CHARITABLE TRUSTS FOR EMPLOYEES

IN RE COX, BAKER v. NATIONAL TRUST CO. LTD.,

[1955] A.C. 627.

In this case the Judicial Committee of the Privy Council held that a trust stated to be for "charitable purposes only" was not a valid trust.

This case was a consolidated appeal, by special leave, from two judgments of the Supreme Court of Canada, and concerned the question whether a testator and his widow had created by their respective wills valid charitable trusts of their residuary estates. In each case the trustees were directed to hold the residuary estate upon trust:

> To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the board of directors of the said The Canada Life Assurance Company as they, the said board of directors, in their absolute discretion shall from time to time decide. . . .

Before considering their Lordships' reasons for holding that this residuary bequest failed as a charitable trust, it is necessary to refer briefly to the characteristics of such trusts, for these characteristics form the basis of the decision.

For a trust to qualify as a charitable trust it must possess the following three characteristics, namely:

(1) The purpose of the trust must be one which is charitable in the legal sense;

(2) The trust must confer a benefit upon the community or upon an appreciably important class or section of the community; and

(3) The trust must be capable of being controlled by the Court.

It is not intended to discuss the third characteristic of charitable trusts in this article. For a discussion of this characteristic see Re Hummeltenberg, Beatty v. London Spiritualistic Alliance Ltd., [1923] 1 Ch. 237.

To ascertain whether the purpose of a trust is charitable in the legal sense the Court will refer to the instances of charity set out in the preamble to the Statute of Charitable Uses, 1601 (Eng.): see per Kennedy J. in In re Wilkinson, Perpetual Trustees Estate and Agency Co. of N.Z. Ltd. v. League of Nations Union of New Zealand, [1941] N.Z.L.R. 1065, 1075. If, however, the purpose of the trust is not one of the instances of charity specified in the preamble (the instances of charity specified have never been treated as exhaustive) the Court will then, by comparing the purpose with those mentioned, decide whether the purpose can be deemed by analogy to come within the spirit and intendment of the preamble: see per Lord Simonds in Gilmour v. Coats, [1949] A.C. 426, 442-443. And it was the use of such an approach as this which led Lord Macnaghten in Commissioners for Special Purposes of the Income Tax v. Pemsel, [1891] A.C. 531, to classify charitable trusts as falling into any one of four divisions. He said (at 583):

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

It must be remembered that these words of Lord Macnaghten are a classification and not a definition. It may still be necessary, therefore, to refer to the preamble to the Statute of Elizabeth to decide whether a particular

purpose is charitable. The main advantage of Lord Macnaghten's classification is that if the purpose of the trust falls within any one of the first three heads of that classification then the Court will more readily, but not necessarily, import the second characteristic of charitable trusts, namely, that the trust confers a benefit upon the community or upon an appreciably important class or section of the community: see National Anti-Vivisection Society v. Inland Revenue Commissioners, [1948] A.C. 31, 42, 65.

What, then, is meant by the words a "section of the community"? The answer (so far as it is relevant to this present article) is to be found in the words of Lord Simonds in Oppenheim v. Tobacco Securities Trust Co. Ltd., [1951] A.C. 297, when he said (at 306):

> The words "section of the community" have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word "possible") beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. . . . A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

Thus the House of Lords in this case held that a trust whereby the income from certain investments was to be used to provide education for the children of employees or of former employees of a named company was not a valid charitable trust falling within the second division of Lord Macnaghten's classification, for the beneficiaries, that is the children, did not constitute a section of the community for charitable purposes. The relationship of common employment was held to be a personal quality depending upon the employees' relationship to a particular person, the employer: see per Lord Simonds (at 307 idem). Nor is the result different if the beneficiaries are the dependants of persons designated by means of their common employment: see per Lord Normand (at 310 idem).

As the law stands at present, however, where the purpose of the trust falls within the first division of Lord Macnaghten's classification - trusts for the relief of poverty - the test relating to this second characteristic is less rigid in its application than in those cases where the purpose falls within one of the other divisions of that classification. Trusts for the relief of poverty constitute a special case, and the extent of this anomaly is best illustrated by the decision of the Court of Appeal in Gibson v. South American Stores (Gath & Chaves) Ltd., [1950] Ch. 177. In this case the Court of Appeal held that where the trust is one for the relief of poverty, then a valid charitable trust is created notwithstanding that the beneficiaries are employees, or dependants of employees, of a named company(1).

If the residuary bequest in Cox's case (supra) is to be held valid as a charitable trust two questions must be answered in the affirmative. First, are the purposes of the trust charitable in the legal sense, and, secondly, do those purposes confer a benefit upon the community or upon an appreciably important class or section of the community?

The answer to the first question depends upon the meaning, in its context, of the phrase "for charitable purposes only", and can be quickly disposed of. Lord Somervell of Harrow, who delivered the judgment of their Lordships, said (at 638), that this phrase looks back to the preamble to the Statute of Elizabeth and to Lord Macnaghten's classification, and, therefore, the relevant bequest must

> . . . be read as if Lord Macnaghten's classification was set out in full after or instead of the words "for charitable purposes only".

This was the construction which had commended itself to all of the Canadian Judges and, says Lord Somervell (at 640 idem), it "gives plain words their proper meaning". Accordingly, the phrase "for charitable purposes only" must be taken as compendiously describing the charitable trusts or purposes recognized by the law, and so read the trust satisfies the first characteristic of charitable trusts mentioned above. The first question is, therefore, answered in the affirmative.

The answer to the second question, however, presents greater difficulty. The testator had stated that

> . . . the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees . . . .

As stated above, such a class of persons does not constitute the community or an appreciably important class or section of the community for charitable purposes unless the purpose of the trust is the relief of poverty among those persons. If the trust is to be upheld as a valid charitable trust, it must be established, as a matter of construction, either, that these persons are not the only beneficiaries of the trust, or, alternatively, that the trust is restricted to the relief of poverty among the employees and ex-employees of the company and their dependants.

The first mode of construction was advanced by counsel for the Public Trustee for the Province of Ontario, who submitted that the testator had by the wording of the residuary bequest manifested a general charitable intention. He submitted that by using the words "in perpetuity" and "directly" the testator had established certain trusts for conferring benefits, denoted by the phrase "for charitable purposes only", which were not restricted to the class upon whom the "direct" benefits were conferred, and that accordingly the testator had intended to confer "indirect" benefits upon persons other than the employees and ex-employees of the company and their dependants. If such a submission is accepted the class of beneficiaries is thereby widened. This general charitable intention would be the primary intention of the testator, and the fact that he wished certain benefits to be conferred upon the employees and ex-employees of the company and their dependants would be incidental to that primary intention. Their Lordships, however, dismissed this submission. Lord Somervell said (at 638):

> The words "in perpetuity" mark the distinction between charitable and ordinary trusts. The word

> "directly" is not inapt though it may be surplusage. The employees are to be his direct beneficiaries and it will be immaterial that others might benefit indirectly. It would need very plain words to restrict a trust to "indirect" benefits, nor is it clear what the words would mean. Their Lordships are satisfied that the only beneficiaries within the bequest are the employees and ex-employees of the company and their dependants.

The use of the word "only" by the testator in the context above cited, although this point was not referred to by their Lordships, supports this construction in emphasizing that these persons are the sole beneficiaries of the trust.

This first mode of construction being rejected, counsel proceeded, in order to avert the invalidity which would follow from reading the words "for charitable purposes only" in their natural sense, to submit an alternative construction, namely, that these words should be construed as if the testator had directed his trustee to apply the income not for all or any of the purposes which the law recognizes as charitable, but only for such of those purposes as, having regard to the prescribed class of beneficiaries, could be regarded as charitable, that is, the relief of poverty. While admitting that this was not an impossible construction their Lordships felt that they could not adopt it. It could not be assumed that the relief of poverty was the sole purpose of the testator's establishing the trust. Further, the sum involved was large, and it was stated (at 638-639) that the testator could not have supposed, except in most unusual circumstances, that the employees and ex-employees of the company and their dependants would be in need of financial assistance. The fact that the beneficiaries were, or had been employed in the insurance business, and thus likely to have made provision by means of superannuation and life insurance for themselves and their dependants, may have influenced their Lordships in rejecting this alternative construction. The second question is therefore answered in the negative and so the trust fails as a charitable trust, for, as Lord Somervell said (at 638):

. . . the trustees are given a discretion to apply the income of the fund in perpetuity for the benefit of the employees in question for any of the purposes enumerated in Lord Macnaghten's classification, and if this is so, it is not in doubt that the gift as a whole is not a good charitable gift. [Emphasis added]

Although the result is clear, the ratio decidendi may be expressed in two different ways - and in New Zealand it is important to discover which alternative is the right one. The residuary bequest in Cox's case could be said to have failed as a charitable trust for either of the following reasons:

(1) that although the purposes of the trust were charitable in the legal sense, they nevertheless did not confer a benefit upon the community or upon an appreciably important class or section of the community; or

(2) that having regard to the prescribed class of beneficiaries the testator had created a mixed trust comprising charitable and non-charitable purposes and had not restricted the trustees to applying the income solely for the valid charitable purposes to the exclusion of the invalid non-charitable purposes.

Thus the final and most important aspect now remains to be considered. In New Zealand as in England the law relating to charitable trusts rests on the preamble to the Statute of Elizabeth. Accordingly, the decisions of the English Courts and of the Privy Council on this aspect of the law will generally apply in New Zealand also. These decisions, however, must be read subject to the modifications imposed by statute in New Zealand. One such statutory modification is s. 2 of the Trustee Amendment Act 1935 which states:

2. (1) No trust shall be held to be invalid by reason that 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 funds or any part thereof is by such trusts directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.
(3) . . .

Similar statutory provisions are in force in the Australian states of Victoria and New South Wales, but not in England nor the Province of Ontario where Cox's case had its origin. The mischief which the Legislature sought to remedy by this statutory provision was the complete failure of a trust which contained some charitable purposes and other non-charitable purposes, and as stated above this could be one of the reasons why their Lordships held that the trust in Cox's case failed.

The manner of the application of s. 2 of the Trustee Amendment Act 1935 was considered by the Court of Appeal in In re Ashton, Siddall v. Gordon, [1955] N.Z.L.R. 192. Prior to this decision of the Court of Appeal, the cases (which are collected and reviewed in the judgment of Smith J. in the Supreme Court, [1950] N.Z.L.R. 42, and in the judgments of Gresson and Turner JJ. in the Court of Appeal) fell into two groups. According to one line of authority the statutory provision applied only where the wording of the trust permitted the non-charitable purposes to be literally struck out by a "blue pencil" thereby leaving the charitable purposes standing in the original wording of the trust without further alteration. This is the "narrow" approach. The other line of authority permitted the application of the statutory provision not only in those cases which fall within the "narrow" approach, but also in those cases where the wording of the trust does not in itself provide any means of severance, so that words have to be inserted to effect a modification of the wording of the trust to achieve the charitable purpose. This is the "broad" approach: see per Turner J. (at 202, idem). The Court of Appeal adopted the "broad" approach as being more in line with the purpose for which the statutory provision had been enacted. Gresson J. said (at 197):

> In those cases in which there are clearly included in the gift as separate and distinct objects purposes which are charitable and purposes which are not charitable, no difficulty in applying the statute arises. The purposes which are charitable can be severed and upheld; the purposes which are not charitable will be held invalid. But, where a fund is directed to be applied in terms so general as to include purposes charitable and purposes non-charitable, the application of the section is more difficult. The question then arises whether the section is to be applied strictly and narrowly or broadly and liberally. There has been some difference of judicial opinion; but the view I take is that the language of the section indicates that a broad rather than a narrow construction is to be adopted. It is not only when some non-charitable purpose, as well as some charitable purpose is <u>included</u> that the section is to apply; it is to apply equally when some non-charitable purpose as well as some charitable purpose <u>could be deemed</u> to be included. The Legislature has provided that the remedial effect of the section is to apply not merely to cases where charitable and non-charitable purposes are expressly included, but to cases where the language used is susceptible of comprehending both charitable and non-charitable purposes.

Section 2 can only be applied in the manner adopted by the Court of Appeal to effect a <u>modification</u> of the wording of the trust so as to validate the trust as a whole: (per Turner J. at 202 idem). It cannot be used to expand the trust. Section 2 has the opposite effect, as was stated by Fullager J. in <u>In re Belcher</u>, [1950] V.L.R. 11; [1950] A.L.R. 138, when he said ([1950] A.L.R. 142) when considering s. 131 of the Charitable Trusts Act, 1928 (Vic.), from which the New Zealand section was drafted:

> In every case, the effect of applying the section is to confine the field within narrower limits than those chosen by the testator.

What, then, is the effect, if any, of s. 2 of the Trustee Amendment Act 1935 on cases such as <u>Cox's</u> case?

Their Lordships had stated (at 638) that the residuary bequest must

> . . . be read as if Lord Macnaghten's classification was set out in full after or instead of the words "for charitable purposes only".

If this be done the residuary bequest would read as follows:

> To pay the income thereof in perpetuity for the relief of poverty, the advancement of education, the advancement of religion, and for other purposes beneficial to the community, not falling under any of the preceding heads; the persons to benefit directly . . .. etc.

As stated previously one of the possible reasons why their Lordships held that this residuary bequest failed as a charitable trust was because the testator had created a mixed trust comprising, having regard to the prescribed class of beneficiaries, charitable and non-charitable purposes. Applying Gibson's case (supra), the relief of poverty among the prescribed class of beneficiaries is a valid charitable purpose; while, applying the decision of the House of Lords in Oppenheim's case (supra) all the other purposes for such beneficiaries are invalid non-charitable purposes.

If this is so, then the trust in Cox's case is one to which s. 2 of the Trustee Amendment Act 1935 can be applied, for the fact that the testator did not endeavour to exclude the trustees from applying the income to non-charitable purposes is irrelevant. By the application of s. 2 the non-charitable purposes are struck out, thereby leaving only the single charitable purpose, the relief of poverty; and the trust is then construed as if the trustees had been directed to apply the income for this purpose alone.

Such a method of application of s. 2 could, perhaps, find support in the two Victorian cases of In re Griffiths, [1926] V.L.R. 212, and In re Bond, [1929] V.L.R. 333, both decisions at first instance. In the former case a testatrix directed her trustees to distribute her estate as follows:

> . . . three-fourths among my near relatives, and one-fourth amongst other persons than my said near relatives and/or charitable institutions or organizations.

Mann J. applied the corresponding Victorian section to the disposition of the one-fourth share by striking out all words other than the words "amongst charitable institutions or organizations". In the latter case there was a legacy "to the blind and their children", and Cussen J. applied the Victorian section striking out the words "and their children".

If s. 2 is thus applied to the trust in Cox's case the result achieved is the same as that which was sought to be achieved by reading the words "for charitable purposes only" as if the testator had directed his trustees to apply the income not for all or any of the purposes which the law recognizes as charitable, but only for such as could be regarded as charitable, having regard to the prescribed class of beneficiaries. This construction was rejected because of the large sum involved and the fact that the beneficiaries would not require financial assistance except in most exceptional circumstances. It is submitted, however, that these factors cannot preclude the application of s. 2. By adopting the construction which they did of the words "for charitable purposes only", their Lordships recognized that one of the testator's purposes in establishing the trust was the relief of poverty, and the fact that the choice of this particular purpose, as an object of his bounty, is inappropriate because of the circumstances should not thereby preclude the application of s. 2 to the trust. Rather it is a situation in which, because of such factors, one further step might be taken, and the provisions of the Charitable Trusts Act 1956 invoked, it now being a case in which it is "inexpedient to carry out that purpose".

It is, however, submitted that the real reason why the trust in Cox's case failed is the first reason mentioned above, namely, that although the purposes of the trust were charitable in the legal sense, they nevertheless did not confer a benefit upon the community or upon an appreciably important class or section of the community.

It is further submitted that because of this s. 2 cannot be applied to validate the trust in the manner stated above.

Section 2 refers to "charitable purposes" and to "non-charitable purposes". What do these terms mean? The answer, it is submitted, is to be found in their Lordships' treatment of the phrase "for charitable purposes only" in Cox's case. It was held (638 idem) that this phrase looked back to the Statute of Elizabeth and to Lord Macnaghten's classification of charitable trusts founded on that statute. That is, their Lordships treated the construction of the phrase "for charitable purposes only" as a determination of whether the trust satisfied the requirements of the first characteristic of charitable trusts. They applied the test appropriate to that characteristic. Thus the purpose of a charitable trust is the manner in which the trust funds are to be applied to confer a benefit upon the community or upon an appreciably important class or section of the community. "Charitable purposes", therefore, are the instances of charity specified in the preamble to the Statute of Elizabeth and others which come within its spirit and intendment. All other instances or modes of conferring benefits upon the community or upon an appreciably important class or section of the community are non-charitable purposes. It is submitted that the application of s. 2 relates exclusively to the first characteristic of charitable trusts.

Before s. 2 can be applied to validate a trust it is necessary to ascertain whether the manner in which the trust funds are sought to be applied or disposed of comprises charitable purposes and/or invalid non-charitable purposes, as determined by reference to the Statute of Elizabeth. This is the only test which the law recognizes for ascertaining whether the manner in which the trust funds are to be applied is or is not charitable. Thus Viscount Cave L.C., in Attorney-General v. National Provincial and Union Bank of England, [1924] A.C. 262, said (at 265):

> . . . Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to

> argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust. [Emphasis added]

To "show it to be a charitable trust" it is necessary to show that the trust satisfies all the characteristics of charitable trusts, not merely that it satisfies one of those characteristics, for each characteristic is separate and distinct and each has its own appropriate test. Accordingly, a purpose (for example, the advancement of education, or of religion) which is normally charitable does not become non-charitable merely because, having regard to the prescribed class of beneficiaries, it does not confer a benefit upon the community or upon an appreciably important section of the community. To adopt such a test is to judge the charitableness or otherwise of the purpose of a trust by reference to the second characteristic of charitable trusts, which is contrary to the dicta of Viscount Cave L.C. cited above.

If the prescribed class of beneficiaries is not such as to satisfy the second requirement of charitable trusts, because the trust though for a charitable purpose, does not confer a benefit upon the community or upon an appreciably important class or section of the community, then s. 2 cannot be applied to validate that trust. Section 2 relates exclusively to the first characteristic of charitable trusts, and can only be applied to render a trust valid where it would otherwise be invalid because the purposes of the trust were susceptible of including invalid non-charitable purposes.

Section 2 cannot, it is submitted, be used to convert an inadequate class of beneficiaries into a class sufficient to satisfy the requirements of the second characteristic of charitable trusts. Nor can s. 2 be used, as a corresponding statutory provision was used in the Victorian cases of In re Griffiths and In re Bond, cited above, to strike

out some of the prescribed beneficiaries so as to validate the trust. The section refers to "charitable purposes" and to "invalid non-charitable purposes": it does not refer to "charitable objects" and to "invalid non-charitable objects". For while persons may be the "objects" of a charitable gift (see per Lord Wrenbury, Verge v. Somerville, [1924] A.C. 496, 499), the expression "charitable purposes", as used in the law relating to charitable trusts and in s. 2, is a term of art, referring not to the beneficiaries who are designated but to the manner in which the trust funds are to be applied so as to confer a benefit upon the beneficiaries.

Summing up, the trust in Cox's case failed as a charitable trust, not because the purposes of the trust, that is the manner in which the income was to be applied, were non-charitable, but because the charitable purposes, having regard to the prescribed class of beneficiaries, did not confer a benefit upon the community or upon an appreciably important class or section of the community. The test whether the purpose of a trust is charitable in the legal sense is whether that purpose comes within the instances of charity specified in the preamble to the Statute of Elizabeth or within its spirit and intendment, and not whether it confers or fails to confer a benefit upon a sufficiently wide class of beneficiaries. That is a separate and distinct requirement for a valid charitable trust. It is submitted, therefore, that s. 2 of the Trustee Amendment Act 1935 could not be applied to validate the trust, for the section relates exclusively to the first characteristic of charitable trusts, whereas the trust failed through non-fulfilment of the second requirement of charitable trusts.

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(1) In the above article it has been assumed that the decision of the Court of Appeal in Gibson's case (supra) is good law notwithstanding the doubt placed on its correctness by the House of Lords in Oppenheim's case (supra). It is submitted that in view of the closing remarks of Lord Simonds in Oppenheim's case (at 308-9), and the test there stated, and in view of the remarks of Sir Raymond Evershed M.R. in In re Scarisbrick, Cockshott v. Public Trustee, [1951] Ch. 622, at 639-40, the "poor relations" cases (of which Gibson's case is but one) would be upheld by the House of Lords or the Privy Council.