CASE NOTES

LEAHY v. ATTORNEY-GENERAL FOR NEW SOUTH WALES[1]

Charitable Trusts—Inclusion of non-charitable purposes—Application of Conveyancing Act 1919-1954 (N.S.W.) Section 37D—Gifts to unincorporated associations—Non-charitable purpose trusts

The previous history of this case, and the judgments delivered in the High Court,[2] have already been noted in this *Review*.[3] An originating summons had been taken out in the Supreme Court of New South Wales to determine the validity of Clauses Three and Five of the will of a deceased grazier. The testator had devised a grazing property upon trust '. . . for such Order of Nuns of the Catholic Church or the Christian Brothers as my said executors and trustees shall select'. (Clause Three.) After certain bequests, the residue was disposed of upon trust to use the capital and income '. . . in the provision of amenities in such convents as my said executors and trustees shall select either by way of building a new convent . . . or the alteration of or addition to existing buildings occupied as a convent or in the provision of furnishings in any such convent or convents. . . .' (Clause Five.) It was admitted that neither gift could be supported on the ground that it was, in its terms, wholly charitable, because the possible recipient Orders and convents could, according to the construction placed upon the will, be either active or contemplative in nature, and the law does not recognize contemplative Orders as being of a charitable nature.[4] However, the Attorney-General contended that section 37D of the Conveyancing Act, 1919-1954 (New South Wales), operated to validate the gift.[5] On this point, the Judicial Committee was in agreement with the unanimous opinion of the justices of the High Court, and held that the section was applicable to the instant case.

It had been argued: (a) that the section had been enacted in order to remedy the particular mischief exemplified in *Forrest's Case (supra), viz.*, uncertainty, and could not be applied where a cause of invalidity was a tendency to perpetuity, and (b) that the section applied only where the testator has expressly indicated alternative purposes, the one charitable, the other non-charitable, and not where the gift is described in a compendious expression which is apt to include both charitable and non-charitable purposes.

[1] [1959] 2 W.L.R. 722. Judicial Committee of the Privy Council; Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Somervell of Harrow and Lord Denning. The judgment of their Lordships was delivered by Viscount Simonds.

[2] [1958] Argus L.R. 257, *sub nomine Attorney-General v. Donnelly; Leahy v. Donnelly*.

[3] (1958) 1 *M.U.L.R.* 525.

[4] *Gilmour v. Coats* [1949] A.C. 426.

[5] This section was originally enacted in Victoria as s. 2 of the Charitable Trusts Act 1914, as a result of the decision in *In the Will of Forrest* [1913] V.L.R. 425, and is now to be found as s. 131 of the Property Law Act 1958 (Victoria).

Their Lordships rejected both these contentions. After briefly considering the history of the section, they observed

> . . . that there is no reason to confine its operation to those cases in which the invalidity of the alternative gift is due to one cause rather than another. The language is clear and admits of no qualification. It applies alike to invalidity due to uncertainty or to perpetuity.[6]

Their Lordships also held that a composite expression was sufficient to attract the section. They considered that this conclusion accorded with the overwhelming weight of authority, and was the only reasonable construction of the language used. It would be nonsensical, they said, if on the one hand a bequest, to 'such Order of Nuns as my trustees shall select' was not covered by the Statute, whilst, on the other hand, a bequest to 'such Order of Nuns, whether active or contemplative, as my trustee shall select' was appropriate to attract the operation of the section.[7]

However, although the section may operate where there is a composite expression such as the one in the instant case, it was pointed out that '. . . not every expression which might possibly justify a charitable application is brought within it'.[8] The decision in *In re Hollole*[9] was approved. In that case, O'Bryan J. held that the section could not operate upon a gift to a trustee 'to be disposed of by him as he may deem best' because the testator had expressed no charitable purpose whatsoever. Their Lordships then proceeded:

> Inevitably there will be marginal cases, . . . and their Lordships do not propose to catalogue the expressions which will or will not attract the section. It may be sufficient to say that in the chequered history of this branch of the law the misuse of the words 'benevolent' and 'philanthropic' has more than any other disappointed the charitable intention of benevolent testators and that the section is clearly designed to save such gifts.[10]

The view that *In re Belcher*[11] cannot be supported, was endorsed.[12]

Their Lordships next considered the question of whether or not Clause Three was valid in its entirety. This disposition would, in any case, be saved by the section so far as Orders other than contemplative Orders were concerned, but the trustees were anxious to preserve their right to select such Orders, and so argued that the clause operated as an absolute gift to the individual members of the Order selected, and that there was thus no need to excise all implied reference to such contemplative Orders from Clause Three as, if the members took beneficially, no question of a purpose trust arose. The High Court had been divided on this question,

[6] [1959] 2 W.L.R. 722, 727.
[7] *Ibid.*, 727. [8] *Ibid.*, 729. [9] [1945] V.L.R. 295.
[10] [1959] 2 W.L.R. 722, 729. [11] [1950] V.L.R. 11.
[12] The reader's attention is directed to (1958) 1 *M.U.L.R.* 525, 527, n. 12. The New Zealand legislature sought to remove doubts as to the construction of the New Zealand equivalent of s. 37D, and enacted an amending statute in very wide terms. It is interesting to speculate as to whether the New Zealand Act would apply to the gift that was the subject of *In re Hollole* [1945] V.L.R. 295.

but had adopted by a majority[13] the view pressed by the trustees. The Judicial Committee agreed with the minority in the High Court, and held that the operation of the section *was* necessary, thus excluding contemplative Orders from the class of possible objects of the power.

Their Lordships began by stating the unquestioned principle of construction that a gift to an unincorporated society *simpliciter,* without anything to indicate that the duties of a trustee are imposed, is 'nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common'.[14] Even if other words are added to the gift, such as 'for the benefit of the community', it is still *prima facie* a gift to the individual members. However, if the qualifying words are sufficiently strong to import a trust, the question arises: who are the beneficiaries?

> If the present members are the beneficiaries, the words add nothing and are meaningless. If some other persons or purposes are intended, the conclusion cannot be avoided that the gift is void. For it is uncertain, and beyond doubt tends to a perpetuity.[15]

The Court then reviewed a number of well-known cases which deal with gifts to unincorporated associations. A variety of circumstances will be found in the cases, and a variety of opinion, no matter what efforts may be made to reconcile the statements of the learned judges concerned. However, their Lordships said, whatever the 'fine distinctions', anomalies, 'deviations' and ambiguities, '. . . the rule as stated in *Morice v. Bishop of Durham (per* Sir William Grant M.R.)[16] *(per* Lord Eldon L.C.)[17] continues to supply the guiding principle'.[18] This rule is that the beneficiary under a trust must be either a charitable purpose, or ascertained individuals, for otherwise there is no person able to enforce the trust. 'If there be a clear trust but for uncertain objects, the property, that is the subject of the trust, is undisposed of. . . . There must be somebody, in whose favour the Court can decree performance.'[19]

There can be no doubt that this principle has been ignored in such cases as *In re Dean,*[20] *In re Thompson,*[21] and *In re Drummond.*[22] It is submitted that even the House of Lords has not always adhered as explicitly to the principle as it might have done. In *In re Macaulay's Estate, Macaulay v. O'Donnell*[23] there was a gift to 'the Folkestone Lodge of the Theosophical Society . . . absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone. . . .' The executors took out an originating summons to determine whether the gift to the society, which was unincorporated, was valid. The House of Lords held that it was not, but only because, in their opinion, a perpetuity was created. It is difficult to see how this question of perpetuity arose. It was admitted that a trust was imported—*i.e.,* that the individual mem-

[13] [1958] Argus L.R. 257, *per* Williams, Webb and Kitto JJ., Dixon C.J. and McTiernan J. dissenting on this point. [14] [1959] 2 W.L.R. 722, 730.
[15] *Ibid.,* 731. [16] (1804) 9 Ves. Jun. 399. [17] (1805) 10 Ves. Jun. 522.
[18] [1959] 2 W.L.R. 722, 737. [19] (1804) 9 Ves. Jun. 399, 405.
[20] (1889) 41 Ch.D. 552. [21] [1934] Ch. 342. [22] [1914] 2 Ch. 90; 30 T.L.R. 429.
[23] Reported in a footnote to *In re Price* [1943] Ch. 422, 435. The date of *Macaulay's* case itself is 1931. The judgments of Lords Buckmaster and Tomlin only are reported.

bers were not meant to be the beneficiaries. This being so, the only possible beneficiary was a non-charitable (so held by the House) purpose. Under the doctrine of the *Bishop of Durham's Case*[24] the gift was therefore void for uncertainty, and no further question need be considered. However, the House of Lords did not, as far as can be ascertained from the Report, either cite, or have its attention drawn to, this case. Moreover, there is a line of authority where lower courts have held such gifts bad, or valid, on the question of perpetuity alone—*In re Prevost,*[25] *In re Ray's Will Trusts,*[26] *In re Drummond,*[27] *Carne v. Long.*[28] It is submitted that it appeared, before the decision in the instant case, that an exception to the rule in the *Bishop of Durham's Case*[29] had been almost established. After a valuable discussion of the cases cited above, H. A. J. Ford says:

> Summing up, the effect of the cases from England considered to this stage is that a disposition to an association *eo nomine* which cannot be read as a gift to the existing members, may operate as a disposition on trust for a purpose if it does not tend to a perpetuity.[30]

Such also is the view of the framers of the *Restatement of Trusts,*[31] and would appear to have been accepted as binding upon him by Dean J. in his judgment, mentioned by their Lordships,[32] in *In re Cain (Decd.).*[33] The reason for the rule in the *Bishop of Durham's Case,*[34] it will be remembered, was that there must be someone able to enforce the trust. Thus the fact that any member of an unincorporated association may apply to the court to prevent a misapplication of the funds,[35] or, in other words 'the presence of individuals who have an interest in the purpose by reason of their membership which justifies their suing to enforce the trust . . .',[36] may well have supplied a logical basis for the exception. However, it appears that the Judicial Committee has rejected this method of reasoning, and in so doing, it has certainly settled a contentious field of law, formerly unpredictable, with gratifying finality. It is once again certain that there can be a trust for individuals, or charitable purposes, but not non-charitable purposes. The gift in the present case was held invalid because it was the testator's '. . . intention . . . to create a trust, not merely for the benefit of the existing members of the selected Order, but for its benefit as a continuing society and for the furtherance of its work'.[37]

Their Lordships commented that the courts would frequently seek to give effect to the intention of the testator by assuming '. . . (however

[24] (1804) 9 Ves. Jun. 399; (1805) 10 Ves. Jun. 522. [25] [1930] 2 Ch. 383.
[26] [1936] Ch. 520; 52 T.L.R. 446. [27] [1914] 2 Ch. 90.
[28] (1860) 2 De G.F. & J. 75. [29] (1804) 9 Ves. Jun. 399; (1805) 10 Ves. Jun. 522.
[30] H. A. J. Ford, 'Unincorporated Associations' (1956) 55 *Michigan Law Review* 67, 247. [31] (1935) s. 119.
[32] [1959] 2 W.L.R. 722, 737. The learned Judge examined all the above cases, approved the principle of the *Bishop of Durham's Case,* and then felt bound to consider the operation of perpetuity because of the authority of *Macaulay v. O'Donnell.*
[33] [1950] V.L.R. 382. [34] (1804) 9 Ves. Jun. 399; (1805) 10 Ves. Jun. 522.
[35] *Stevens v. Keogh* (1946) 72 C.L.R. 1.
[36] H. A. J. Ford, 'Unincorporated Associations' (1956) 55 *Michigan Law Review* 67, 247. [37] [1959] 2 W.L.R. 722, 738.

little the testator may have intended it) that the gift was to the individual members in the name of the society or of the committee of the society'.[38] The cases of *Cocks v. Manners*,[39] *In re Smith*,[40] and *In re Clarke*[41] are cited for this proposition. However, in the instant case, their Lordships held that the circumstances of the case, and the wording of Clause Three, were sufficient to show that the testator attempted to create a trust for the purposes of the Order, rather than make a gift to the individual members thereof.[42] The form of the gift, being expressed to an Order *qua* Order; the fact that the members of the Order might be very numerous and scattered over the world; the fact that the property was realty; and the assumed nature of the rules and purposes of the possible recipient Orders, all combined to indicate that the members were not to take beneficially.[43] The conclusion is that all the surrounding facts must be considered in determining who is the intended beneficiary.

The net result of the case, it is submitted, is a substantial agreement, on every important issue, with the judgment of Dixon C.J. and McTiernan J. in the High Court.[44] Clear and authoritative statements now cover many much-disputed areas of the law relating to charitable trusts.

N. H. M. FORSYTH

B. R. MEADOWS AND SONS v. ROCKMAN'S GENERAL STORE PTY LTD[1]

Contract—Consideration—Equitable Estoppel

The plaintiff B.R.M. commenced an action against the defendant R. to recover the sum of £403 15s. 4d. representing the cost of goods sold and delivered. By way of defence, the defendant raised an agreement with the plaintiff concerning the payment of the sum for which the plaintiff was now suing. Hudson J. held that this agreement was not a defence to the action, and the plaintiff was entitled to judgment.

As to the nature and terms of the agreement relied upon by the defendant, the learned judge was not prepared to accept some of the allegations in the defendant's pleadings. For convenience, only the learned judge's findings are summarized here, and substantial differences between finding and pleading will be indicated. (1) There was an agreement between the plaintiff and the defendant that the defendant should be at liberty to withhold payment, in respect of goods which the plaintiff had sold and delivered to the defendant, of a sum equivalent to a debt owing to the defendant by H. & N. Meadows Pty Ltd, until such time as that debt was paid by the debtor. (2) H. & N. Meadows Pty Ltd went into liquidation and its assets realized only sufficient to pay two shillings in the pound. (3) There was no request or promise, either express or implied, that the defendant should not take legal action against H. & N. Meadows

[38] *Ibid.*, 732.
[39] (1871) L.R. 12 Eq. 574.
[40] [1914] 1 Ch. 937; 30 T.L.R. 411.
[41] [1901] 2 Ch. 110; 17 T.L.R. 479.
[42] [1959] 2 W.L.R. 722, 737-738.
[43] *Ibid.*, 738.
[44] [1958] Argus L.R. 257.
[1] [1959] V.R. 68; [1959] Argus L.R. 298. Supreme Court of Victoria; Hudson J.