that stage it consisted of the contributors, these days it implies with the members and then 3, ss4 tells us that it's the same body as was previously constituted under the 1926 legislation.

Blanchard J Who are the members?

Hodder The current members?

Blanchard J Yes.

Hodder The people who are using, or I presume they sign up and use the services - 11,700 or so.

Blanchard J Right.

Hodder Section 5 just refers to who contributors were. In those days people gave money were life members, and then Powers of the Board. The Board was appointed with s.8 four trustees appointed by the Governor-General; five elected by the contributors, so there's substantial Government involvement in the Foundation's Board. Section 18, Board Powers, for our purposes it's worthwhile noting s.20 'The Board with the consent of the Minister, may sell or exchange any land vested in the Foundation other than land held in trust for any special purpose and may pay or receive on behalf of the Foundation any money by way of equality of exchange'. And then ss.2 'nothing in this section authorises the sale or exchange of any land granted by the Crown or by any Act as an endowment to the Foundation'.

Tipping J Subsection 2 of what section?

Hodder Section 20 Sir.

Tipping J Thank you.

Hodder It's on page 232 of the reprint of the statute. That's the first reference I think in the Act to where endowment

Anderson J It appears of course in the 1935 Rating Relief Act doesn't it?

Hodder It does.

Anderson J Along with actually used?

Hodder Yes. So references at that point to endowment followed through into s.21. S.21(1) 'the Board may grant leases of any land vested in the Foundation'. Subsection 3, 'the powers of leasing shall extend to any reserve or endowment vested in the Board and to land held by the Board any trust but not lawful for the Board to grant a lease of any such reserve, endowment of trust property for any term or any condition which is inconsistent etc', and what we identify in there is the use of the language of reserve as distinct from endowment, as distinct from trust property. Subsection 5 says these powers are in addition. Section 24, across the page, notes that there may from time to time paid to the Foundation of money appropriated by Parliament – a grant which is sufficient when added to the payments received by the Foundation from any other source to meet the cost of the

education and maintenance etc of the children under care. So there's the Government involvement in the process. And then at 24(b) 'subsidies as the Minister approves on devises bequests etc'. And then s.26 ' subject to the terms of any trust or endowment, the Board may apply any money or property received or held by the Foundation in such manner as the Board thinks fit for all or any of the following purposes'. And this is the first time I think there was reference to the Board's purposes. It goes through and sets out what one would expect to find as (a) education, (b) employment, (c) residential accommodation, (d) branches, (e) prevention of cure and (f) making such provisions as the Board thinks expedient in order the Foundation may best accomplish the purposes for which it is established. So those are statutory purposes identified, including a sort of a general paragraph (f) purpose. And then in s.35 we come to the exemption provision which first it says 'no rates shall be levied on the Foundation by any local authority on any land held by or on behalf of the Foundation and reserved or set apart, or otherwise any manner acquired for any purpose of the Foundation and held otherwise than as an endowment'. Subsection 2 deals with land tax. Subsection 3 deals with income tax.

Tipping J It's interesting that the rating exemption was narrower than the land tax exemption.

Hodder Yes, all land owned by the Foundation, that's correct. Section 35 brings together what was in the 1931 exemption as Justice Anderson mentioned, and had been applied to the Foundation of the 1949 Education Amendment, and then brings together the provisions from the Taxation Statutes in one place. So our submission is that within this Act one has, as it were, the base point for Parliamentary coherence about what it is that's being done here.

Elias CJ You know I find it hard to see how s.35 helps your argument, because it makes a distinction between the way in which land is acquired and uses this expression 'held otherwise than as an endowment' to the point that Justice Tipping was putting to you.

Hodder Well our interpretation of endowment is being a specific gift with the right to draw income from it

Elias CJ Well then what does or otherwise and in the manner required mean.

Hodder That's what the exception relation to, the otherwise relates to, required otherwise and as an endowment.

Tipping J But it can be required by gift and then it's held as an endowment, or it can be acquired in any other way but held as an endowment. I mean it doesn't seem to be making a distinction between the actual method of acquisition.

Hodder Well our submission has to be and is that the endowment if read narrowly that the whole subsection does make sense and relates back to the way in which endowment is used back in sections 20 and 21, that it's something distinct from other gift or trust or property and in particular what we had in mind was endowments that were granted by the Crown or under Statute in ss.22.

Blanchard J But why would the Crown be content to see those rated?

Hodder Because any rating affecting those would come from somewhere else. Any rating issues about that land would be decided in this other legislation.

McGrath J Doesn't the statutory context have to be either the earlier provisions of this Act or the previous legislation dealing with Educational Institutions, but can't be both?

Hodder I'm not sure I followed the alternative there

McGrath J Well I understood that what you were saying in terms of the phrase other than that endowment, you're saying well that comes from the earlier legislation. Is it the 1931 Act or the Educational Institutions Legislation?

Hodder Yes.

McGrath J Well I'm suggesting that it seems to me on what I've read seems a fairly good point in terms of the context in which you're looking. There should be statutory context we should be looking at. But if we go to that historical legislative context, doesn't it mean that we can't get any value from the immediate context of the provisions in this Act that you're also seeking to rely on?

Hodder In the 2002 Act, or the 1955 Act.

McGrath J In the 1955 Act.

Hodder Well we'd say they're consistent. This Act as I say brings together the 1926 Act and also brings together what was the 1931,1945 Act provisions, and the reason for spending a moment on this is that it's the one place where you'd expect to find a coherent use of language across the Board. If there is a doubt about the meaning of the phrase 'otherwise an endowment' in s.35(1), then yes one would go back and look at, and we

will, at the 1931 and 1949 amendment provisions that have the exemption as previous form. So I'm heading in that direction, unfortunately backwards, I appreciate that,

McGrath J Thank you, I understand, yes.

Tipping J You're bringing us to the 35 Act in a moment are you?

Hodder Yes. So at this stage we say there's a perfectly respectful argument which is open to us and we urge you to give favourable consideration to this. The endowment of the kind that's contemplated in 35(1) is an endowment of the kind that is contemplated in 20(2), and that that is something that is distinct from land that's acquired by other means which is what the general exemption of 31(1) is designed to do. Now before I go backwards, can I go forwards? The s.35 formula is effectively maintained in the next rounds, which are the 1963 Act, which is the Foundation's own Act and then in the Rating Act which takes the exemption for rating out of the 1963 Act and then goes through to the 1988 Act and then it gets changed in the 2002 Act where it loses the hill, 'buyer on behalf otherwise acquired' and really resorts to owned or used. That's the change that the 2002 Act makes, and our proposition is it wasn't intended to make any change, but that this exemption applies to land held required for any purpose.

Tipping J The rationale for the addition alone must surely be that the focus shifting from occupation long-term to ownership to ownership, and the draftsman's just bunged it in on account of that, that must be the source of the addition of ownership mustn't it?

Hodder Well you'd have to assume that's the factor that motivates use of the phrase 'owned', yes.

Tipping J Yes. But does it shift the meaning of the phrase 'for the purposes of'.

Hodder Well we say no, owned incorporates the concept of 'acquired for any purpose' which is the language of s.35. So in their current exemption 5, when it says 'owned for purposes', that is not meant to mean anything other than acquired for any purpose, or it's meant to incorporate that concept from s.35. There's no change intended. So if s.35 here in 1955 was exempt in land acquired for any purpose of the Foundation, as we say it does, then we say nothing has changed.

Elias CJ Well, but you're still cast back on the same question of 'what and held otherwise than as an endowment means', and I would just like to flag that I see no assistance in construing s.35 from the Powers in sections 20 and 21, which simply make it clear that you can't sell land that's come to you as

an endowment, but you can lease it. Here the whole question is how are you holding land? Are you holding it as an endowment in which case it's not caught within the exemption? In other words I can accept that the meaning may well be consistent between the 2002 Legislation and the 1955 Legislation, but I don't know that it's consistent in the way you're contending for.

Hodder It may be of some relevance to go back as I was planning to do, but just before that to respond to one of the points Your Honour made. In s.20 we would see the power in ss.1 to sell land vested other than land held in trust for a special purpose, and land held in an endowment, not entitled to sell land authorised in an endowment from the Crown or under an Act

Elias CJ Yes.

Hodder As support of our proposition that there's a particular kind of endowment, which is in mind here, not all endowments, just those endowments.

Tipping J There does appear to be, in your favour there does appear to be a distinction in the 1955 Act between an endowment and a gift to be held in Trust.

Hodder Correct, I'm not putting it very well but that's the point I was trying to make. It's reflected in 21(3) as well.

Tipping J And 28 is the key to the sections where they hold 28(2). All money, land and other property accepted in Trust under the authority etc. And that land seems to be distinguished from endowment land.

Hodder Which we can sell and which we say is free from rates.

Tipping J Yes, there is some force in that point in your favour semantically.

Hodder Semantically, at least. Can I go back to the 1931 Act, which is at Tab 7 of these? Actually if I can just, perhaps the simplest way around this is to explain why we're bothering you with confiscated land going back to Raupatu. It wasn't just an attempt to attract Her Honour's attention, but what's interesting from that is that if one goes to our volume 3 materials, the ones that we supplied yesterday. I'm not sure how relevant this is, but I must say I found it interesting, but this 1868 Act for the endowment of a Colonial University makes provision in s.6 that there be land reserves for the endowment of the anticipated Colonial University Institution, and then prescribes 20,000 acres of confiscated land in the Schedule – 10,000 from the Taranaki Province and 10,000 from the Auckland Province. And at tab 2 we're given this example in Napier High School Legislation, not picking on the Hawkes Bay, but what that tells us is that in 1882

Elias CJ Oh yes this is famous, yes.

Hodder The Third Schedule explains that there were two parcels of land – one of 4,500 and the other of 5,400 acres which are provided as an endowment for the Napier High School, which is a fairly tidy area of land, no doubt a lot less than Hawkes Bay

Elias CJ Subject to claim.

Hodder Yes.

Hodder What that is indicative of is that in the 19th Century the Government had land, it probably didn't have that much money, and so in terms of supporting the Institutions we're talking about, and in particular Education Institutions, they provided endowments. If I can turn to tab 5 of this volume, the Education Lands Act of 1949, s.13, ss.1 vests back in the Crown the land that had been previously High School Reserves, including for example the land that was Napier High School Reserves, that's on page 439 of the statutory pagination at the bottom and it's the giving back of 3,500 acres or thereabouts and lots of other land as well. So there's a re-vesting of lots of this endowment land going back in 1949. And in s.13(3) there's a question mark about what happens to the endowments and the monies that came from them and ss.4 has what is presumably an enlarging definition of endowment in terms of land granted by the Crown or land acquired from grants from those matters in (a), (b), (c) and (d). So we suggest that that provides some context for when we get to the 1931 Act which is at tab 7 of volume 1 of our materials. This is before 1949, but obviously after the endowments have been dished out in the 19th Century. So s.40 of the Finance Act at tab 7 of our volume 1 of materials has the language that we find in s.35 of the 1955 Act 'no rates levy in any land held by and behalf of an Educational Authority and reserved or set apart or otherwise in any manner acquired for any purpose of such education authority and held otherwise than as an endowment.

Tipping J But if you took the view that endowment meant any land vested in the organisation by the Government, and then land that was intended to be exempted would be withdrawn from the exemption because of the comprehensiveness of the concept of endowment.

Hodder Well that Your Honour depends where one starts with endowment, and the practical proposition I suppose which we refer to I think in the submissions is that if there was a large amount of land out there that's been leased, an endowment land but has previously been subject to rates, then to grant this exemption and extend it to all that endowment is going to create difficulties. It's very large tracks of land

Tipping J But let's pretend that Napier Boys High was holding that land you referred to earlier and it's still holding it in 1931, and it's holding it as an endowment, but most of it, if not all of it, is being used actually for the physical education of the boys, so I mean it's a self-defeating proposition isn't it Mr Hodder? It can't mean that because otherwise the exemption would in whole would immediately be defeated by the "held in otherwise as an endowment'.

Hodder That with respect, I don't accept that follows. If the land is 10,000 acres of Hawkes Bay land which is being leased out to provide income for the School's purposes, or the School Board's purposes, it was paying rates before 1931 – it pays rates after 1931.

Tipping J But somehow or other you've got to distinguish within the concept of endowment that part of the land that is being used to educate the boys, and that part of the land that's being used to provide funds for the school.

Hodder Yes.

Tipping J Somehow or other it's necessary to make this work, to make that distinction I would have thought

Hodder Yes.

Tipping J And that's the very distinction that's been put to you as appropriate to the modern conceptual uses of the word 'endowment'.

Hodder Yes, well to this extent that if the land is actually being used for the purposes of the school

Tipping J It's not held as an endowment in those circumstances, but if it's not being used literally and directly for the purposes of the school, it is held as an endowment.

Hodder It's either generating income or it's not. The purpose of the endowment was to generate income so whether its generating income is not used directly, as I understand the way Your Honour's putting it to me

Tipping J That's exactly how I'm putting it to you, that you must make a distinction apropos endowment land as a whole that Napier Boys' High got.

Hodder (a) it comes from the Crown; (b) it generates income.

Tipping J No, no, some of it's used actually for the school.

Elias CJ I'm not sure that that's so.

Tipping J Or is that not so?

Elias CJ No.

Tipping J Am I begging that question?

Hodder I think with respect I would say you were that if it's held as an endowment it's held to generate income.

Tipping J I see, well in that case my premise may not be sound. I just assumed that the whole of the land was used, some of it was used to build the school on and some of it was used to fund the school if you like. If that premise is unsound then my point evaporates.

Hodder I can't be definitive but my impression and my apprehension has been that those lands were provided not to build schools on but to fund the operations of schools.

Tipping J Well I think that's a very necessary ingredient of the inquiry.

Hodder And particularly in Hawkes Bay and all of those, they were quite early on, those endowments are quite early.

Tipping J Well Christ College for example was endowed, because there is a case about it in the book, was endowed with land both for the uses of school and to support the school education, so that very distinction applies I think, I haven't

Hodder Yes, I would like to give Your Honour a completely definitive answer across all endowments across the country obviously. Can I take you back to the Napier Legislation which is the one at tab 2 at volume 3.

Tipping J Yes.

Hodder The land described is roughly 10,000 acres in two blocks. S.28 says it's set apart as an endowment for the Napier High School.

Elias CJ I think this was land that was originally provided by the Maori owners, wasn't it, and it was treated as wastelands and I think that's part of the background.

Hodder That's what this paragraph comes on to.

Elias CJ Yes.

Hodder So we dealt with this waste lands of the Crown and subject to the provisions of the Land Act and the Schedules all rents and profits derived should be handed over for the purposes of the High School. That was my apprehension, and the same in relation to the Colonial University provisions as well. The idea was not that you built a 10,000-acre school, but that you had 10,000 acres of rents and profits.

Tipping J Yes well if that's so I acknowledge the point and I may have been to pre-emptory in the assumption I made.

Hodder Well that's where my argument is coming to that when we get to the s.40 of 1931 Act which we were looking at, then what it's trying to do is say that kind of land is not exempt from rates under this particular exemption. And that's what the focus was on.

Tipping J I understand

Hodder And then at the same time, well not the same time, in 1949 that land has been re-vested, or most of it is being re-vested back in the Crown which is also the time at which the exemption for the Foundation changes from being used. You will recall the specific 1935 Act which says 'actually used' by the Foundation on the Parnell site. That's the New Zealand Institute for the Blind Rating Exemption Act 1935, and so it stays on a used basis for its exemption, even though the 1931 Finance Act exemption has moved away from used and transferred to held. The Foundation only gets from used to held by the 1949 Education Amendment which basically amends the 1931 Finance Act, s.40, to insert reference to the Foundation in subsection 1. So the proposition is that although at the time of the 1931 amendment comes in, which is the sort of precursor of where we get to by the time we get to the 1955 Act, in which we say carries through to 2002, the position is that large chunks of educational land is out there vested as endowments and there's a perfectly sensible reason why you wouldn't want to make all that land exempt from rates when you grant a non-use based exemption in s.40 of the Finance Act 1931. The Foundation tags onto that exemption in 1949 and it carries through to the day.

Tipping J If all this is right, there's a very curious provision and I think my brother Anderson referred to it in the 35 Act, but perhaps we can come to that.

Hodder Well the 35 Act was a very limited purpose piece of legislation. It was designed specifically to deal with the actual site of Parnell. It says 'actual use'.

Tipping J It says 'actually used for all sorts of specific purposes and held otherwise as an endowment'. Now if it was actually used for all those specific

purposes it couldn't have been held as an endowment within the meaning you're putting forward.

Hodder Yes.

Tipping J I mean there's no consistency here at all.

Hodder There's a, well, that's why I was referring it kindly as a jigsaw puzzle, but

Elias CJ You're really asking us to read 'endowment' as a term of art, investing it with a very technical meaning.

Hodder That land that is acquired as an endowment or held as an endowment, yes.

Elias CJ Well held as an endowment.

Hodder Sorry?

Elias CJ Held as an endowment. It doesn't necessarily mean land that's acquired through endowment. If it's used to generate income, isn't it held as endowment?

Hodder We would say 'held as an endowment' is an awkward way to describe what is simply an income generating land. The connotations of endowment are a gift with particular purposes. It doesn't need to use the word 'endowment' to describe trust property that's held to generate income, but that's the way that the argument against me is advanced.

Elias CJ Yes.

Hodder So we'd say endowment doesn't, obviously we say endowment doesn't just mean land that generates income which is where the Court of Appeal finished up, but 'endowment' has a more technical sense that's why it's used.

Elias CJ Is that a convenient time to take the adjournment?

Hodder Yes, it is, thank you.

11.37am Court Adjourned
11.57am Court Resumed

Elias CJ Yes Mr Hodder.

Hodder Thank you Ma'am. There are perhaps a couple of clarifying points before I move backwards as I was always intending to do, not in retreat you'll understand, but simply backwards in time. Firstly there was the question about the lands and the schools that Justice Tipping was after and one point that provides some assistance on that is that in the Education Lands Act which is at tab 5 of volume 3 of our materials, and my apologies for not drawing your attention to this earlier. Part 1, where s.3 starts, Part 1 of the Education Lands Act 1949 is about school sites which I think as I recall the question that His Honour was addressing to me, an effect of this re-vesting legislation was that under s.4 the land that had been reserved or set apart as a site for public schools was vested in the Education Board and the contrast was whether the s.13 endowments which had re-vested in the Crown.

Elias CJ Sorry, it's just a bit hard to find the place to look. What are we looking at s.4?

Hodder Section 4, ss.1. All land reserved was set apart as a site for a public school shall from the time of the reservation vest without grant in the Education Board of the education district.

Tipping J So you're making the distinction between the school site if you like and the endowment lands?

Hodder Which is s.13 land.

Tipping J S.13 land, right, yes well that seems to be a fairly partial point Mr Hodder.

Hodder The next point was the question which Justice Anderson has raised and Justice Tipping has reminded me I haven't answered, is in relation to the 1935 Act which is the specific Institute Rating Exemption, that's the one in volume 1 of our materials at tab 11 and the question is whether in s.21 which creates the exemption lands vested in and actually used by the Institute and held otherwise as an endowment not to be rateable property for the purposes of the Act. Now the short point is I don't have a complete answer to Justice Anderson's point. If endowment means simply land that generates an income then I acknowledge that would make sense and be against the argument. If it means land gifted for the purposes of generating income which is what we say is the ordinary meaning of endowment, then it looks an odd provision to sit along-side, actually used, I can't avoid that, our submissions has to be that this is a one-off Statute and given the context of the 1931 amendment that this was some sort of braces exercise to make sure that no income-generating land of that kind, that is endowment land in the true sense, was then or later made free of rates.

Anderson J It's a difficult section isn't it, because if it was held with an endowment it couldn't be actually used?

Hodder That's our proposition that it doesn't make sense unless one sees it as being a very precautionary proposition to try and mirror part only of the 1931 Exemption.

Anderson J Yes, belt and braces.

Hodder And I can't take it any further than that. Now the backwards direction I was heading was from the 1955 Act back to the 1926 Act. You may recall the 1955 Act has a series of those marginal references noting that follows on from provisions in the Hospitals and Charitable Institutions Act 1926, and those are in volume 3 of our materials, or that Act is in volume 3 of our materials at tab 4, and Your Honours will see that from the table of contents that Part 1 which is very lengthy from sections 3 to 107 is about Hospital Boards, but in Part 2 is about Separate Institutions and the effect of s.108 is effectively to cast the Foundation in its then form as being a separate Institution. And s.122 of that Act provides that certain of the Part 1 provisions of the Hospital Boards apply to separate Institutions, including the Foundation. That's the relevance of this piece of legislation. So s.108 says the Foundation's a separate Institution; s.122 says that certain Part 1 provisions apply being those in the Schedule, the Sixth Schedule, which is on the last page of the extract. There are also some specific provisions about the Foundation, then called the Jubilee Institute in the Seventh Schedule, which is on page 438. That's the structure of the Act, and for our purposes the Sixth Schedule tells us that sections 71 to 73 and indeed ss.67 to 69 all apply to separate Institutions even though they're framed in terms of Hospital Boards, and ss.71 to 73 are the precursors of the language in the 1955 Act that I took you before in terms of ss.20 and 21 and others about leasing and use of assets, and so at page 408 of the Statute Book one finds s.71 which you will recognise has similar terms to what became s.20 of the 1955 Act, and again 71, ss.2 nothing authorises the sale of land granted by the Crown or by any Act as an endowment to a Hospital Board. Section 72, ss1 a Hospital Board may grant leases. Leases are subject to the Public Bodies' Lease Act. The powers of leasing shall extend to any reserve or endowment vested in the Board and to land held by the Board upon any trust. So it's a distinction drawn in language between reserve endowment and trust which is the same distinction that finds its way in the 1955 Act. Going back even further, if we go back to the previous tab in this volume of materials, we get to the Hospitals and Charitable Institutions Act of 1885. Two provisions there are of interest. We say one is s.57 and one is

Elias CJ That's empowering though again isn't it?

Hodder Yes, but we say the distinction is significant.

Elias CJ But you'd need to make that distinction for the purposes of powers because if the trust deed is silent or if the Statute providing the endowment or vesting the reserve doesn't specifically refer to it then this gives you the authority to do it, so that's a power question?

Hodder Yes, but if the wider concept of endowment was to mean any income generating the land, those words would not be necessary, that's the proposition. If endowment has the widest meaning that simply land that generates income, or could be used for generating income, then nothing more needs to be said than the word 'endowment'.

Tipping J I thought that in *Auckland City Corporation and The King* Mr Justice Fair had virtually said that as much, [1941] NZLR 659. The passage I have noted is 'the object of an appropriation as an endowment for any purpose is reasonably clear. It's purpose is to ensure that the capital where the land funds or money so set aside should be reserved in tact and that the income derived therefrom should be available for a considerable period of time or perhaps as an assured source of income'.

Hodder Yes

Tipping J And I didn't think there could be much difficulty, the legislation having been passed against that sort of judicial background as to the idea here is not the method of acquisition but the purpose for which the land is being used, i.e. is income generating source?

Hodder Well that's the distinction that I draw from the use of the words 'endowment versus trust'. So the source of the land becomes relevant. That's the idea of the endowed gift the word 'endow' has it's connotations of gift. To treat it as simply being any land that's held to generate income removes the whole semantic part of endow from the equation.

Tipping J Well I have to say I think you're betting a wee bit against some of the authorities Mr Hodder.

Hodder That's not impossible Your Honour. So obviously enough the argument for the Foundation is that endowment has what we would have thought was in its reasonably orthodox sense that endowment is defined both by the method by which it is created and the purpose for which it is created, not simply the purpose or the use that it has made of the property, and there are ways of describing what is to be done if one's simply talking about income generation without any reference to where the source of the land

Tipping J There may be simpler ways of doing it Mr Hodder but in this field of rates and charities I would have thought that there was a reasonably clear trend of authority that when you're talking about purpose you're talking about immediate purpose, and the *Glebe* case, *St Mary's Glebe* in the Privy Council and so forth.

Hodder Yes but again that's related back to the particular words of the section.

Tipping J Well I'm not sure that you can say that the conclusion was driven inexorably by language. I would have thought it was a connotation of the concept of purpose for the purpose of charity, law and rates. I would have thought with respect there was quite a strong back down of authority limiting purpose to actual usage rather than revenue generation.

Hodder Well we'd say that's because all the Statutes that material comes from are Statutes framed in terms of use.

Tipping J You say those can all be distinguished on account of the precise language of the relevant statutory provision?

Hodder Precise perhaps overstates it, but yes they all use the word 'use' or 'occupy', yes.

Tipping J Yes, and your trump card is the addition of the word 'owned'?

Hodder Well I think my trump card is the word 'held' which precedes the word 'owned'. In the 1910's and 20's we get cases like *Wanganui Burrough* which take a very narrow view about what is there. The *Wanganui* case itself is an example and it says 'we think use has got a very narrow scope for it and as I think as common ground the purpose of the 1931 Amendment was to widen what was a very narrow interpretation of use that came from cases such as *Wanganui*, so the language moved from 'use' which is the old exemption before 1931 to 'held' etc, which is the formula that survives up until 2002. It's an expanding proposition. It was meant to be expansionary. So it's a deliberate departure from the language of use which was in play before 1931. The cases that His Honour Justice Tipping refers to use that very precise language which the Statute moves away from at that point, so that's why we see those cases as not being particularly of assistance.

Tipping J You say that the move from 'use' to 'held' with the same conjunction for the purposes of is the key shift?

Hodder I do.

Tipping J Yes, because otherwise you're precisely caught aren't you by the authorities like *St Mary's Glebe* and so on?

Hodder That's one of the consequences of it, yes.

Tipping J Yes.

Hodder But the other consequence is you don't get away from *Remuera* or *Wanganui*, those very narrow interpretations which seemed quite difficult in their context.

Tipping J Right, thank you, that's very helpful Mr Hodder, thank you.

Hodder So that's the argument. Now I think I was going back one stage further to talk about the 1885 Act for hopefully only a minute.

Elias CJ I'm sorry I'm a bit slow on this. I'm thinking about the uses of endowment in this earlier legislation. As I indicated it seems to me that you have to have distinct treatment for trusts, reserves, vested as reserves and endowments when you're talking about the power to use land in different ways and in particular to dispose or to lease of it because otherwise you don't have a source of power. It seems to me however that held as an endowment is a shorthand which allows you to use it, because some of the land you might hold on trust may well be land that you need for the purposes of your institution, but if you're holding it as if it were an endowment then it seems to me that it makes perfect sense for it to be held as an endowment. I'm just wanting to know if there's anything else you want to add about the emphasis you're placing on the use in the s.20, 21 context of endowment as a distinct concept, and then the later use in relation to rating, because I'm still struggling for any policy reason why land should only be exempt if it was acquired by way of endowment as opposed to whether you're treating it as a source of endowment.

Hodder I don't think this is going to be an entirely

Elias CJ It is probably the most incoherent question Mr Hodder.

Hodder No, no, no this maybe a complete answer. There are perhaps two aspects of it. One is the concept of land that is actually used that was somehow gifted to the Institution in the first place, so it's not being used for income generation purposes but is actually being used – the sort of a school site versus the school farm, deserves a distinction. That seems perfectly sensible and we'd say that our interpretation allows for that.

Blanchard J And yet they had to say that specifically in s.71(3) of the 1926 Act. I mean it may have just been a precautionary statement but felt it necessary to say it should not be deemed to be an endowment.

Hodder Within the meaning of the section which relates to the prohibition on sale in 2. It's a slightly odd proposition and I can't fully explain the policy explanation behind it but as I see it what it's trying to do is say that if it is being used as a site then for the avoidance of doubt it's open to be sold, and it's not something

Blanchard J It rather suggests that the word 'endowment' had a wider meaning. Well if it weren't for s.72 being in existence and drawing distinctions between the reserves, endowments or trusts, which is the Chief Justice's concern, then I would have had difficulty disagreeing, but my proposition is that 71 in a sense is a full avoidance of doubt provision in 71(3) and that the distinctions in 72(3) are significant. Now in terms of Your Honour's question, the first proposition is that if the land is being actually used it may come out of the endowment category but that the paradigm of endowment that we were able to find as we try and get to the bottom of, or put together what I've been describing as a jigsaw, is those early 19th Century gifts of land for schools. Not gifts, they were held as reserves. If they were to be rated that was a question that didn't concern the person on whose behalf they were an endowment. They were the donors, or the issues related to the donor rather than to the donee's rating status and that is what I apprehend as being preserved in the 1931 amendment and in the 1935 amendment and what we've got is sort of the appendix in the medical sense of the exercise still lurking around in our clause 5 exemption. That's where we come from. But what we resist as best we can is the proposition that the whole concept of endow and the concept of a gift as where it came from, which is of course at the essence of the 19th Century Land Endowments, there's no consideration for a meaning of that kind, is simply to be translated into income generation – full stop. We say that doesn't pay sufficient attention to the choice of that word, and the

Tipping J In Charities law generating commercial revenue was not in and of itself regarded as a charitable purpose was it?

Hodder In the early authorities, that's fair.

Tipping J Well in any authorities.

Hodder Well the early authorities are the ones that set that pattern.

Tipping J So when you're talking about purposes in charity context, meaning essentially charitable purposes, I have some difficulty in seeing how the

purpose of the use of this land was within the connotation if you like of a charitable purpose.

Hodder Well there is legislation, the English legislation I think refers specifically to the terms charitable purposes. What we get in our case is the Statute that says these purposes are charitable. That's what the Foundation

Tipping J Yes of course

Hodder And then describes them in the most general terms.

Tipping J You have that protection by Statute, but in this different context when one's trying to construe it against the sort of background of the approach to these sort of matters through the cases, and I daresay some of the text, then I think I can see clearly the distinction between immediate use and generating revenue, and I'd be surprised if that wasn't what the whole thing is really driving at.

Hodder Well the first proposition we have no difficulty with, which is absolutely correct and consistent with our argument that direct use is not of itself and the authorities established it does not include generative revenue.

Tipping J But you have to then full back on owned.

Hodder Exactly, well that's what it's there for we say.

Tipping J And it's there because, clumsily they just added it without reflection if you like on account of the shift from occupation to ownership as being the rating base.

Hodder Well we, obviously we take a slightly different view which is

Tipping J You must do, you must do, and I'm putting to you that that seems to be the most likely explanation for this and they weren't endeavouring to completely expand or abandon the previous consistent trend between direct use and indirect use if you like.

Hodder Alright, well the historical response is that up until 1931 use was the test and that's where you get those

Tipping J But use is still the test. It's the

Hodder It's one of the tests we say.

Tipping J It's the 'owned' or 'used' that held as you were voting with me a few minutes ago, only comes in in relation to endowments.

Hodder No, that preface is the exemption, it also refers to the endowment itself.

Tipping J But the primary wording is owned or used isn't it?

Hodder Not in the 1931

Tipping J No, I'm talking about the current legislation.

Hodder What we say is that held occurs twice in the pre-2002 exemptions from 1931, so 1931 says held or set apart etc or required and not held as an endowment, so we say the first held was translated in 2002 into owned or used.

Tipping J Well I'm particularly interested in the present wording against the historical background of course, but at the moment you have the unfortunate position that used, it's not held twice, it's owned and used in the first place and then the exception from the exception is held as an endowment.

Hodder Well actually in the current one it just says as. It doesn't use the word 'held' either.

Tipping J Oh well sorry, I beg your pardon, well it's worse from your point of view.

Hodder I think probably in terms of wanting to discuss it with Justice Anderson, there's probably an implied held there which really means owned or used to be consistent of the language, so what we've got now is owned or used rather than held, probably in both places, but for the purposes of the direct response to Justice Tipping it's we say is that in 1931 you move from use to held – that's meant to be deliberate expansion and in 2002 there's a how successful translation of held into owned or used and gives alternatives which are the disjunctives on which we base our main argument.

Tipping J In 88, what was it, just remind us?

Hodder Saying it was held.

Tipping J Held.

Hodder Yes, 2002 is the first time we see owned or used.

Tipping J And back to uses again?

Hodder Yes, and we say that in the sequence we've been going through that for whatever reason that was meant to simply be a translation from held, or to

be equate to held and the part I have to say I'm basing myself on the proposition nobody intended to change anything. So we say the change that's critical is not 2002. In fact we say 2002 is no change. The change is actually 1931 in general terms and 1949 as far as the Foundation is concerned, because that's where you get away from the use factor which is what we would say totally influences the earlier jurisprudence, including the English cases, and we move from there to held which has the connotations of ownership. So for example in, and I think it's the *Wanganui* case, the Judge says ownership has never been part of the test for rating exemption. So what happens, the Legislative parks an Act that says held is sufficient, so ownership does become part of the test.

Anderson J As it stands at present a public-spirited person who says 'use all my land for your purposes' is exempt from rates?

Hodder Yes. Now, why that should be exempt from rates, and why, partly raises the alternative which I have to face up to and which is a difficulty that can't be fully explained but nor could everything else in this pattern of legislation, which is you then have the distinction between land which is general income, which has always been owned by the Foundation in our case, and land which has been gifted which we say is an endowment generally, legislation being outside it. So how do we explain that anomaly? The only explanation that we can give is that there is an oversight but what was designed to be achieved was to avoid that scenario that land of the kind that had been vested in Education Institutions of the 19th Century was somehow by accident removed from the rating base in 1931. The 1931 Act was clearly designed not to have that result and what we have right through to now is some legislation kept in for drafting caution which has no current function but was reflecting that particular perfectly sensible decision back in 1931, so that's the core proposition which have the core changes and the 1931 change. From the Foundation's perspective the 1935 Act is a kind of a hybrid to avoid doubt because it was thought it was under previous legislation and then it becomes consistent with everybody else more or less in 1949. And then the odd thing in some ways is that when the rating exemption goes out of the 1963 Act and goes into the Rating Act 1967, it then takes back the subject to endowment proposition which is by then gone from Educational Institutions, or at least it's gone from some of them. Now I'm not sure I made myself clear on that last proposition. Can I just say that in terms of whether the endowment qualified things, in 1949 endowment qualified schools, universities and the Foundation. That endowment exception applied to all three of them. For reasons that we don't have an explanation for and it isn't obvious to us, in 1967 Universities ceased to be subject to the endowment exception but schools and the Foundation remained subject to it. In 1988 Universities were still free from that exception, and schools and Foundations remained subject to it. In 2002 Universities were again

free from that endowment exception but schools also became free from the endowment exception, but the Foundation remained subject to it. Now I mention that because that's the historical sequence as we read the Statutes. What I can't tell you is what the logic of it is, which in part takes me back to the proposition that one should read the current exemption as it is and say clearly the Foundation owns the land. If one takes the 2002 Foundation Act, the ownership is for its purposes and this is not land that was gifted by anybody, therefore the endowment exception is irrelevant. So the simple answer is that once we go backwards into the historical context then it gets we say much, much harder, if only because there's this large volume of material which might tough upon it. Now we've probably covered much of what there was to cover. I'm conscious that others are entitled to have something to say to Your Honours about all these matters. I was proposing to go very quickly through our written synopsis and then have a quick look at the Court of Appeal judgment and I'm happy to pick up any points from a previous discussion at this discussion at this stage if that's more helpful to Your Honours.

Elias CJ Yes, Mr Hodder emphasise anything you want to but we have of course read your submissions.

Hodder I understand that Ma'am. So the chronology on page 4, there's nothing to add to that except perhaps in terms of the updating affidavit that was provided in Mr Homes. It sets out the 2005 and 2006 Foundation annual reports and the difficulties that the Foundation has in kind of holding the thing together, not relevant to the statutory interpretation exercise, except insofar that that must have been understood we say by Parliament in enacting an exemption in the first place. There was always going to be a need for this sort of Institution to have the benefits of an exemption such as this, and clearly that Parliament contemplated that there would be revenue from property - that's clear from all the legislation. In s.3, I don't think I need to say anymore about the approach to interpretation of Statutes, although one understands that perhaps two generations ago hostility to tax impositions is no longer a part of the equation. The general proposition that the taxpayer's entitled to the benefit of the doubt or there's elegantly a kennant against doubtful penalisation is not just a sort of a rich person's charter for escaping taxes; it actually has a rule of law foundation that says 'before the State can exact a tax, including a rate there needs to be clear law.

Tipping J Sorry Mr Hodder I just wanted to engage the Chief Justice for a moment and I might have rather rudely distracted her from the point you were making.

Hodder Well of course Sir, the proposition I was making was that although one suspects there might be a degree of disrepute among the idea that there

was a benefit of the doubt for taxpayers and that taxpayers trying to avoid taxes have not got the highest moral abrogation in current times, there is a rule of law underpinning to it which is that before any kind of charge can be imposed against somebody's property there has to be clear law to that effect, and we say that the Foundation is entitled to the benefit of the lack of clarity in this exercise on that rule of law Foundation, not just because it's the Foundation on the rule of law basis. Obviously enough related to that is the point we make on para.3(11) which is that if there was doubt about it, which we say there is, and which we say must follow if endowment has the narrow and we would say more traditional meaning that we adhere to, then the answer if there was a problem is for it to be fixed by some amendment to the legislature, not to in our submissions stretch the definition of endowment. In terms of purposes which I have already discussed saying that we say the provisions in the act and I've drawn attention to the 55 Act which carried through, are indicative of the purposes of the Foundation for the purposes this appeal has firstly under the 2002 Foundation Act, they're all deemed to be charitable, and secondly they include the widest scope for making provision to achieve the kinds of, or provide the kinds of services which the Foundation is concerned with, and as Your Honours I think will have picked up perhaps from the affidavit in particular, what's happened with the way the Foundation provides services is that it has moved a way from a residential school, which was a 19th Century approach to a proposition where if we look at the Foundation's 2002 Act, there is a range of facilitative services, including advocacy and a range of other things that are not land based. They have to be funded but they're not land based in the way they traditionally were, and I recognise that cuts two ways. One is to say the Foundation no longer needs the exemption; the other is that the Foundation does need the exemption because the world has moved and the service it needs to provide are not exclusively land based as they may have been at the outset. All the cases that are referred to in the Courts below and in the things we say are explicable on the disjunctive analysis that we provided. The case that gets most emphasis is the *Polish Historical* case, the decision of Justice Wilberforce, and therefore of interest in his brief time as first instance Judge and because he was obviously Richard Wilberforce, but the case is one which we say depends again on the context of the legislation which is why we provided the whole of s.8 of the English Act in the supplementary bundle volume 3 because if one looks at it the particular exemptions all have connotations of activities and actual use. That's the context in which Justice Wilberforce undertakes his analysis in the *Polish Historical*. At no stage does he need to draw a distinction between ownership and use and so we say that can't be taken any further. If I can then turn but briefly to the Court of Appeal's judgment, most of the arguments and discussions that we've had thus far today picks up most of the points that were raised in the Court of Appeal's reasoning. It's a thoughtful judgment as I said at the outset. We say that it correctly

recognises this is not at all free from doubt but obviously we're here on a basis that the doubt that it's not free from, went in the wrong direction. At para.31, which is part of the foundation of the way in which this judgment from a Court of Appeal looks at the purposes etc aspect of it, the Court of Appeal judgment refers to s.158, the rating, and then refers to the 1931 amendment and notes that's the first time that an endowment appears in the legislation and the point that I've been attempting to make to Your Honours thus far this morning, is that the important point that has to go with that is that it's also the point where one moves from use to held, so the endowment as it were is a cap on the hill to change and that doesn't as we see it factor into the reasoning in this judgment. At para.33 there's reference to the removal or the disappearance of the endowment, the combination of 32 and 33 is to note that the endowment exception or exclusion is limited in the 1988 Act. In fact as I indicated to Your Honours earlier, there's this gradual transition so by 1967 Universities have lost the endowment qualification, but it's only in 2002 that schools lose the endowment qualification, and it survives on we say as a relic in relation to the Foundation. At para.42 there is a point which we'd say has some rule of law implications as well where as you see the Court of Appeal refers to the Foundation's submissions on the Local Government Rating Bill, going back to the point that Justice Blanchard and Justice Tipping were querying with me earlier, and say it's not a controlling consideration, the fact that it was enacted in that form can't be treated as legislative acceptance of the Foundation's belief, and we can't attribute to the legislative precise knowledge of the purpose which the land is being used. With respect to the Court of Appeal we say that you don't need to go that far to make the point that everybody assumed as we say one can assume that no change was intended in the 2002 Act, then the correct approach is that described in the *Boland* decision which is 'if now people think that what was understood then was wrong and that there should be rating, that's a matter that should go back for amendment to the Schedule. And so in the concluding part of the judgment, paras.56 through to 59 is the sort of a core part of the reasoning of the Court of Appeal and the proposition that one reads the words of the clause as a whole, at one level that's obviously what one does, but another level if that doesn't of itself provide an obvious answer then one has to go deeper. When one goes deeper the reasoning very much hinges on the endowment exception and our proposition is that the endowment exception shouldn't drive the definition for the reason which as I've said more than once, there is a straightforward analysis that says there is ownership and ownership is for purposes which are recognised as charitable by Statute and this is not land that was gifted. Under those circumstances we say that the history of rating exemption provides a depth on which one can swim but not necessarily clear water in which one swims and therefore the plain approach is perfectly sufficient. Now Your Honours that probably is

sufficient, taking into account the fact Your Honours have read our written submissions, and unless Your Honours have specific questions?

Elias CJ No thank you Mr Hodder, thank you. Yes Mr Galbraith.

Galbraith Thank you Your Honours. It would be obvious that if I can with respect adopt some of the points which the Court has made to my learned friend, and I'll try not to repeat those, and the Court also has the advantage of the written submissions which Mr Palmer is principally responsible for. I'm responsible for not picking up a couple of typos in the submissions but that's about all the credit I can claim for them.

Elias CJ You're an editor Mr Galbraith?

Galbraith I'm a bad editor I'm afraid Your Honour, so I won't repeat those because Your Honours have read those and in my respectful submission they do comprehensively deal with the issues which my learned friend has raised. There are two issues which determine, or can determine, the result. There's the issue which Your Honours have largely debated with my learned friend which is the effect of the 'except as an endowment provision' and my respectful submission is that the Court of Appeal decision in that respect is correct and should be upheld for both the reasons the Court of Appeal have expressed in that with respect the more detailed reasons which some of Your Honours have put to my learned friend today. The second issue is what does 'for the purposes of' mean and we dealt with that in our written submissions and if I can just say briefly in respect of that that as our written submissions say for the purposes one has to consider the use, otherwise it has no content, one has to look at the use and our submission, and it's consistent with the point that His Honour Justice Tipping put to my learned friend, is that the purposes have to be the charitable purposes of the Foundation and that's consistent as His Honour Justice Tipping put to my friend with the law is to charities which has existed since Queen Elizabeth I, where

Tipping J It's not quite as simple as that is it Mr Galbraith, because if you're a charity and you own property and you let it out for the purpose of using the income for your charitable purposes, then you're not outside the scope of charitable activity.

Galbraith No.

Tipping J It's more that in the specialised field of rating and in an analogise exemptions there's a narrower view that has been taken, a purpose.

Galbraith Yes Your Honour and you'll find it possibly useful. Your Honour's probably looked at this already but in our small bundle of authorities if

Your Honours wouldn't mind going behind tab 15. It's a very small bundle of authorities Your Honour because my learned friend was courteous enough to put almost everything in their two larger bundles. Just the respondent's bundle of authorities is all it says.

Tipping J Oh yes, thank you.

Galbraith Behind tab 15 there's a judgment of the Court of Appeal, a judgment given by Justice Somers who I think I think in my respectful submission was well recognised for having a significant chance for background. It's in relation to land tax exemption arising out of *Dunedin Central Methodist Mission* there and Your Honours will see in the first column of the judgment he sets out s.27 of the Land Tax Act and in s.27(1)(h) Your Honours will see 'land owned by or in trust for any society or institution established exclusively for charitable purposes, and not carried on for the private pecuniary profit of any individual, if the land is used as a site for the purposes of that society of institution' and then one goes across the page to 6092 and in the first column again – this is really the point I was just illustrating, the second to land paragraph on that lefthand column 'the distinction between the user of land for charitable purposes and the derivation of rent or profits from it is well recognised and has been discussed in a number of cases including, then he sets out authorities, refers then to the *Oxfam* case – this was a case where *Oxfam* were using shops to make profits for charitable purposes and the question was whether they were wholly or mainly used for charitable purposes and he then sets out Lord Cross's speech and you'll see in the second extract of that speech, two thirds of the way down the righthand column in 6092 His Lordship said 'the wording of s.40 etc' and then in the last

Tipping J I think the passage immediately above that is very helpful too Mr Galbraith frankly

Galbraith Yes Sir, yes Your Honour

Tipping J Where he draws important distinction.

Galbraith Distinction

Tipping J Yes.

Galbraith And then he goes on the last sentence of the second passage 'so the answer must be I think those purposes or objects the pursuit of which make it a charity – that is to say in this case the relief of poverty, suffering and distress, and that in my respectful submissions sums up the context in which this legislation

Tipping J Well I think with respect the middle of the previous passage 'yet this subsection clearly contemplates by its reference to purposes, because all purposes must be intra vires that a charity may be properly using premises which it occupies for the purposes which are not 'charitable'.

Galbraith Yes Your Honour.

Tipping J That's the key point with respect it seems to me, that that's the distinction between whether it's charitable for present purposes as opposed to generally charitable.

Galbraith Because all purposes must be intra vires and the Foundation in my learned friend's submissions recognised this and they say well they have then got to carve out a category of intra vires but not for the purposes of, because otherwise of course everything just collapses into the owned by the Foundation

Tipping J What I think is implicit in Lord Cross's speech is that for the purposes in a charitable context necessarily cuts down the concept of general charitable purposes, because otherwise it would be redundant as Justice Wilberforce said in the *Polish* case.

Galbraith Yes it just collapses all into one

Tipping J Yes.

Galbraith And what the Foundation in it's submissions tried to do was to try and find some categories that might be intra vires but not for the purposes of, because otherwise as I say it doesn't make any sense, you just owned, and they've done that in 4.19 of their submissions and the Court of Appeal thought that they were unlikely, perhaps just use that term, but it of course raises the question which Her Honour The Chief Justice asked my learned friend earlier on, well what's the policy reason why if these categories could exist, why these would be rated and income, fully income-producing land wouldn't be rated, and it's the same question of course which Your Honour The Chief Justice asked

Tipping J But there is an oddity Mr Galbraith that if for the purposes of, has to be so limited, you don't need the endowment exception.

Galbraith Well you may Your Honour. We deal with it in our submissions in that

Tipping J Well you've raised some cunning examples Mr Galbraith within the most general of terms. It's otiose.

Galbraith Well you can come up with examples Your Honour and I think we have in the written submission come with a fair example where the land might be owned by the Foundation but may be let to say a Braille workshop or something like that, so the land isn't owned for the Foundation's purposes at that stage and the *Glebe* case indicates that you can have that situation once it's leased out, and so one can construct those possible situations Your Honour which don't make an otiose but the thought that Parliament sat down and thought of those sort of fine exceptions Your Honour I think is unrealistic to contemplate and therefore my respectful submission is it's much more likely that it was the broad concept of the charitable objectives, what Lord Cross said are the real charitable objectives of the Foundation that Parliament had in contemplation when it used the phrase 'for the purposes' and of course 'for the purposes' goes back to the dim dark days of the existence of the exemption. That's a phrase which hasn't changed, whether its been used or held or owned or used, it's always been for the purposes of and in my respectful submission it takes the colour from those judgments which Justice Somers' is referring to in that case.

Anderson J Is this the belt and braces response that Mr Hodder recognised in relation to the 1935 Act? It's the sort of compendious concept.

Galbraith Yes, well the 1935 Act in my respectful submission is a very good starting point in the sense to see where things have got to today because that arose as the Act itself says, out of a dispute as to whether the Foundation's land was exempt or not exempt and it was an attempt to resolve what should be and what shouldn't be. And so you get there the use of the term 'actually used' and then a description of the various, quite a specific description of the various uses, which are all uses within that very direct charitable purpose of the charitable objects of the Foundation, and then

Anderson J But the Act was a private Act wasn't it, and it wouldn't be surprising if it had the doubling up of concepts that you would get in a private document? It was probably drawn up by the parties.

Galbraith Yes, probably too many lawyers involved Your Honours. But those are the two issues. Going back to the endowment issue if I may for a moment. In my submission it's clear the endowment provision came through the educational stream and one can't be certain of course whether it was simply endowments of the *Napier* type or not that are involved, but His Honour Justice Blanchard pointed out that in section 71, ss.3 of the Hospital and Charitable Institutions Act you get that specific reference to, sorry, oh it was the 19, it was the 1931 Act, the 1926 Act. You get the specific exemption in relation to not deeming certain land to be an endowment. But the 1935 Act in my submission is a good starting point for seeing and my learned friend went backwards through the Acts but normally one starts at the beginning and goes forward to see what

Blanchard J Depends on where you want to get.

Galbraith Well I understand why he did it but I think it's safer if one starts at the beginning and sees how these things develop and my learned friend is quite correct that there's the difference in 1931 and 1949 between the previous use of the term 'use' and then the term 'held' and he referred to the *Wanganui* case and what happened in the *Wanganui* case was that the Education Authority or the *Wanganui School* held the land but they hadn't yet got around to using it for a school and a narrow view was taken of the exemption, so the amendment which was the subsequent legislation changed to the term 'held' but still for the purposes of, so while they held it and that obviously got over the *Wanganui* problem, it still had to be for the purposes of and in my respectful submission comes back to the same point I made about the charitable objective. So in no time did the phrase 'for the purposes of' change. Perhaps just while on that theme His Honour Justice Tipping put to my learned friend that the reason for the change of wording in the 2002 Act 'to own' is of course one had a change in the fundamental base upon which rating was then being, liability to rating arose, previously it was occupation now it's ownership and well one is speculating to some extent, it seems pretty evident that's the reason that the concept of ownership has then emerged in Schedule 1. It's also relevant in relation to considering whether some of the cases which the Court of Appeal were referred to and which we've referred to in our written submissions, their relevance, because my learned friend says oh well most of them use the term 'use' and the *Polish Historical Society* case that Your Honours will recall he distinguishes on the basis that they used the term 'occupied', but if you look at the case it's not occupied as a fact, it's occupied in the legal sense defined under the Rating Act there, it's legal occupation, just the same as ownership is under a Rating Act legally defined. So the issue in that case wasn't 'did the occupiers' a fact or not, they did occupy legally the premises but Lord Wilberforce considered were the premises occupied for the purposes of the Society or not, and so his concentration and his judgment which you'll see is on that question, or it was, 'was it for the purpose' because it was simply producing rent. It was like the *Oxfam* case. The *Oxfam* case comes later but it was at that same approach and therefore it didn't fall within the exemption. Again just staying with the 2002 Act for a moment, and I'm trying not to repeat points at which the Court has made to my learned friend, but it is in our respectful submission significant that the terms 'owned or used' which appear in clause 5 of the First Schedule, then grammatically must be applied to the 'except as an endowment' provision and so one has land owned except as an endowment or land used except as an endowment, and so the owned or used comes also owned or used as an endowment which in my respectful when one thinks of used as an endowment drives one towards the interpretation which we've suggested, that used as an

endowment can only mean not how it was historically acquired, it's how it's being used now and the concept which comes out of that is that it's being used for investment purposes to derive income, otherwise it's difficult to see how any meaning can be given to the concept of used as an endowment. And so our respectful submission is that the way clause 5(e) operates is that it's a temporal direction owned as an endowment now, used as an endowment now and again as we raise in our written submissions, there would be no policy sense in our respectful submission in differentiating between land which had been acquired as an endowment and land which was now being used for investment purposes, rating the land that had been acquired as an endowment, say 100 years ago, but exempting the land which was now being used for investment purposes akin to an endowment. The policy suggestion which has been raised is that there may be limitations in terms of the endowment geographic or whatever, but of course those limitations could apply to land which had been vested in the Trust.

Tipping J So the point is this is it Mr Galbraith that the only logic of the policy is to focus on present use?

Galbraith Yes.

Tipping J Rather than on method of acquisition?

Galbraith Yes.

Tipping J Because that is incidental if you like to what must be the purpose of the exercise.

Galbraith Yes, and one gets from the phrase 'for the purposes to' indicates we're talking about what's happening now? What's this land now being used for? Is it being owned and used for the purposes of? Is it as an endowment, owned or used as an endowment now? How it was acquired historically difficult to see that there could be any policy significance in that in respect to whether it should be rated on or not and as I say the only suggestion made in the Foundation's written submission is that, and my learned friend repeated today, was that there may be some geographic restriction for example only in the Canterbury area, but you could have that in relation to land which had been vested in trust in the Foundation. You could have all sorts of restrictions also. So that in our respectful submission is not relevant. I don't want to go through our submission in any detail unless Your Honours are going to be helped by that. On the other hand I don't want to sit down just because it's getting near 1 o'clock, but would it be helpful if I go quickly through the submissions and just hit the high points.

Elias CJ We don't think unless there's anything Mr Galbraith you want to emphasise that there's any need for you to go through the submissions.

Galbraith As I said I think Mr Palmer did express them more clearly than I probably would have, so unless Your Honours have any questions, that's a very very short submission from me.

Elias CJ No thank you. Mr Hodder do you want to be heard in response?

Hodder Very briefly I begin with the circumstances, although I suspect they were applying more to the bench than to my learned friend. In terms of the 'use for a purpose' proposition, obviously we say that you make 'the use' proposition redundant if you treat the purpose as meaning 'use', and the response that caught our eye was the one that says 'well that language still has work to do if the Foundation were to let its property to opticians, and we thought that if one if looking for some policy threads to this, it doesn't actually make much sense. And why does it make any difference if you let it out to opticians as against letting it out to medical practitioners generally as against letting out to accountants or heaven forbid, lawyers. So we say that if one is going to look for policy that kind of example doesn't really take us very far, which then leaves the bare problem which raises again that if purpose means use then use becomes otiose in the phrase 'owned or used' and so in respect of the *Oxfam* discussion by Lord Cross, then our proposition which I hope is clear already, but that has to be related to the statutory context in which it was made. There isn't as it were a common law principle that says there's a distinction between user and investment. It is driven from the particular legislation that has been addressed in that case and also in the *Land Tax* case where the critical word is used. And the only other thing that I perhaps should mention is that since one of Your Honours raised the question, it possibly was Justice Blanchard, my learned friend Mr Smith has extracted a copy of the explanatory note to the Local Government Rating Bill which we can make available but it does say as part of the introduction on page 2 'the existing categories of rating exemption will remain' a sort of a central proposition that came from that. And the rest of it Your Honours have heard at least enough from me.

Elias CJ Thank you very much Mr Hodder, Mr Galbraith and all counsel for your excellent submissions and a most enjoyable hearing. We will reserve our decision.

1pm Court Adjourned