SALVAGE OF TRUSTS WITH MIXED CHARITABLE AND NON-CHARITABLE PURPOSES

Under the general law where trustees are granted a discretion to select objects, some of which are charitable and others non-charitable, in the alternative, then the trust is not a valid charitable one but is void for uncertainty. So a gift to "such charitable or public purposes as my trustee thinks proper" is void, (*Blair* v. *Duncan,* [1902] A.C.37) and this is so if the alternative to charitable purposes is a vague and general expression, e.g. "other purposes", or "benevolent purposes", or a precisely defined non-charitable institution. Similarly, such a gift is invalid if it is given for a purpose expressed in a compendious phrase embracing both charitable and non-charitable objects (*Leahy and Others* v. *Attorney-General of New South Wales And Others,* [1959] A.C.457, [1959] 2 All E.R.300, 304). It was to remedy this state of law that s.61B of the Charitable Trusts Act 1957 was enacted. The Legislation was originally passed as s.2 of the Trustee Amendment Act 1935, as a result of the decision in *Re Catherine Smith* (*In re Catherine Smith, Campbell* v. *New Zealand Insurance Co. Ltd and Attorney-General,* [1935] N.Z.L.R.299, affirmed by the Privy Council sub. nom. *Attorney-General of New Zealand* v. *New Zealand Insurance Co. Ltd* [1937] N.Z.L.R.33.) where the Court of Appeal held the residue of an estate, amounting to some £80,000, which was to be applied "towards institutions societies or objects established . . . . for charitable benevolent educational or religious purposes" as the trustee in its absolute discretion should deem advisable, void for uncertainty and passed to the next-of-kin of the testatrix. The provision has an interesting history; being initially based on s.131 of the Victorian Property Law Act 1928 it was re-enacted as s.82 of the Trustee Act 1956, embodying both its former provisions together with the concept of an 'imperfect trust provision' outlined in s.1(1) of the Charitable Trusts (Validation) Act 1954 (U.K.). The operative provisions of s.61B provide:

"(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 the 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 poperty 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."

Under ss.(4), although it applies to all 'imperfect trust provisions' declared before or after the section's commencement (2nd October 1963), it has no application to trusts declared by the will of testators dying prior to, or any other trust declared prior to the date of the Trustee Amendment Act 1935 if, before the commencement of the Trustee Act 1956, the trust had been declared invalid by the court or any property subject to the trust had been paid or transferred or set aside for persons entitled by reason of the invalidity.

To date there have only been four New Zealand decisions concerning this section (and those prior to it) but certain principles have clearly evolved, as a result of these and the Victorian and New South Wales cases. A brief summary of these principles can be set out as follows:

(a) Where the testator or settlor has stated severable charitable and non-charitable objects the section will apply to save the former. These trusts fall squarely within both parts of the definition of 'imperfect trust provision' set out in s.61B(1).

Gifts of this nature may be couched in such phrases as 'charitable or benevolent purposes', and the court would merely strike out the non-charitable term (in this instance 'benevolent'), leaving the charitable object to stand, in the words of the settlor or testator, without alteration. This application of the section was affirmed by the Court of Appeal in *Re Ashton,* (*Re Ashton, Gordon* v. *Siddall,* [1955] N.Z.L.R.192, per Gresson J. (as he then was) at p.198, and Turner J. at 202) and effected in *Re Cumming* (*Re Cumming, Public Trustee* v. *Cumming* [1951] N.Z.L.R.498) where there was a trust to erect a hall, rooms and offices for the use of farmers, youth and other organisations (of a charitable nature) in the Gore district. Kennedy J. administered the section to delete the reference to farmers and so validate the remaining uses which were charitable. This application of the section has long been recognised in both Australian jurisdictions, (*In re Griffiths,* [1926] V.L.R.212; *In re Bond,* [1929] V.L.R.333; *In re Thureau,* (1949) 55 A.L.R.487; *In re Belcher* [1950] V.L.R.11; *In re Ingram* [1951] V.L.R.424, and *In re Lloyd* [1958] V.R.523) whereby the court merely effects a 'blue-pencil' to excise the non-charitable purposes, applying the section to preserve the remaining charitable purposes of the trust. The latest implementation of this rule was by Wilson J. in *Re Mitchell, Public Trustee* v. *Salvation Army and Others,* [1963] N.Z.L.R.934, which involved a gift on trust to the North Canterbury Hospital Board directing it to apply the income towards 'creature comforts' or the means of obtaining such creature comforts or actual necessities. The court construed the gift as falling within the second part of the definition of 'imperfect trust provision' in ss(1) and struck out the reference to creature comforts, directing the income to be applied exclusively in the provision of actual necessities or the means of obtaining them.

(b) Where the words of the settlor do not provide any means of severance (trusts in this category generally fall to be considered under

the first part of the definition of 'imperfect trust provision' set out in s.61B(1)), the validity of the trusts will depend on (i) whether there is a perceptible sub-stratum of charity, and (ii) whether a liberal or restrictive approach is adopted by the court in construing the section.

(i) Perceptible sub-stratum of charity: This fundamental requirement must be clearly present in the language of the testator or settlor before the section will be applied at all. (See 'The Flavour of Charity' by I. W. Hooker, (1964) 1 N.Z.U.L.R.312, for discussion on this point). This means that the wording of the trust must be analysed in order to ascertain whether or not it signifies a generally charitable intention and was explicitly held necessary to a valid application of the section by Gresson J. in *Re Ashton,* where there was a gift on trust "to help in any good work" of the Church of Christ, Wanganui, (supra, at p.199), and the Privy Council in *Leahy's Case,* where the testator disposed of an extensive farm property "upon trust for such order of nuns of the Catholic Church or the Christian Brothers" as my executors shall select, (supra, at p.305). It was the absence of this essential element that led Wilson J. in *Re White (In re White (Deceased), Perpetual Trustees Estate and Agency Co. Limited* v. *Milligan and Others,* [1963] N.Z.L.R.788) to reject the proposition that a gift of residue to a trustee absolutely, to dispose of in his absolute discretion, was an 'imperfect trust provision' merely because it was sandwiched between two clearly charitable provisions in the will. He held that a charitable intention is necessary in order to constitute an 'imperfect trust provision' under the first part of the definition in s.61B(1). Since such an expression of intention is the sine qua non of the second part of that definition it is clear that all imperfect trust provisions must express a substantially charitable purpose. Whether or not this is present can only be decided in the particular case by the court.

(ii) Section 61B must be given a wide and liberal construction: Prior to *In re Ashton* (supra) there was some doubt whether or not the section operated where there is a composite expression covering charitable and non-charitable objects. In Victoria a restrictive approach had been adopted whereby the court limited "the application of the section to cases in which there is an express indication of a distinct and severable class of charitable objects so that a constructional severance is possible" (*Re Belcher* [1950] V.L.R.11, see also *Re Ingram* [1951] V.L.R.424), whereas in New South Wales a wider interpretation of the comparable statutory provision (s.37D of the Conveyancing, Trustee and Probate Administration Act 1919-43) was applied. (By Nicholas C.J. in *Union Trustee Co. of Australia Ltd* v. *Church of England Property Trust,* (1946) 46 S.R. (N.S.W.)298, and Roper C.J. in *Perpetual Trustee Co. Ltd* v. *King George's Fund For Sailors,* (1949) 50 S.R. (N.S.W.) 145.). These decisions were considered by the Court of Appeal in *Ashton's case* (supra) preferring, and applying, the New South Wales view. The whole tenor of the judgments of both Gresson and Turner J.J. was that a large and liberal approach to the section must be adopted in order that the remedial objects of the provision might be attained. (Although s.5(j) of the Acts Interpretation Act 1924 was raised in argument, it was not referred to specifically in either judgment.) Gresson J. (at p.200) pointed to Kennedy J.'s decision in *Re Cumming* (supra) inferring a similar approach to the

same question. In *Re Ashton,* adopting the wide view, the Court of Appeal applied the section and directed that the disposition be used for 'good and (charitable) works' only.

In taking this view the Court of Appeal overruled Smith J. in the lower court (*Re Ashton, Gordon* v. *Siddall,* [1950] N.Z.L.R.42) and refused to follow the decision of Fullager J. in *Re Belcher* (supra). (It is interesting to note that the editor of Garrow and Henderson's 'Law of Trusts and Trustees', 2nd Ed. at p.126, was perceptive enough to only tentatively posit the proposition applied by Smith J. in *Re Ashton*). The same question was faced by Dean J. in *Re Lloyd* (*The Trustees Executors and Agency Company Limited* v. *Zelman Memorial Symphony Orchestra Limited,* [1958] V.R.523) where there was a gift on trust by will to the Zelman Memorial Symphony Orchestra, an incorporated society, not all the objects of which, set out in its memorandum of association, were charitable. After reviewing the decisions, including *In re Ashton* (supra), Dean J. held himself bound by the Victorian cases but expressed the opinion that if the matter was to arise before the Full Court the reasons expressed in *Re Ashton* (supra) for preferring the New South Wales approach would have to be considered. In the event, he held the trust saved by applying the section and confining the gift's application to those objects expressed in the memorandum of association as were charitable.

The seal was finally set by the Privy Council in *Leahy's case* (supra) where *Re Belcher* (supra) was overruled on this point and the liberal approach to the section affirmed (at p.305). In all three Australasian jurisdictions then, the section must be liberally construed so as to include composite expressions covering charitable and non-charitable purposes.

(c) Where there is no general intention of charity the section will not validate a gift made in uncertain terms. Not every expression which might possibly justify a charitable application is brought within the ambit of s.61B. In *Re Hollole* (*In re Hollole,* (Deceased) (2), [1945] V.L.R.295) a gift to a trustee "to be disposed of by him as he may deem best' was held to be invalid as having no defined purposes and being uncertain as to subject-matter. This decision was affirmed in *Leahy's Case* (supra, at p.305) on the ground that the testator did not designate any purpose at all but, in effect, delegated his testamentary power in a manner that the law does not permit. In this way *In re Hollole* (supra) can be distinguished from *In re Ashton* (supra) because in the latter case there was implicit in the words of the testator an overriding charitable intention which is lacking in the words used in the former case. Wilson J. in *Re White* (supra) adopted the same view, holding there must be an ascertainable charitable intention, and that the section's object was not to create charitable trusts where none previously existed (at p.792).

The only real difficulty in this respect lies in distinguishing such cases as *Re Hollole,* where the trust cannot be saved, and those falling under (b) above containing only vague allusions to charitable purposes which may or may not be saved by the section. No ready formula can be laid down as guides to these fringe instances, the remedy lying in accurate use of terms by the will draftsman. If an executor has any doubt whatsoever on this score common prudence demands an application be made to the court for direction. (c.f. The tragic results

arising out of a late application, (though not on this point), to clarify a case under s.1(1) of the Charitable Trusts (Validation) Act 1954 U.K., in *Re Harpur's Will Trusts,* [1961] 3 All E.R.588, as a consequence of which one executor committed suicide and the others had their fortunes impounded to the extent of £250,000).

(d) Trusts that might otherwise fall within the section cannot be validated by it by converting them into something inconsistent with the donor's intention. This is clearly laid down in the second part of the definition of 'imperfect trust provision' in s.61B(1). The same principle was applied by three members of the Full Court of Victoria (affirmed on appeal by the High Court of Australia which was evenly divided) in *Roman Catholic Archbishop of Melbourne* v. *Lawlor,* ((1934) 51 C.L.R.1) where there was a gift to establish a Catholic newspaper and to use the income for Catholic education or any good object that the Hierarchy might decide, until sufficient funds for the newspaper were at hand. The gift to found the newspaper was held void as non-charitable and the court would not apply the section by limiting the purpose to a Roman Catholic religious newspaper, since this was not the intention of the testator.*

Under ss(1) of s.61B any direction by the court for an exclusively charitable application of trust property must be consistent with the terms of the whole provision setting out the objects of the trust. The court is not empowered to frustrate the testator's intention, but only to implement it where it is generally charitable and not inconsistent with the court's proposed directions.

(e) The charitable purposes need not be expressly stated to fall within the first part of the definition of imperfect trust provision, but must be able to be implied by the court. Unlike the United Kingdom legislation, where the objects must be *declared* by the testator or settlor, under the first part of s.61B(1) a valid 'imperfect trust provision' includes purposes 'which are *or could be deemed to be included*' in the directed application of the trust property. This gives our courts room to manoeuvre in cases where there is a substantial sub-stratum of charitable intention but the actual objects are not specifically set out. In *Re Lloyd* (supra at p.531) the same principle was applied where it was held that there was no valid distinction to be made between a gift to an institution for stated purposes, some only of which are charitable, and a gift simpliciter to an institution having objects, some only of which are charitable. That is, the court can infer the purposes with reference to the objects clause of the constitution of the named body.

Wilson J. adopted an essentially similar position in *Re Mitchell,* (supra at 942) in discussing *Re Harpur's Will Trusts,* (supra) where there was a gift to institutions which were described as having certain charitable objects but which were not declared. He considered "The objects were left to be inferred and thus failed to satisfy the (U.K.) statutory requirement. It may well be that had the case fallen to be decided in this country the disposition would have been found to come within the scope of the first part of the definition in s.82 which has no counterpart in the United Kingdom Statute". Although only *obiter dicta,* this statement is a clear expression of principle applicable in New Zealand. The position is not clear in applying the same rule to the

second part of the definition of "imperfect trust provision". Our provision is in pari materia with the English legislation and requires that the objects be both declared and described. If however the statute were to be construed strictly it would make nonsense of such decisions as *In re Ashton*, (supra, which was decided prior to this provision being incorporated in the legislation). Instead, it is suggested that s.5(j) of the Acts Interpretation Act 1924 would apply to permit the court to exercise the salvage provisions of s.61B and imply the purposes where this can be reasonably done. That is, the words 'declaring', and 'describing' must be construed widely. The court's power of course, would be subject to the overriding requirement that the implied objects are consistent with the terms of the provision. Before such implied purposes can be enforced the court would have to satisfy itself on the requirement of sub-stratum of charity.

(f) The term 'objects' in the second part of the definition of 'charitable trust provision' set out in s.61B(1) means 'purposes'. This was held in *Re Harpur's Will Trusts* (supra, at p.595 per Harman L. J.) and applied by Wilson J. in *Re Mitchell* (supra, at p.942).

(g) The English decisions must be regarded with some suspicion since they apply only to the second part of the definition of 'imperfect trust provision' in s.61B(1) which (i.e. its United Kingdom equal) was construed restrictively on the only occasion it appeared before the Court of Appeal in *Re Harpur's Will Trusts*, (supra) in counter-movement to Australian and New Zealand trends.

(h) The section applies a fortiori to save certain cases of mixed charitable and non-charitable purposes that would be otherwise void for uncertainty of subject-matter.

Under the general law where a bequest on trust is made for mixed charitable and non-charitable objects, and no apportionment is made by the settlor, the whole gift is void. This rule no longer applies to 'imperfect trust provisions' and the whole of the amount is applied to the charitable objects only. However, not even the section will save gifts on trust where the subject-matter is completely uncertain, e.g. where the amount has been omitted altogether.

(i) s.61B does not in itself set out the means whereby a trustee can always immediately implement the charitable purposes of an 'imperfect trust provision'. Where the charitable purposes are ambiguous or non-existent it requires either an approach to the court to apply its cy-pres jurisdiction or the effectuation of a scheme under the provisions of the Charitable Trusts Act 1957. All s.61B does is to validate the trust.

Addendum: Since writing this article the case of *In re Inman*, deceased, [1965] V.R.238, has been decided by Gowans J., where *In re Lloyd* (supra) was not followed on a number of points. In *Re Inman* the testator directed his trustees to hold the residue of the estate in trust in perpetuity into 10 equal parts and pay such parts to various named organisations which included the Anti-Vivisection Society. It was held that a bequest, without more, of a fund or trust to pay the income thereof in perpetuity to a society, whether corporate or incorporate, whose objects are exclusively charitable, will, if the

circumstances justify the inference that the bequest is intended for the furtherance of the work of the body, be upheld as a gift for the purpose of a charitable body and therefore for a charitable purpose. A like bequest to a society, whether corporate or unincorporate, whose objects are in no respects charitable, will, if the circumstances justify the inference that the bequest is intended for the furtherance of the work of the body, fail as a gift for the purpose of the body and, therefore, for a purpose which is not charitable. If there is a like bequest to a society, whether corporate or unincorporate, whose objects are diverse, so that some considered apart would be charitable and others (not merely ancillary) considered apart would be non-charitable, and the circumstances justify the inference that the bequest is for the work of the body, it will also fail because it is a gift for the purpose of the body, and, therefore, for a purpose which is not charitable, and s.131 of the Property Law Act 1958 (Vict.) cannot apply as though it were a trust for both charitable and non-charitable purposes. (ibid 246-248)

Since the Anti-Vivisection Society was not a charitable institution, because its leading object was to secure the abolition of vivisection by demanding its prohibition by law, s.131 of the Property Law Act 1958 did not apply to save the gift in any way, and it lapsed.

It is only the third proposition of Gowans J. relating to dispositions to societies with mixed charitable and non-charitable objects that is open to objection. It is to be noted that this, (as was *In re Lloyd* (supra)), is a Victorian Supreme Court decision and is open to review by the Full Court. It seems to be another example of the dichotomy of construction afforded the relevant legislation by the Courts of Victoria as opposed to New South Wales and New Zealand. Even so, it is submitted that in any event it does not affect the application of s.61(B) of the Charitable Trusts Act 1957 to such societies with mixed charitable and non-charitable objects. Instead, it is suggested that the combined effect of s.5(j) of the Acts Interpretation Act 1924 and the views of Wilson J. in *Re Mitchell* (supra) make it clear that a gift to such an institution would apply to its charitable objects, as long as the *objects as a whole* revealed a substantial sub-stratum of charity. Without recourse to such objects it would be impossible to assess the 'charitability' of the disposition itself, and the whole purpose of s.61B would be defeated. On this basis alone Gowans J. could have held against applying the Victorian section because the predominant purpose of the Anti-Vivisection Society, as outlined in their objects, was non-charitable.

In re Inman does, however, underline the principle that any salvage of trusts with 'mixed objects' must not be inconsistent with the donor's or testator's intention. Since it was only an ancillary purpose of the Anti-Vivisection Society to prevent cruelty to animals, and the abolition of vivisection was the "gist of the object and dominates it" (ibid 248), the abolition of the latter in favour of the former could not make it charitable, i.e. (implicitly) it would not be in accord with the testator's wishes. In this way it is analogous to *Lawlor's Case*, (supra).

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