INTERNATIONAL CASE NOTES

Paul Bater[1]

Australia

1. A trust for general charitable purposes was established by a husband and wife. The trust earned income from the provision of accountancy services by the wife's father to a company associated with the family. The intention of the settlors was to accumulate funds until they reached AUD 1 million so that the trust would be able to produce sufficient annual income to fund more substantial distributions. In the meantime the trust made small distributions including grants to an Australian charity that provided care for orphans in Bangladesh. The trustees appealed against the Commissioner of Taxation's refusal to endorse the trust as a fund established for charitable purposes exempt from income tax under section 50-105 Income Tax Assessment Act 1997 (ITAA).

   Held:

   (i) the requirement in section 50-60 ITAA that the fund "is applied for the purposes for which it was established" is directed towards an overall characterisation of the conduct of the fund and does not require satisfaction about the appropriateness of every action of the trustees and those administering the fund on their behalf;

   (ii) the trustees' policy of accumulating part of the reported income for the purpose of establishing a fund of AUD 1 million before implementing full distribution of annual income does apply the fund for the purposes for which it was established;

   (iii) the trustees were not implicated in the accountant's apparent failure to apply the funds in his trust bank account exclusively for the benefit of each of the persons entitled to them, and consequently

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that failure did not contradict the inference that the fund was applied for the purposes for which it was established;

(iv) the provision of loans to two unconnected private companies on terms that the advances were unsecured and provided for capitalised interest did not warrant rejection of the accountant's evidence that he regarded the loans as a sound and proper investment;

(v) the requirement in section 50-60 ITAA that the fund pursued its charitable purposes solely in Australia was satisfied by the distributions to the Australian charity notwithstanding the latter's application of the funds in Bangladesh as the statute did not require the place of expenditure of funds by the donee to be analysed for this purpose;

(vi) a payment for repairs to a vehicle used in Australia by the sons of one of the Australian charity's missionaries was properly made for the benefit of the missionary to alleviate the financial sacrifices required of him and the difficulty to which it gave rise in supporting his family in Australia.

(*TACT v Commissioner of Taxation* [2008] AATA 275, Administrative Appeals Tribunal of Australia, 7 April 2008)

2. Aid/Watch is an organisation which was established to research, monitor and campaign for the more effective delivery of environmentally sound overseas aid but does not deliver aid itself. It appealed to the Administrative Appeals Tribunal against the Commissioner of Taxation's refusal of its application for exemption from income tax as a "charitable institution" within section 50 Income Tax Assessment Act 1997.

Held:

(i) the relief of poverty is not promoted solely by the act of giving itself;

(ii) the work of Aid/Watch as provided in its objects and carried out in practice was directed towards promoting the relief of poverty and the advancement of education;

(iii) to the extent that its main objects fall outside these heads of charity they are otherwise beneficial to the community;

(iv) since its objects meshed harmoniously with Australian government policies and it did not seek changes to the law as a main object it was not disqualified from being charitable by its political activities.

(*Aid/Watch Incorporated v Commissioner of Taxation* [2008] AATA 52, 28 July 2008)

3. The objects of a non-profit association included the entry of women into and their advancement within the legal profession. They also contained an incidental political object of working towards the reform of the law. The association appealed against assessments to income tax on the basis that it is a charitable institution established for community service purposes within Division 50 of the Income Tax Assessment Act 1997.

Held:

(i) The Sex Discrimination Act 1984 was a clear statutory indication of the community's recognition of gender based discrimination and the need to take positive steps to overcome it; encouraging and advancing women's rights in the legal profession was a service to the community;

(ii) the law reform object was not a significant element of its purposes such as to affect its characterisation as a charitable institution.

(*Victorian Women Lawyers' Association Incorporated v Commissioner of Taxation* [2008] FCA 983, 27 June 2008)

4. A non-profit company, which provided private health insurance to serving members of the armed forces who have dependants and other persons having particular connections with the armed forces, appealed against an assessment under the Fringe Benefits Tax Assessment Act 1986 (FBTAA) on the grounds that it was a charitable institution or a non-profit association "established for community service purposes". The applicant had a single corporate member which in turn had seven individual members. The appellant contended that its objects promoted the efficiency of the defence forces for the benefit of the community as a whole sufficient to fall within the fourth head of charitable purposes identified in the *Pemsel* case.

Held:

(i) the fact that health cover was sold to members at normal premium rates would not, given the absence of private gain, disqualify the

applicant's activities from being regarded as charitable;

(ii) a body cannot be regarded as a charitable institution so long as it has a non-charitable object which is more than merely incidental or ancillary to its main charitable object;

(iii) the purpose of providing aid, comfort and encouragement to serving and former defence personnel and their dependants would tend to promote the efficiency of the forces (*Downing v Commissioner of Taxation* (1971) 125 CLR 185 followed);

(iv) the extension of membership to purely civilian persons who comprised something less than 10% of the total membership demonstrated that the company had as an object the provision of health benefits to persons who fell outside the *Downing* principle and such an object could not be described as ancillary or incidental;

(v) accordingly the appellant was not a charitable institution;

(vi) a single member company did not constitute an association for the purposes of the FBTAA;

(vii) the concept of community service required the community or a section thereof to benefit by way of the receipt of some identifiable help, benefit or advantage provided directly by the benefactor, a requirement that was not satisfied merely because the operations of the applicant had a tendency to promote the efficiency of the forces and thereby benefit the community as a whole.

(*Navy Health Limited v Deputy Commissioner of Taxation* [2007] FCA 931, Federal Court of Australia, 20 June 2007)

5. The will of a testator who died in 1913 provided, inter alia, for specific gifts of capital to four charitable institutions and the devise of certain properties on trust to pay the net annual rents to three other charities in equal shares. It also provided for the conversion of the residue into money and the application of the proceeds in a certain way on the happening of certain events. The two remaining beneficiaries of the trust sought an order that the trustee company transfer to them in equal shares the corpus of the trust.

Held:

(i) the rule in *Saunders v Vautier* could not apply because the named charities did not have an absolute vested indefeasible interest in the

trust property;

(ii) there is a presumption in favour of a transfer of capital where a gift of income to an individual or a charity is without time limit, but the presumption is rebutted if there is a clear intention expressed or implied from the will that the beneficiary is not to take more than the income (following the rule in *Congregational Union of New South Wales v Thistlethwaite* (1952) 87 CLR 375);

(iii) the courts are more ready to find a contrary intention where the gift is to a longstanding charity in perpetuity;

(iv) it was clear from the words used in the will that the testator intended to create a trust of indefinite duration and that each of the named charitable beneficiaries was not to take more than the income.

(*Melbourne Jewish Orphan and Children's Aid Society v ANZ Executors and Trustee Company Ltd* [2007] VSC 26, Supreme Court of Victoria, 20 February 2007)

6. The testatrix, who died in 1998, by her will left her house to her daughter, then aged 55, and the residue to the respondent Public Trustee of Queensland on trust to apply the income, and the capital if the income proved to be insufficient, in its absolute discretion for the benefit of her daughter during her lifetime with the remainder being divided equally between two charities. The daughter, who lived in the family home, had no dependants and suffered both mental and physical ill health. In 2006 the respondent, on the advice of an independent investment manager, implemented an investment strategy involving the use of growth orientated investment trusts. The daughter obtained professional advice that recommended an alternative investment strategy involving investment in superannuation funds. Following the respondent's rejection of this plan, the daughter applied to the court under section 8 of the Trusts Act 1973 for review of the respondent's decision.

Held:

(i) a trustee is under no obligation to give reasons for the way in which he exercises a discretion, but where he does give reasons a court may examine them;

(ii) under section 8 of the Trusts Act 1973 the reasons may be looked at for the further purpose of impugning the decision of the trustee on the ground that he was wrong on the facts or that he made an unwise

or unjustified exercise of discretion in the circumstances;

(v) the strategy proposed by the applicant's adviser requires that the management of the bulk of the capital would pass from the respondent to the trustee of the superannuation fund with an immediate and drastic reduction in the capital which might eventually pass to the charities, such a scheme being inconsistent with the express provisions in the will giving the respondent absolute and uncontrolled discretion to apply capital for the benefit of the applicant should the income be at any time insufficient for the purpose;

(iv) as the respondent had not been shown to have erred in fact or to have exercised his discretion in an unwise or unjustified way, the court declined to interfere and the application was dismissed.

(*Jaques v Public Trustee of Queensland* [2008] QSC 108, Supreme Court of Queensland, 29 May 2008)

7. A complex dispute arose between two factions of the Macedonian Orthodox Church in which the plaintiffs claimed that the defendants had contravened the law and doctrine of the Church in dismissing and replacing the parish priest of the St Petka Parish, and making changes to the parish church building of which the defendant association is the registered proprietor and trustee. The defendants sought judicial advice under section 63 of the Trustee Act 1925 (NSW) in the Equity Division of the Supreme Court of New South Wales, following which the court made several orders including a ruling that the defendant association was entitled to have recourse to certain property assets other than the church land for the purpose of paying its reasonable costs of defending the main proceedings. The judge reasoned that the final settlement of disputes as to how the objects of a charitable trust are to be achieved by use of the trust property is an important benefit of the administration of the trust and the value of that benefit is not measured according to who pays the costs of the proceedings. The plaintiffs argued successfully before the Court of Appeal of the Supreme Court of New South Wales that the judge failed to take into account the adversarial character of the proceedings and to conduct a balancing exercise. The defendant appealed to the High Court of Australia.

Held:

(i) where, as here, the legislation reflected and even copied laws enacted for identical or analogous circumstances in England, it was permissible and helpful to construe the New South Wales legislation

with the benefit of the experience expressed in judicial observations on the English analogues;

(ii) section 63 contained no implied limitations on the court's power to give advice or on the discretionary factors to be taken into account, and provided the court with a facility to give private advice in that its function is to give personal protection to the trustees and to enable them to take advice before embarking on any course which might carry a risk of incurring costs outside the scope of a trustee's rights of indemnity;

(iii) there is a public aspect to the interests at stake because they concern the administration of a charitable trust and are larger and more complex than allegations of breach of trust, and the classification of the proceedings as adversarial is not useful in deciding whether advice should be given under section 63;

(iv) in contemporary circumstances where there is an increasing tendency on trial, as on appeal, to commit argument to very detailed and lengthy written submissions, it is undesirable that appellate courts should adopt a hypercritical stance and it had not been shown that the judge failed to take into account a material consideration.

Appeal allowed.

(*Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42, High Court of Australia, 4 September 2008)

Canada

1. In 1946 a company owned by the Simpson family agreed to sell two parcels of land to the City of Kelowna subject to two conditions known as the Simpson Covenants: that the City will use the property for municipal purposes and will not at any time sell it or use it for commercial or industrial purposes. In 2004 the City obtained the consent of the corporate successor to the vendor company to the release of the Covenants. A society representing registered owners of land in the City, including members of the Simpson family, petitioned the court for a declaration that the Covenants were enforceable by the Simpson family heirs. The petitioner argued, inter alia, that the Covenants imposed a public purpose or charitable trust on the City for the benefit of its citizens.

Held:

(i) by its ordinary meaning municipal purposes connotes the use of property for purposes that could be considered charitable;

(ii) the agreement that the City could not sell the properties implied that the City would be bound by these conditions in perpetuity which tends to support the intention to create a trust;

(iii) the evidence indicated that the price paid by the City was well below market value and the price paid did not therefore displace a charitable intention;

(iv) the registration of the Covenants in the Land Registry as restrictive covenants was not conclusive against a finding that they constitute a valid charitable trust.

(*Save the Heritage Simpson Covenant Society v The City of Kelowna* [2008] BCSC 1084, British Columbia Supreme Court, 13 August 2008)

2. An amateur youth soccer association, established to promote youth soccer exclusively in the province of Ontario, applied for registration as a charity under the federal Income Tax Act. The tax authority refused registration on the grounds that the association's purpose of promoting soccer, which was agreed to be an end in itself and not incidental to any other purpose, was not charitable. The Federal Court of Appeal rejected the association's appeal, holding that it was not necessary to consider the position under Ontario law because the federal legislation had been amended in 1972 to provide a specific exemption for amateur athletic associations operating on a national basis. The court concluded that Parliament must be taken to have decided, at a time when it was clear that the pursuit of sport *per se* was not a charitable purpose under the common law, that it wished to limit the federal funding of amateur sports associations to those which operate nationally. The association appealed to the Supreme Court.

Held:

(i) the fact that the association was not a national body and did not therefore qualify for tax relief as a Registered Canadian Amateur Athletic Association (RCAAA) did not automatically preclude it from being a charity at common law;

(ii) the promotion of sport can be charitable if ancillary to another recognised charitable purpose but not in itself;

(iii) the recognition of sporting non-profit organisations as charities would potentially have a significant effect on the income tax system, and such a wholesale change was best left to Parliament.

(*A.Y.S.A. Amateur Youth Soccer Association v Canada Revenue Agency* [2007] SCC 42, Supreme Court of Canada, 5 October 2007)

3. A family established a charitable trust in 1980 to provide an annual scholarship in memory of a family member. The trust funds vested in the respondent school under a deed which provided that the respondent agreed to invest the funds in interest bearing securities and to apply the income in perpetuity for the promotion of education at the school, and to provide the founders with audited accounts every two years. The family made further donations to the trust in later years up to 2000. In 2007 the school wrote to the petitioner, a family member, indicating that it was unwilling to continue administering the trust and would seek directions from the court, pending which no further scholarships would be awarded. The petitioner sought an accounting and damages payable to the trust fund for the school's failure to invest the funds properly. The school also presented a petition for variation of the terms of the trust or an order terminating the trust and distributing the remaining funds to the petitioner. The school contended, inter alia, that the petitioner had no standing to enforce the trust.

Held:

(i) in the absence of any statutory provision equivalent to section 28 of the Charities Act 1960 (UK), the issue must be resolved in accordance with the basic rules of standing at common law;

(ii) if, because of the charitable nature of the trust, what is at issue is the enforcement of a public right, the court is satisfied that either the Attorney-General has consented to the action or that the petitioner has established some special interest beyond that possessed by the public generally;

(iii) assuming, without deciding, that the enforcement of a private right is at issue, it is one in which the petitioner has an interest (following the reasoning of the English Court of Appeal in *Re Hampton Fuel Allotment Charity* [1988] 2 All E.R. 761 (C.A.)).

(*Lee v Board of Education of North Vancouver School District No. 44* [2008] BCSC 896, British Columbia Supreme Court, 9 July 2008)

4. A company formed to promote ethical tourism applied for registration as a charitable organisation for income tax purposes under section 248 of the Income Tax Act. Its principal objects were:

- to work with key government authorities and grassroots communities of various tourism destinations to create and develop model tourism development projects that contribute to the realisation of international human rights and environmental norms and that achieve social and conservation aims that are in harmony with economic development aims for the particular region;

- to develop, fund, administer, operate and carry on activities, programs and facilities to produce and disseminate materials on a regular basis that will provide travellers and tourists with information on socially and environmentally responsible tourism in order to establish normative discourse around travelling with a social conscience.

Since the Minister of National Resources failed to respond to the application within 180 days, the Minister was deemed to have rejected the application. The company appealed the deemed refusal to the Federal Court of Appeal.

Held:

(i) even if the promotion of tourism is a charitable purpose within the line of cases holding that the general promotion of an industry or trade constitutes a public benefit for the purposes of the *Pemsel* test, the object of the applicant is limited to promotion of those tourist projects that meet the undefined goals of contributing to the "realisation of international human rights and environmental norms" and "achieve social and conservation aims that are in harmony with economic development aims for the particular region";

(ii) this object, being limited to a particular, but vague and subjective, view of what kinds of tourism are beneficial to the community, is not sufficiently analogous to a purpose already recognised as charitable to qualify under the fourth *Pemsel* head of charity;

(iii) although it is not necessary to decide the point, it is doubtful whether the dissemination of information under the second object would qualify as either the publication of research or an educational purpose;

(iv) it is unnecessary to consider whether the law of Quebec recognises a wider concept of charity than the common law as there is no

evidence that the applicant has any connection with Quebec or intends to operate there, and there is considerable force in the Minister's submission that the issue of charitable status for income tax purposes is a question of public law and not one of property and civil rights to which the private law of Quebec is relevant.

Appeal dismissed.

(*Travel Just v Canada Revenue Agency* [2006] FCA 343, 24 October 2006)

5. The applicant university's College of Medicine offered postgraduate positions to students known as supernumerary residents, whose studies are funded by third parties or government agencies. The college had a policy which provided that if a funding agency withdrew its financial support the resident's training would be terminated immediately. The university sought to dismiss the respondent but, following allegations of lack of due process, suspended him with pay while continuing to deduct tuition and other fees which depleted his third party funding. Following further internal hearings, the respondent requested the intervention of the Visitor of the university, who directed that the respondent be permitted to continue his residency. The university sought judicial review of the Visitor's decision.

Held: Application granted (by a 2-1 majority, Lane J.A. dissenting).

(i) the thoroughly public character of the university, created by statute and substantially funded by government, suggests that the substance of the Visitor's actions should be open to a measure of scrutiny by the courts;

(ii) the Visitor's office in this case has a purely statutory foundation and as such his decisions are subject to review by the courts on a standard appropriate to any other statutory decision-maker;

(iii) there is no authority to support the proposition that the Visitor must confine his intervention until all the relevant appeal procedures of the university have been exhausted;

(iv) the Visitor did not err by concluding that he should intervene only if the college had acted unreasonably in insisting on compliance with its funding policy;

(v) the standard of review to be applied by the court in considering the Visitor's decision is patent unreasonableness;

(vi) the Visitor was entitled to fashion a remedy that took account of the delay in resolving this matter, and the fact that the remedy might not reconcile with the college's funding policy did not invalidate the decision;

(vii) it was impossible to reconcile the conditions set out by the Visitor as prerequisites to the implementation of the university Appeal Committee's decision with the requirements of the Labour Standards Act, and the decision must therefore be set aside.

(*Pearlman v University of Saskatchewan* [2006] SKCA 105, Saskatchewan Court of Appeal, 27 September 2006)

New Zealand

1. A UK national, who was born and worked in the UK, retired to live in New Zealand with his wife in 1987. In 2003 he died leaving substantial assets in both countries including a 50% interest in a property in England. His will provided by clause 5 for certain bequests to his wife with the residue to be held on trust to pay debts, administrative expenses and "any other death duties" with the balance to be divided between his wife as to 25% and his three children by his previous marriages as to 25% each. Probate in relation to the UK assets was granted to the New Zealand executors under the Colonial Probates Act 1892 (UK). The beneficiaries subsequently entered into a deed of consent to pay UK inheritance tax and to transfer the UK property to the four beneficiaries as tenants in common in equal shares. A question arose concerning the allocation of the UK inheritance tax liability between the exempt and non-exempt beneficiaries. The executors sought directions from the court as to the proper approach to be adopted regarding the distribution of the estate. Evidence as to English law was given by three experts.

Held:

(i) while the essential validity of a testamentary gift of immovables is governed by the *lex situs*, a will relating to immovables out of the jurisdiction of the testator falls to be construed in accordance with the law intended by the testator, which the court found to be New Zealand law;

(ii) the natural meaning of administrative expenses includes UK inheritance tax payable by the administrators of the estate;

(iii) it was the intention of the testator that all taxes should be paid out of

the residue of the estate, and there was no basis for inferring that the particular share of any residuary beneficiary escapes that deduction;

(iv) as section 41 of the Inheritance Act 1984 (UK) does not create a restraint on distribution but is only a rule of construction, it does not operate under New Zealand law to override the clear intention of the testator (*Re Benham's Will Trusts* [1995] STC 210 and *Re Ratcliffe* [1999] STC 262 considered);

(v) clause 5 is not invalid under UK law and the executors are not bound to preserve for the wife the benefit of the spousal exemption from inheritance tax when distributing the estate, and if that involves the payment of additional UK tax it is simply a consequence of meeting the testator's intention.

(*Hamblett v Hamblett* [2006] NZHC 646, High Court of New Zealand, 8 June 2006)