

SUPREME COURT OF QUEENSLAND

CITATION: *Cassels & Anor v Brisbane City Council* [2009] QSC 124

PARTIES: **PAUL KEVIN CASSELS AND DARRYL CLIVE
RUSSELL PENFOLD on behalf of themselves and all
other members of the Brisbane Association for Rates
Equity Inc who are owners of lots in community titles
schemes within the City of Brisbane**
(applicants)

v

BRISBANE CITY COUNCIL
(respondent)

FILE NO/S: BS927/09

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court, Brisbane

DELIVERED ON: 28 May 2009

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 25 February 2009

JUDGE: Douglas J

ORDER: **Application dismissed.**

CATCHWORDS: REAL PROPERTY – RATES AND CHARGES – RATING
OF LAND – LEVYING RATE – GENERALLY – where the
Brisbane City Council passed a resolution adopting a budget
in which it adopted a differential general rate incorporating a
parity factor relating to premises contained in a community
title scheme – whether the Brisbane City Council lawfully
charged residential unit owners a higher level of rates
depending on the value of the land on which the units are
constructed.

Acts Interpretation Act 1954 s 14D

City of Brisbane Act 1924 s 48, s 49, s 50, s 51, s 81, s 82, s
83

Statutory Instruments Act 1992 s 20

Alan E Tucker Pty Ltd v Orange City Council (1969) 90
WN(Pt) 1 (NSW) 477 and 484 cited
*Australand Land and Housing No. 5 (Hope Island) Pty Ltd &
Ors v Gold Coast City Council* [2006] QSC 332 cited

Ex Parte Fairfield Municipal Council; Re Cousins (1953)
LGR 38, 42-43 cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986)
162 CLR 24 applied
Project Blue Sky Inc v Australian Broadcasting Authority
(1988) 194 CLR 355, 388-391 at [91]-[93] referred
Shanvale Pty Ltd v Livingstone Shire Council [1999] QCA
483 at [85] cited
Sheffield City Council v Graingers Wines Ltd [1977] 1 WLR
1119, 1125 referred
Sunwater v Burdekin Shire Council [2002] QSC 433; 125
LGERA 263 at [23]-[26], [30]-[35] and [38]-[40] applied

COUNSEL: GA Thompson SC and BG Cronin for the applicants
SL Doyle SC and DG Clothier for the respondent

SOLICITORS: Purcell Chadwick & Skelly for the applicants
Allens Arthur Robinson for the respondent

- [1] **Douglas J:** This is an application for a declaration that a resolution by the Brisbane City Council passed on 19 June 2008 adopting a budget for the year ending 30 June 2009 in which it adopted a differential general rate incorporating a parity factor relating to premises contained in a community title scheme is unlawful and invalid. Stripped of the jargon, the question is whether the Council may charge residential unit owners a higher level of rates depending on the unimproved value of the land on which the units are constructed.

The setting of rates

- [2] Rates are set by the Council annually under s 48 of the *City of Brisbane Act* 1924. They may only be made for a financial year by resolution at the Council's budget meeting for the year.¹ In this case a differential general rate was said to have been made and levied. Before that can be done, rateable land must be categorised into two or more categories under Div 4 of the Act.² The definition of "differential rate" is:

“**differential general rate** means a rate, other than a special rate, made and levied equally on the unimproved value of all rateable land in the city included in a category decided by the Council in levying the rate.”

- [3] A differential general rate may be made and levied on a lot under a community titles scheme as if it were a parcel of rateable land.³ The relevant sections of Div 4 of the Act include:

¹ See s 49 of the Act.

² See s 50(1) of the Act.

³ See s 50(4) and s 50(5) of the Act.

“81 Establishing criteria and categories

Before the council makes and levies a differential general rate for a financial year, it must, by resolution, determine –

- (a) the categories into which rateable land in the city is to be categorised; and
- (b) the criteria by which land is to be categorised.

Example –

If the categories decided by the Council for rateable land are residential land, commercial and industrial land, grazing and livestock land, rural (sugar cane) land, rural (other) land, sugar milling land and other land, the criteria for the categorises might be as follows –

- (a) for residential land – land used for residential purposes in particular urban centres, rural localities, park residential estates and coastal villages;
- (b) for commercial and industrial land – land used solely for commerce and industry in particular urban centres and rural localities, other than land used for manufacturing sugar or another rural production industry;
- (c) for grazing and livestock land – land –
 - (i) used, for commercial purposes, for grazing and livestock; and
 - (ii) to which a concession under the *Valuation of Land Act 1944*, section 17(1) applies;
- (d) for rural (sugar cane) land – land used for producing sugar cane;
- (e) for rural (other) land – land that is not –
 - (i) in an urban centre or locality; or
 - (ii) used for grazing and livestock; or
 - (iii) rural (sugar cane) land or sugar milling land;
- (f) for sugar milling land – land used for manufacturing sugar;
- (g) for other land – land not mentioned in paragraphs (a) to (f).

82 Identification of categories for parcels of land

- (1) After the categories and criteria have been determined under section 81, all rateable land in the city must be categorised by the council identifying the category in which each parcel of rateable land is included.
- (2) The category in which a parcel of rateable land is included may be identified in any way the council considers appropriate.

83 Specification of categories for parcels of land

- (1) If the council resolves to make and levy a differential general rate, the resolution must specify the categories in which rateable land is to be included.
- (2) Parcels of rateable land may be identified in whatever way the council considers appropriate.
- (3) The accidental omission from categorisation of parcels of rateable land does not prevent the making and levying of the differential general rate.

...

85 Notice to owner of categorisation

(1) If the council resolves to make and levy a differential general rate, a rate notice mentioned in subsection(2) must contain, or be accompanied by, a statement that –

- (a) specifies the categories of rateable land in the city and the criteria by which land is categorised; and
- (b) specifies the category in which the rateable land is included; and
- (c) informs the owner-
 - (i) that the owner may object to the categorisation of the land by giving to the council notice of objection, in the form approved by the council, within 30 days after the date of issue of the rate notice or such further period as the council allows; and
 - (ii) that the sole ground on which the owner may object is that, having regard to the criteria determined by the council for categorising rateable land, the land should have been included, as at the date of issue of the rate notice, in another of the categories specified in the statement; and
 - (iii) that giving a notice of objection will not, in the meantime, affect the levy and recovery of the rates specified in the rate notice; and
 - (iv) that if, because of objection made, the owner's land is included, as at the date of issue of the rates notice, in another category an adjustment of rates will be made.”

[4] The Council's resolution for the year ending 30 June 2009 addressed the making and levying of differential general rates in para 4(a) in these terms:

“4. DIFFERENTIAL GENERAL RATES

- (a) For the purpose of making and levying differential general rates for the *financial year* on all *rateable land* in the city, the Council determines that –
 - (i) the categories into which the rateable land in the City is to be categorised are –
 - (a) From 1 July 2008 to 31 December 2008, **9** in number, then from 1 January 2009 to 30 June 2009, **14** in number and
 - (b) identified by the ‘Category’ numbers of the Differential General Rating Table.
 - (ii) the criteria by which land is to be categorised as being in a particular one of those categories are specified in the ‘General

Criteria’ and ‘Specific Criteria’ columns of the Differential General Rating Table opposite the identification of the particular category.”

- [5] Categories under a differential general rating table were then set out. Categories 6 and 10 were particularly relevant to this dispute. They provided:

6.	Applies only where land does not fall within categories 1, 2, 3, 4, 5, 7, 8 or 9, and from 1 January 2009, categories 10, 11, 12, 13 or 14, or any deemed category under paragraph (e) (a) of Section 4	Land not included in: Category 1, Category 2, Category 3, Category 4, Category 5, Category 7, Category 8, or Category 9 And from 1 January 2009 Category 10, Category 11, Category 12, Category 13, or Category 14 or any deemed category under paragraph (e)(a) of Section 4
10.	This criterion will only apply where: the current use, or having regard to any improvements or activities conducted upon the land, the potential use of the subject land is solely <i>principal residential purposes</i> . Where the land contains a <i>dwelling unit</i> contained within a <i>community titles scheme</i> and otherwise meets the general criteria above, then this category will apply: (i) regardless of the City Plan 2000 classification of the area within which the land is situated and, (ii) only where the land	Subject to meeting the General Criteria: (1) Land to which the following <i>land use code</i> applies – 08 <i>community titles scheme</i> unit used for <i>principal residential purposes</i> . (2) The following land is specifically included in this category: <i>premises</i> that would otherwise be the <i>owner’s principal place of residence</i> but where the <i>owner</i> is incapable of occupancy due to ill or frail health and is domicile in a care facility, provided such

	represents the <i>principal place of residence</i> of at least one person who constitutes the <i>owner/s</i> of the land.	<i>premises</i> remain unoccupied by any other person/s
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”

[6] Paragraph 4 of the resolution then went on to provide:

- “4(b) The Council, using the criteria specified in the Differential General Rating Table identifies the category in which each parcel of *rateable land* in the City is included as the category specified in relation to that parcel of land in the document now tabled and marked “A”.
- (c) The Council determines that the Chief Financial Officer is the person authorised by the Council for the purposes of section 87(1) of the City of Brisbane Act 1924.
- (d) For the *financial year* the differential general rate is first calculated as set out opposite a category determined under (a) and specified in Table ‘B’ and made equally on the *rateable value* of all *rateable land* in the City included in the category.
- (e) The result of (d) shall then be multiplied by the parity factor corresponding to the differential category specified in Table ‘B’ to derive the differential general rates levied on an individual property.
- (e)(a) For the purposes of the application of Section 50 of the City of Brisbane Act 1924, if a property in a differential rating category (the “Original Category”) has a parity factor which is different from another property within that same Original Category, then to the extent necessary to establish the validity of any rate charged by reference to that parity factor, each property will be deemed to be in a separate category relevant to the Original Category and that parity factor.
- (f) Effective from 1 January 2009 and only in relation to *premises* contained in a *community titles scheme*, the parity factor referred to in Table ‘B’ and which forms part of the calculation of differential general rates shall be determined by reference to the following basis shown in table ‘A’.”

[7] Tables A and B referred to in that paragraph were as follows:

Table ‘A’

Band		factor 1	factor 2	
A	for each dollar of <i>rateable value</i> of the land upon which a <i>community titles scheme</i> is constructed up to and including \$1,000,000	0.0000	0.0000	plus,
B	for each dollar of <i>rateable value</i> of the land upon which a <i>community titles scheme</i> is constructed up to and including \$1,000,001 up to and including \$5,000,000	0.0110	0.0000	plus,
C	for each dollar of <i>rateable value</i> of the land upon which a <i>community titles scheme</i> is constructed up	0.0150	0.0000	plus,

	to and including \$5,000,001 up to and including \$10,000,000			
D	for each dollar of rateable value of the land upon which a community titles scheme is constructed in excess of \$10,000,000	0.0175	0.0000	plus,
	for each dollar of rateable value apportioned to each lot within a community titles scheme by reference to its interest schedule lot entitlement under a community management statement	1.0000	1.0000	
The parity factor referred to in Table 'B' is calculated to be the sum of factor 1 divided by the sum of factor 2				

Table 'B'

Category	Description	Differential General Rate (cents in the dollar)	Differential Minimum General Rate	Parity Factor
1	Residential – Owner-occupied	0.3472	\$414.32	1.0000
2	Non-Residential	0.8816	\$1,052.04	1.0000
3	Rural	0.3716	\$443.44	1.0000
4	Multi-Residential	0.5372	\$641.04	1.0000
5	Central Business District	1.1372	\$1,357.04	1.0000
6	Other	0.8816	\$1,052.04	1.0000
7	Residential – Non-owner Occupied or Mixed Use	0.4336	\$517.44	1.0000
8	Major Shopping Centre – Group A	1.0860	\$250,000.00	1.0000
9	Major Shopping Centre – Group B	1.1116	\$850,000.00	1.0000
The following Differential Rating Categories will have effect from 1 January 2009				
10	CTS – Residential – Owner-occupied	0.3472	\$414.32	Refer TABLE 'A'
11	CTS – Non-Residential	0.8816	\$1,052.04	Refer TABLE 'A'
12	CTS – Multi-Residential	0.5372	\$641.04	Refer TABLE 'A'
13	CTS – Central Business District	1.1372	\$1,357.04	Refer TABLE 'A'
14	CTS – Residential – Non-owner Occupied or Mixed Use	0.4336	\$517.44	Refer TABLE 'A'

[8] Paragraph 4(g) then provided:

“(g) Despite (e), the minimum differential general rate payable in respect of all **rateable land** in each category determined under (a) is that shown against its corresponding category in table 'B' above with the exception of any land to which Land use code 72 applies or which is otherwise exempt from minimum general rating under s 51(4) of the *City of Brisbane Act 1924*.”

Applicants' submissions

[9] The argument made by Mr Thompson SC for the applicants was that so much of the resolution as purported to impose a “parity factor” as an element in levying or making and levying differential general rates was invalid. They advanced that submission on the basis that a differential general rate had to be made and levied equally on the unimproved value of all rateable land included in a category, referring to the definition of “differential general rate”. From the definition the argument proceeded to s 50(4)'s terms, allowing a differential general rate to be made and levied on a lot as if it were a parcel of rateable land, to conclude that it had to be made and levied equally on the unimproved value of all lots included in a category.

- [10] To understand this submission in context it is necessary to bear in mind that, on the Council's submissions, the practical effect of the application of the parity factor is that the categories of community title schemes listed in Table B, because of the terms of para 4(e)(a) of the resolution, each contained several deemed sub-categories derived by reference to the rateable value of the land on which the community title scheme was constructed and calculated by the application of the parity factor.
- [11] The applicants' submissions drew attention to the effects of paragraphs 4(d) and 4(e) of the resolution which, on their face, separate the function of making the rate and levying it. Paragraph 4(d) refers to the differential general rate as being first calculated as set out in a category determined under paragraph 4(a) and specified in Table 'B' and made equally on the rateable value of all rateable land included in the category. Paragraph 4(e) then requires the result of paragraph 4(d) to be multiplied by the parity factor to derive the differential general rate levied on an individual property. The submission then was that the result of applying the parity factor was not "a rate made and levied equally on the unimproved value of all lots included in a category". Several reasons were advanced to support that conclusion.
- [12] First, it was said that the rate "made" in relation to a particular lot in categories 10 to 14 would, in most if not all cases, be different to the rate levied and there could not be two differential general rates, one made in one amount and one levied in a different amount. The second argument was that the effect of paragraph 4(e) was that the rates were not levied equally on the unimproved value of all lots included in a category. Paragraph 4(e)(a), it was recognised, sought to address the issue by deeming each property with a different parity factor from another property in the same original category to be in a "separate category relevant to the Original Category and that parity factor".
- [13] The applicants' argument was also that, when one reads paragraph 4(e)(a) of the resolution with category 6 in the differential general rating table, it appeared that the intention was that, when two properties in the same differential general rating category had different parity factors, one was deemed to be in category 6 and the other remained in the original category. I doubt that this is so. In my view the natural meaning of category 6 is that land falls into that category only when it does not fall within any deemed category under paragraph 4(e)(a). In other words, category 6 should be understood as it reads so that it applies "only where land does *not* fall within ... any deemed category under paragraph (e)(a) of Section 4"⁴, not that it applies when land does fall within a deemed category.
- [14] The submission proceeded to the conclusion that paragraph 4(e)(a) was an attempt to evade the fundamental precept that a differential general rate is a general rate applying equally to all rateable land in a category. Not all lots with differing parity factors could be deemed to be in category 6 and deeming a lot to be in another category was said to be contrary to s 81 requiring the categories to be determined for rateable land and the criteria by which they were to be categorised.
- [15] It was also argued that the categories had been set by reference to land use and that the Council had no statutory authority to create new categories or to re-allocate land to a different category according to criteria such as different parity factors.

⁴ Emphasis added.

- [16] The submissions proceeded to contend that the resolution took into account irrelevant matters by levying a rate not made and levied on the unimproved value of the lot levied but on it as affected by the unimproved value of the land on which the community title scheme had been constructed. Reliance was placed on what Chesterman J said in *Australand Land and Housing No. 5 (Hope Island) Pty Ltd & Ors v Gold Coast City Council*:⁵

“[36] In forming its opinion the council must not have regard to matters that are irrelevant and must not ignore relevant factors. What are relevant considerations are determined by the proper construction of s 971 in its statutory context. The factors which may be taken into account are those to be found in the subject matter of the section, its scope and purpose: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.”

- [17] In the same context my attention was drawn to the decision of the English Court of Appeal in *Sheffield City Council v Graingers Wines Ltd*⁶ where Scarman LJ spoke of parliament expecting and intending strict compliance by a subordinate authority with the conditions for the exercise of a power to impose a monetary burden on a citizen.
- [18] The conclusion, it was submitted, was that these were breaches of mandatory provisions of the Act which required the relevant part of the resolution to be struck down.

Submissions for the Council

- [19] The Council’s submissions on these issues addressed the issue whether the resolution was bad in form because para 4(e)(a) qualified para 4(a) by arguing that the resolution must be read as a whole. The submission was that, when that was done, it was clear that the Council had determined that, if legally necessary, each lot within each of categories 10 to 14 with a different parity factor constituted a different category. If that were not legally necessary, there were 14 categories. The submission went on:

“50. A resolution in this form does not fail to comply with any requirement of [the Act]. It evidences that the Council had some doubts as to whether the application of different parity factors required lots to be placed into different categories and evidences a desire to act lawfully (within power). However, the resolution is unequivocal in its terms and intention. It does not leave the determination of the categories to some later decision by the Council or some extraneous event. If lots within each original category with different parity factors are legally required to be in different categories for the making of differential general rates then the resolution has the effect of creating those different categories. The resolution also identifies the criteria for

⁵ [2006] QSC 332.

⁶ [1977] 1 WLR 1119, 1125 followed by Chesterman J in *Shanvale Pty Ltd v Livingstone Shire Council* [1999] QCA 483 at [85].

those different categories being the combination of the original category and the different parity factor. This is made clear from clause 4(ea).

51. The Applicants' case seems to be that in a circumstance where there is some legitimate doubt about the matter, the Council cannot pass a resolution which seeks to cater for that doubt. Such a construction would require that the Council must take a stance and take the risk that the stance is ultimately held to be incorrect. There is no such requirement in the [the Act]. Nor would one expect it in circumstances where the Council can only pass the resolution at its budget meeting and there is no capacity for the Council to later rectify a resolution which is invalid (and upon which budgeting decisions had been based)."

- [20] The Council characterised the process of making and levying a differential general rate as occurring in two stages: first, by the resolution making a differential general rate and determining the categories and criteria by which the land was to be categorised. At that stage the Act permitted it to identify parcels of rateable land in whatever way it considered appropriate⁷. Following the determination of the categories and criteria, the Council then categorised particular land in any way it considered appropriate. The breadth of those provisions was said to be demonstrated by Cullinane J's decision in *Sunwater v Burdekin Shire Council*⁸ where his Honour concluded:

"[35] It is the local authority which has the statutory function of determining whether a differential rating system should be adopted and if so, what are the relevant criteria to be applied in determining the relevant categories of land. Substantial latitude must be allowed a local authority in choosing such criteria for the purposes of achieving an equitable sharing of the general rate burden across ratepayers as a whole."

- [21] The levying of the rate occurred, it was submitted, at a later stage than its making, namely when the rate notices were sent out to ratepayers after the precise calculation for each individual lot had been made based on the average value of the lot applied to the differential general rate determined as a number of cents in the dollar in accordance with para 4 of the resolution. Mr Doyle SC for the Council characterised the resolution's effect on lots in community title schemes as follows:

"22. The effect of Table A is to calculate the parity factor itself by reference to the average rateable value of the land on which the scheme is constructed and the lot's lot entitlement. The reference to factors of this kind is normal in this context. A lot in a community titles scheme is by its nature an improved thing and the valuer-general does not determine an unimproved value for each lot. Rather, under the relevant legislation, the unimproved value of the lot is determined as

⁷ See s 83(2).

⁸ [2002] QSC 433; 125 LGERA 263.

its ultimate percentage interest in the unimproved value of the land on which the lot (and scheme) is constructed.”

- [22] In dealing with the argument that the Council had taken an irrelevant consideration into account he submitted that there was no limitation apparent in s 48, which requires the making of rates, or in the meaning of “differential general rate” obliging the “cents in the dollar” figure determined by the Council to be derived only by reference to the value of the land on which the rate was made and levied. The value of the land on which the community titles scheme was constructed could, he argued, be taken into account as a relevant consideration because of the unconfined nature of the discretion given to the Council. In that context he relied on this passage in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:⁹

“In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ...”

- [23] He also argued that the making and levying of the rates by the Council is entitled to the presumption of validity.¹⁰
- [24] In addressing the argument that the rates had not been made and levied equally he submitted:

- “28. The context of the requirement of equality is important. The context is not the determination of a person's entitlement to a share of something. In such a context one might treat a requirement of equality as meaning that each member of the class shares to precisely the same extent and in the same amount.
29. However, the reference to equality here is in the context of the making and levying of rates on rateable land within a category. The context is not the ultimate amount which the ratepayer has to pay. It is inevitable that rates will be levied in different amounts within a category because the unimproved value of land will differ. It could not have been intended therefore that the requirement for rates to be made and levied equally required literal equality between rateable land within each category. This tends against the suggestion that the requirement of equality is concerned with rateable land within a category being charged the same amount.

⁹ (1986) 162 CLR 24, 40. See also *Ex Parte Fairfield Municipal Council; Re Cousins* (1953) LGR 38, 42-43 and *Sunwater v Burdekin Shire Council* [2002] QSC 433; 125 LGERA 263 at [23]-[26], [30]-[35] and [38]-[40]. In the latter decision the Council's imposition of a higher rate on land it believed to have been valued at too low a figure was held to be valid and not based on an irrelevant consideration.

¹⁰ *Alan E Tucker Pty Ltd v Orange City Council* (1969) 90 WN(Pt) 1 (NSW) 477, 484 and s 20 of the *Statutory Instruments Act 1992*.

30. It is the making and levying, rather than the results of the levying, which is required to be done equally within each category. The requirement of equality seems to be directed towards the avoidance of discrimination between different parcels of rateable land within the same category. There is no such discrimination if rates are levied according to the same objective formula. Indeed one of the natural meanings of the word equally is ‘according to the one and the same rule or measure’.
31. Moreover, there is no apparent purpose to be served by taking a more narrow approach to the word ‘equally’. The Council has, on any view, broad powers to levy an unequal rate by (if that is required) the multiplication of the categories. Given that broad power, there is no reason to suppose Parliament would have intended ‘equally’ to be applied in a narrow confining way.
32. All that is required is that rateable land within each category be treated on the same basis, that basis being applied equally to each parcel of rateable land. The resolution achieves that result. Within each of categories 10 to 14, rates are calculated on the same basis. They are not calculated in the same amount but that is only because the parity factors will differ according to unimproved value. For the reasons given above, that does not mean that rates are not ‘made and levied equally’.
33. The result of this construction is that categories 10 to 14 do not require further categorisation depending on the parity factors for rateable land within each of those categories. Each category is stated in the resolution and so too are the criteria which relate to each category. Even if it is a requirement of the [the Act] that each category be set out in the resolution in terms, the resolution is valid because it does just that.”

[25] The Council submitted, therefore, that there was no need for the categories to be listed seriatim in terms and that the deeming provision in paragraph 4(e)(a) of the resolution was effective to determine the categories appropriately. To decide otherwise, it was submitted, would be to prefer form over substance and would be inconsistent with the flexible discretion given to the Council by s 82(2) and s 83(2) of the Act, which, it submitted enabled the rateable land to be categorised not just by reference to land use but by other criteria such as the value of the land on which a community titles scheme was constructed.

[26] Even if that were not the case, the Council submitted that there was no legislative intention shown to invalidate a resolution that did not list the relevant categories for parcels of land seriatim, relying on the well known discussion in *Project Blue Sky Inc v Australian Broadcasting Authority*¹¹ about the consequences of failure to

¹¹ (1988) 194 CLR 355, 388-391 at [91]-[93] and characterising the decision in *Sheffield City Council v Graingers Wines Ltd* relied on by the applicants as one where there had been compliance with the substance of the statute if not its form so that the relevant resolution was maintained.

adhere to a statutory provision, the true issue being whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.

[27] In that context the Council submitted:

- “43. Under s.48 of the [the Act] it is mandatory for the Council to make a general rate or differential general rates for each financial year. The reason for this is obvious. Rates are a primary source of revenue for the Council. Without them the Council could not carry out its public functions. Invalidating a resolution because of a technical non-compliance with the requirements of the [the Act] with no substantive effect would see the Council placed in breach of the mandatory requirements of s.48 and (potentially) would see the Council without rate revenue for the financial year. This is because, according to s.49, general rates or differential general rates may only be made for a financial year by resolution at the Council's budget meeting for the year. Such a drastic consequence could not have been intended.
44. This conclusion is evident from the terms of s.83 of the [the Act]. It requires the resolution to specify the categories. For the reasons given above it does not require the resolution to list the category. When read in conjunction with the requirements of s. 81 is [sic] merely requires that the resolution state the determination under that provision. But if the requirements of the [the Act] are thought to go further, s.83 provides a clear indication that non-compliance with them does not invalidate the making of the rates. The provision does not identify how differential general rates are made or prescribe an essential pre-requisite to making it. It is conditioned upon the Council first resolving to make and levy differential general rates and so assumes that a valid resolution has already been passed in accordance with ss. 49 and 81. Section 83(3) goes on to say that the accidental omission from categorisation of parcels of rateable land does not prevent the making and levying of the differential general rate. In other words, although the Council is required by s.83(2) to determine sufficient categories to cover all rateable land, non-compliance with that requirement does not invalidate the resolution.
45. This is a clear manifestation of Parliamentary intention that s.83(1) states a requirement as to the content of a resolution which is not essential to its validity. For the reasons given above, it is obvious why this should be so. The Council can only resolve to make differential general rates during one meeting each year. Non-compliance with a nonessential prescription as to the contents of the resolution might have drastic consequences for a principal source of revenue for the Council for the financial year. It is one thing to ascribe the Parliament an intention to invalidate a resolution which does not set out the minimum amount of information

required to levy differential general rates. It is quite another thing to ascribe such an intention if there has been a failure to comply with an incidental prescription.

46. For these reasons, even if the resolution was required to list each category, in circumstances where the resolution determines the categories and criteria it is not invalidated by reason of a failure to comply with the former requirement.”

Discussion

- [28] The concept of a differential general rate applied equally within a category of rateable land should apply, as the Council submitted, to avoid discrimination between different parcels of rateable land within the same category. There is, however, no statutory limit on the number of categories that the Council may fix. The language of s 81, s 82 and s 83 does not limit the categorisation of the land by reference to its use in spite of the nature of the examples listed under s 81(1).¹² The categorisation by reference to the value of the land on which a community titles scheme is constructed occurred at the same time as the general categories based on land use were established. The determination of the categories required by s 81(1) does not seem to me to require that each category be listed seriatim so long as the formula for identifying a category is clear.
- [29] In that context I might say that the method of using Table A and Table B to arrive at a particular result is not clearly self-evident but it did not seem to lead to uncertainty in practice on the examples referred to in the evidence and that was not an issue in the proceedings.
- [30] Taking into account the width of the language used in s 82(2) and s 83(2) and the unconfined nature of the factors that may be taken into account in setting the rate, there is no necessary reason stemming from the structure of the Act to prevent the categories of rateable land in a community titles scheme from being identified not only by land use type but also by reference to a calculation taking into account the value of the land on which that scheme was constructed. That follows from the passage in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* discussed above.¹³ It is also consistent with the approach adopted by Cullinane J in *Sunwater v Burdekin Shire Council*. I should not treat it as a consideration irrelevant to the proper application of the statute.
- [31] There is no reason why the categories cannot be identified as affected by the parity factors to, in effect, create deemed separate categories determined by reference to the calculation applied to the bands of value of the land on which the relevant community title scheme is constructed.
- [32] Nor should I conclude that any failure to list those subcategories separately in the resolution should invalidate the rates that have been made and levied by the Council.

Order

- [33] The application should be dismissed.

¹² See also s 14D of the *Acts Interpretation Act 1954*.

¹³ See at [22] of these reasons.