CASE NOTES

ATTORNEY-GENERAL v. DONNELLY; LEAHY v. DONNELLY[1]

Charitable Trusts—Gifts to religious Orders—Inclusion of non-charitable purposes—Application of Conveyancing Act 1919-1954 (N.S.W.) Section 37D.

A testator devised a grazing property to trustees 'upon trust for such Order of Nuns of the Catholic Church or the Christian Brothers as my said executors and trustees shall select' (clause 3 of the will), and, after several small bequests, disposed of the residuary estate by clause 5 on the following terms: 'upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such convents as my said executors and trustees shall select'. The trustees were given complete discretion as to which Order of Nuns should benefit and the bequests were therefore taken outside the protection given to charitable trusts: some Orders being contemplative ones, whose members 'devote themselves wholly to pious contemplation and personal sanctification'—an occupation which the courts consider to be outside the legal category of charitable purposes.[2]

Upon an originating summons taken out in the Supreme Court of New South Wales, Myers J. held that the bequest in clause 3 was valid as a gift to the individuals comprising the Order selected by the trustees; that the gift in clause 5 was invalid since it comprehended purposes which were non-charitable; and further that the clause could not be held valid in part by application of the Conveyancing Act 1919-1954 (N.S.W.) section 37D. The next-of-kin appealed unsuccessfully in respect of his Honour's decision on clause 3, but the appeal of the Attorney-General on clause 5 was allowed, and section 37D was held to be applicable. Leave to appeal has since been granted by the Privy Council.

The first question raised by the appeal was whether Myers J. was correct in holding that clause 3 constituted a gift to the individuals comprised in the Order selected by the trustees, absolutely. On this view, any agreement made by the individuals of the Order among themselves regarding the use to which the property would be put was not material.[3] There was a difference of opinion here between, on the one hand, Williams, Webb and Kitto JJ., who held that the clause did constitute such a gift,[4] and, on the other hand, Dixon C.J.

[1] [1958] Argus L.R. 257. High Court of Australia; Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.
[2] *Gilmour v. Coats* [1949] A.C. 426.
[3] *Re Smith* [1914] 1 Ch. 937, 948-949.
[4] [1958] Argus L.R. 257, 277-278, 280-281.

and McTiernan J., who opposed this view. The difference appears to be purely a matter of the construction of clause 3 and the related parts of the will. The decision of the majority, which is similar to that of Dean J. in a recent Victorian case, *re Cain*,[5] and follows a line of English authorities beginning with *Cocks v. Manners*,[6] was most forcibly put by Kitto J., who considered that there was 'no attempt to impose any trust upon the body which the trustees select' and that the individual members of that body would take immediately and absolutely.[7] Dixon C.J. and McTiernan J. distinguished the relevant but conflicting Irish cases on the ground that the mode of construction applied in those cases related to a fund or property that might be handed over to a particular body at an ascertainable place or in a more or less definite area.[8] They contrasted with that situation the trust contemplated by clause 3, in particular the indeterminacy of the membership of the Order chosen, and the fact that there was 'no intention to restrain the operation of the trust to those presently members or to make the alienation of the property a question for the governing body of the Order chosen or any section or part of that Order'.[9] They considered that it was apparent on the face of the will that 'the trustees were intended . . . to remain the repository of the whole legal title and to administer the trust'. This raised the problem of the oft-discussed non-charitable purpose trust—for in the minority view clause 3 was similar to clause 5. In clause 3 there was, however, a gift to a group of persons, and it seems that Australian courts will hold such gifts valid. The recent trend has been to give effect to such clauses provided that such purposes are not *expressed*, despite the more rigorous interpretation that prevails in England. Had it been necessary to apply section 37D to clause 3 (and Dixon C.J. and McTiernan J. were of the opinion that it could be applied), the effect would have been to limit the discretion of the trustees to those bodies whose purposes were within the legal conception of charity, and the Contemplative Orders would have been excluded from any possibility of taking.

Perhaps the most significant question resolved by the High Court was that concerned with the application of section 37D to clause 5. The whole court was agreed that this clause was invalid—although their agreement was for differing reasons. Clause 5 obviously constituted a purpose trust (the language excluded any possibility of a

[5] [1950] V.L.R. 382; [1950] Argus L.R. 796.
[6] (1871) L.R. 12 Eq. 574. *Re Smith* [1914] 1 Ch. 937 and Dr H. A. J. Ford: 'Dispositions of property to unincorporated non-profit associations': (1957) 55 *Michigan Law Review* 67-90, 235-260. Also Morris and Leach: *The Rule against Perpetuities* (1956) Chapter 12 especially 301-302.
[7] [1958] Argus L.R. 257, 281.
[8] *Ibid.*, 261.
[9] *Ibid.*, 263-264.

direct gift) and some of the purposes included were non-charitable. Dixon C.J. and McTiernan J., quoting a passage of Lord Parker in *Bowman v. Secular Society Limited*,[10] took the simple view that for a purpose trust to be valid, the purposes must all be charitable.[11] Kitto J. agreed with them, apparently accepting the view that the trust was bad because of the lack of a beneficiary who could enforce it in his favour. However, Williams and Webb JJ. decided that clause 5 was bad for perpetuity, an argument completely at variance with the view that a trust for purposes must be charitable—in which case no question of perpetuity arises[12]—or else invalid.

The crucial matter, therefore, was whether clause 5 could be saved by section 37D. This section was copied from section 2 of the Charitable Trusts Act 1914 (Victoria), which is now section 131 of the Property Law Act 1928. These sections are very similar to section 2 of the New Zealand Trustee Amendment Act 1935.[13] Unfortunately,

[10] [1917] A.C. 406, 441.

[11] See also Eggleston: 'Purpose Trusts' (1940) 2 *Res Judicatae* 118; and Sheridan, 'Trusts for Non-Charitable Purposes' (1953) 17 *Conveyancer* (N.S.) 46.

[12] The rule here referred to is not the Rule against Remoteness of Vesting, but an analogous rule which requires that trusts for non-charitable purposes may not endure beyond the perpetuity period; in other words that the beneficiaries *may be able* to dispose of the corpus of the trust within the period allowed. Morris and Leach, *op. cit.*, chapter 12.

[13] In order to remove some of the difficulties surrounding the interpretation of this clause, the New Zealand legislature passed s. 82 of the Trustee Act 1956, which is reproduced here in full.

S. 82. *Inclusion of Non-Charitable and invalid purposes not to invalidate a trust*—

(1) In this section the term 'imperfect trust provision' means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.

(2) No trust shall be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.

(3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the same manner in all respects as if—

(a) The trust property could be used exclusively for charitable purposes; and

(b) No holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

(4) This section shall apply to every trust under which property is to be held or applied in accordance with an imperfect trust provision, whether the trust is declared before or after the commencement of this Act:

Provided that this section shall not apply to any trust declared by the will of any testator dying before, or to any other trust declared before, the twenty-sixth day of October, nineteen hundred and thirty-five (being the date of the passing of the Trustee Amendment Act 1935) if before commencement of this Act—

(a) The trust has been declared to be invalid by any order or judgment made or given in legal proceedings begun before the commencement of this Act; or

(b) Property subject to the imperfect trust provision or income therefrom has been paid or conveyed to, or applied for the benefit of, or set apart for, the persons entitled by reason of the invalidity of trust.

some confusion has surrounded the interpretation of these sections. In the first place it has been argued that they could not apply if the trust was bad for uncertainty of purpose, for perpetuity, or as a delegation of testamentary power, it being argued that these grounds for the invalidity of the gift go beyond the evil which the provision is directed to meet. The High Court answered this argument by showing that section 37D operates to turn a trust which includes a non-charitable purpose into a wholly charitable trust. And if a trust is wholly charitable, none of these objections are open.[14] A further difficulty was posed by the very narrow view of the section taken by Fullagar J. in *re Belcher*.[15] His Honour held that the section was only applicable where 'the testator has expressly indicated a distinct and severable class of charitable objects as among the possible recipients of his bounty'. In this interpretation he was supported by O'Bryan J. in *re Hollole*.[16] Myers J. took a somewhat similar view in his judgment on clause 5 in saying that 'a trust in the terms of which an intention to benefit charity is shown, is nevertheless defeated because an intention to benefit non-charitable purposes is shown'. A second school of thought, headed by the New Zealand Court of Appeal,[17] took a wider view of the application of the sections, considering that they were applicable not only where the language of the will expressly stated purposes, both charitable and non-charitable, but also where such general language was used that some charitable purpose could be deemed to be included. The shortcomings of the narrow view were pointed out to great effect by Gresson J. in the following passage:[18]

> It seems to me illogical to suppose that the legislature intended the beneficent effect of the section to apply where purposes charitable and purposes non-charitable were definitely expressed, but not to apply where language was used which, though not specifying with particularity purposes charitable and purposes non-charitable, yet comprehended both categories.

The wider application of section 37D would appear, in the light of the language of the section, to be the more logical one, and the High Court, by its unanimous rejection of the view expressed in *re Belcher* and *re Hollole*, has brought Australia into line with the New Zealand cases and has given support to an earlier judgment of Nicholas C.J. in Eq. in *Union Trustees Co. v. Church of England Property Trust*.[19]

[14] [1958] Argus L.R. 257, 265.
[15] [1950] V.L.R. 11. But see the remarks of the same judge in *Lloyd v. Federal Commissioner of Taxation* (1955) 93 C.L.R. 645, 666.
[16] [1945] V.L.R. 295, 301; [1946] Argus L.R. 78, 81-82.
[17] *In Re Ashton* [1955] N.Z.L.R. 192.
[18] *Ibid.*, 197.
[19] (1946) 46 S.R. N.S.W. 298. Also articles by E. H. Coghill, (1940) 14 *Australian Law Journal* 58; (1950) 24 *Australian Law Journal* 239; (1955) 29 *Australian Law Journal* 62.

The attitude of the High Court is put most clearly in the test which was recommended by Dixon C.J. and McTiernan J.:[20]

> It appears to us that what must be found in order to justify an application of the provision is a distinct or sufficient indication of an intention to authorise the application of the income or corpus of the fund or other property to what is clearly a charitable purpose even although the description which embraces the purpose is so wide that it may go beyond charitable purposes or there is associated with the description a description of non-charitable purpose or purposes capable of going beyond the legal conception of charity.

It is interesting to note that despite the fact that they considered the opinion expressed in *re Hollole* to go too far, their Honours were in complete agreement that the actual decision was correct. In that case there was a gift to a trustee 'to be disposed of by him as he may deem best'. Kitto J. in explaining why the section would not apply to such a gift, made the illuminating comment[21] that 'for the section to apply, purposes must be designated as the objects of the trust, and they must be purposes not for the benefit of definite beneficiaries'. It may be seen, therefore, that the effect of the decision will be to save trusts for 'benevolent purposes', or for 'undertakings of public utility', the discretion of the trustee being limited to purposes considered by the law as charitable. Both examples would, under the test in *re Belcher,* have failed. It remains to be seen which of the two approaches the Privy Council will uphold.

S. P. CHARLES

BRAND v. CHRIS BUILDING CO. PTY LTD[1]

Injunction—Building erected by Mistake on Plaintiff's land—Right of Defendant to remove—Estoppel—Unjust Enrichment

The defendant building company was employed by P to build a four-roomed weatherboard house on the latter's land. In showing the builder the site on which the house was to be constructed P negligently pointed to an adjacent block of land instead of his own. The company then went ahead and did work to the value of two thousand pounds in erecting the house on the land which P had indicated. The plaintiff, who was the registered owner of this land, sought an injunction restraining the company from entering upon the land and demolishing or otherwise interfering with the house, and this injunction was granted.

The major part of the judgment of Hudson J. was concerned with arriving at a finding on the true nature of the facts, and in particular with determining whether or not the plaintiff knew that the house

[20] [1958] Argus L.R. 257, 266. [21] *Ibid.*, 283.
[1] [1958] Argus L.R. 160. Supreme Court of Victoria; Hudson J.