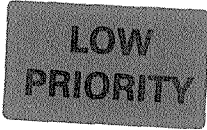


30/4

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1229/88



1872

IN THE MATTER of the Declaratory
Judgments Act 1908
and the Trustee
Act 1956

A N D

IN THE MATTER of the Estate of
ANDREW
WEATHERSPOON
THORBURN of
Auckland Deceased

A N D

IN THE MATTER of an application
by FREDERICK OWEN
THORBURN

Hearing: 7 November 1989

Counsel: Beattie for Applicant
Walter for D.W. Cruickshank

Judgment: 10 November 1989

JUDGMENT OF SINCLAIR, J

Before the Court is an application by the abovenamed Frederick Owen Thorburn to be appointed trustee of a Trust created in 1901 - provided that the trust is found to be valid - and for an order that the property affected by the Trust be vested in his name. If the trust is found to be invalid then he seeks to be appointed as administrator of the estate of the abovenamed Andrew Weatherspoon Thorburn, deceased.

At the commencement of the hearing Mr Walter appeared for one of the relatives of the abovenamed deceased, namely a

Mr D.W. Cruickshank but as the proceedings did not affect him or any interests of his, Mr Cruickshank was quite content to allow the matter to proceed and Mr Walter was given leave to withdraw. Numerous other decendants of the abovenamed deceased were served with the proceedings but none appeared to oppose the application. A Mrs Y.F.B. Cruickshank, however, did take a particular interest and asked to be advised of the outcome in due course.

I turn to consider the matters in issue. The abovenamed Applicant is a great grandson of Andrew Weatherspoon Thorburn who died at Auckland on 16 July 1901. A short time prior to his death the deceased conveyed, by way of conveyance in trust, certain land owned by him and situated on the Wade River, North of Auckland, to two of his sons, Andrew Weatherspoon Thorburn, the younger, and Robert Thorburn. The conveyance in trust is dated 3 July 1901 and is numbered 155844. It affects the land comprised in Certificate of Title Vol.584 Folio 253 (North Auckland Registry). A copy was annexed to the affidavit of the Applicant sworn in support of the application. The terms of the Trust were that the trustees hold part of the land (amounting to one quarter of an acre and which at that time was already used as a burial ground) as a place for the internment of the settlers residing in the Lower Wade and such other persons as may be approved of by the trustees. The remainder of the land, which became subject to the Trust, was to be leased or used by the trustees to

obtain an income for the purpose of keeping the graves and burial ground well maintained and in good order. The deed made provision for the trustees to nominate and appoint new trustees from time to time.

The document creating the Trust was duly registered against the title to the land and as at today the title shows the original two trustees as being the registered proprietors with a caveat lodged by the District Land Registrar to protect the provisions of the trust. Contemporaneously with the creation of the Trust, the settlor and trustees created a lease of the property to one Katherine Meldrum, a daughter of the deceased, for the duration of her life and upon her death the lease was to pass to Robert William Thorburn , a son of Robert Thorburn, one of the original trustees. The present Applicant is a son of Robert William Thorburn.

The deceased and settlor died intestate in 1901 and there were 12 children of his two marriages. No personal representatives were ever appointed in respect of his estate. Andrew Weatherspoon Thorburn, the younger, died in 1945 and the co-trustee, Robert Thorburn, died in 1950. Neither trustee to the Trust appointed any trustee or trustees in their place during their lifetime and both died intestate with no personal representatives ever being appointed in respect of either estate. Robert William Thorburn succeeded as lessee under the lease on the death

of Katherine Meldrum and he in turn died in 1957. In approximately 1951 a lease was granted to Mrs Y.F.B. Cruickshank's husband. The lease is now believed to have been invalid. That lease eventually found its way into the hands of the Landel Corporation which has now surrendered the lease and it therefore appears that that aspect of the matter no longer creates an impediment.

On such evidence as is available, it would appear that there has been no trustee to the present Trust since the death of Robert Thorburn on 19 May 1950. For the past 15 years the present Applicant has looked after the property and has restored it from the overgrown state into which it had fallen. The graves and burial grounds have been located and are now well maintained and the Applicant has ensured that the property has been looked after in accordance with his great grandfather's wishes. In addition he personally has paid the rates which had accrued up to the time when he stepped in.

The first aspect of the application is that the Court must be satisfied that the Trust created by the deceased is a valid Trust. On the face of it it contravenes the rule against perpetuities as it provides for the trustees, for the time being, to hold the property in terms of the Trust forever. For such a Trust to be declared valid it is necessary for the Court to consider whether or not in all the circumstances it can be regarded as being of a

charitable nature because the provisions of such a Trust are valid whether or not they infringe the rule against perpetuities. It was submitted on behalf of the Applicant that the Trust is one which can be regarded as charitable in nature and that it comes within the common law classification of "charitable trust" which has its origins in the Statute of Elizabeth (43 Eliz c. 4-1601). The Statute itself does not define charitable uses or Trusts but the leading case of Commissioners of Income Tax v. Pemsel (1891) AC 531 divides charitable Trusts into four classes:-

- (a) Trusts for the relief of poverty;
- (b) Trusts for the advancement of education;
- (c) Trusts for the advancement of religion;
- (d) Trusts for other purposes beneficial to the community not falling under any of the trustee preceding heads.

The purpose of the Thorburn Trust was to provide a burial ground for the internment of the settlers residing in the Lower Wade area and such other persons as shall be approved by the trustees. Additionally it was to provide an income for the maintenance of both the Thorburn family graves and the burial grounds. A case not dissimilar from the present is that of Scottish Burial Reform & Cremation Society Ltd v. Glasgow Corporation (1967) 3 AllER, 215. In that particular case the Appellants were a non-profitmaking limited company incorporated in 1890. The company's main object was to promote inexpensive and sanitary methods of disposal of the dead and in particular

to promote cremation. For many years the Appellants had carried on a crematorium in Glasgow. They charged fees which were not intended to yield a profit. However, a substantial reserve fund had been built up. The Appellants provided the means of religious observance but their purposes were independent of any religious bases. They sought a declaration that they were entitled to remission of rates in respect of the crematorium and the premises they owned and occupied. The question at issue was whether the Appellants were a charity. Reference may be made to portions of two of the speeches of the House of Lords and I quote firstly from the speech of Lord Reid at p.218 where he said:-

"The Appellants must also show, however, that the public benefit is of a kind within the spirit and intendment of the statute of Elizabeth. The preamble specifies a number of objects which were then recognised as charitable. But in more recent times a wide variety of other objects have come to be recognised as also being charitable. The courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. Then they appear to have gone farther, and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable. This gradual extension has proceeded so far that there are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the statute of Elizabeth. Counsel in the present case were invited to search for any case having even the remotest resemblance to this case in which an object was held to be for the public benefit but yet not to be within that spirit and intendment; but no such case could be found."

I next refer to a portion of the speech of Lord Wilberforce at p.223 where he said:-

"More explicitly, in *Re Manser, A-G v. Lucas*, a trust for keeping in good order burial grounds for members of the Society of Friends was considered charitable. The opinion of Warrington J was that such trust could be brought within the heading "advancement of religion" - "I think one naturally connects the burial of the dead with religion" he said. Then in *Re Eighmie, Colbourne v. Wilks*, a trust for the maintenance of a cemetery owned and managed by a local authority was held charitable. The cemetery was an extension of a closed churchyard, so that the decision can be regarded as a logical step rather than a new departure. Now what we have to consider is whether to take the further step of holding charitable the purpose of providing burial, or facilities for the disposal of mortal remains, without any connection with a church, by an independent body. I have no doubt that we should. I would regard the earlier decisions as falling on the borderline between trusts for the advancement of religion and trusts otherwise beneficial to the community. One may say either that burial purposes fall within both, or that the categories themselves shade one into the other. So I find no departure in principle in saying that purposes such as the present - which, though the appellants in fact provide the means for religious observance, should be regarded as independent of any religious basis - are to be treated as equally within the charitable class".

On the authority of the above statements of the law, I am satisfied that the Applicant has established that the purpose and objects of the Thorburn Trust can be held by this Court to be charitable.

It is necessary however for the next hurdle, namely that the purpose of the Trust must be public rather than private, to be overcome. In both Garrow & Kelly's Law of

Trusts and Trustees, 5th Edition, pp.110 and 111 and Nevilles Law of Trusts, Wills & Administration in New Zealand, 8th Edition, pp.94 to 97, it is stated that the restriction of a trust to a particular locality is quite permissible providing it refers to the public in that locality rather than the beneficiaries being dependent upon some personal relationship to a single propositus or to several propositi. More importantly, however, is the decision in re Tree, Idle v. The Corporation of Hastings (1945) 2 ALLER 65. That was a case where the objects of the Trust were to assist poor residents of the Borough of Hastings to emigrate to dominions of the British Empire. At p.69 Evershed J said:-

"As I have already indicated, I think the essential quality here is the connection, albeit at one, or more than one, remove, with a particular locality, Hastings. True it is, as counsel or the next of kin urges, that proof of ancestry in a sense is something personal. But, in my view, proof of descent from a resident in Hastings, that is, not from a named resident but from any resident, is, within the principle of Re Compton proof of a quality which is impersonal in the sense that, so far as this testator is concerned, the residents, or the descendants of residents, as individuals, are not a link in the chain selected by him as such, nor is he in the least concerned who they, as individuals, may be. It is open to any person, who can claim to have the characteristic of a Hastings ancestry. If I may so describe it, to come in and say: "I am a member of the class entitled to benefit." And that class, however awkwardly ascertained or defined, is a section or portion of the general public."

Thus, in the instant case, the Trust is not for a selected group of persons but embraces the whole of the community

of the Lower Wade and thus falls within the ambit of the decision just referred to.

Finally, it is necessary to consider whether or not in all the circumstances, the Trust is for the public benefit. By analogy with the Scottish Burial case, I accept the submission that the purpose of the Thorburn Trust does come within the class of 'charitable trust', it being for the advancement of religion. In the absence of any evidence to the contrary such Trusts are presumed to be for the public benefit. But in this case there is the additional public benefit in that the Trust specifies for the provision and maintenance of a burial ground for the rest of the Lower Wade area thus enabling burial of persons within their community, and falling within the category provided for, rather than burial at a considerable distance from the community.

Simply as an aside, it is to be noted that the local authority has acknowledged in its town planning ordinances that this particular area of land is designated as a burial ground.

The sum total of the above is that the Applicant has established to the satisfaction of this Court that the Trust created by the abovenamed deceased on 3 July 1901 is a valid Trust and one which subsists to this day. However, as is obvious from what has been set out above,

there is no trustee available at the moment to administer the Trust. In those circumstances the Applicant resorts to ss.51 and 52 of the Trustee Act 1956. Section 51(1) empowers the Court to appoint a new trustee whenever it is expedient and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court. Section 52 enables the Court in such circumstances where a new trustee is appointed to vest any land or any interest therein affected by the Trust in the name of the trustee. This particular aspect was considered in Re Shepperd's Trust (1955) NZLR 585. So far as the trustee aspect of the matter is concerned, this particular application is almost on all fours with that considered in the Shepperd case where there were no existing trustees to administer the Trust and the Court had little difficulty in holding that the Applicant had established there was jurisdiction to appoint a new trustee pursuant to the provisions of s.41 of the Trustee Act 1908 - which is almost in identical terms with s.51(1) of the Trustee Act 1956. There are no persons in existence at the moment who can be regarded as trustees of the Thorburn Trust and the present Applicant has indicated his willingness to so act. In all the circumstances I find that the requirements of s.51(1) have been satisfied and accordingly the present Applicant, Frederick Owen Thorburn of Takapuna, Painter, is appointed trustee of the Trust create by the abovenamed deceased on 3 July 1901. There will accordingly be an order vesting in him title to the

land comprised in Certificate of Title Vol.584 Folio 253
(North Auckland Registry).

P. Q. J.

Solicitors:

Hesketh Henry, Auckland, for Applicant;

Graham & Co, Auckland, for D.W. Cruickshank.

