CASE NOTES

Australia

1. The applicant trust corporation was a trustee of three charitable trusts, the Latham Trust, the Lucy Rose Trust and the Loveridge Trust. The three trusts shared a common purpose in seeking to provide the Anglican clergy in various dioceses in Victoria with free or reasonably priced accommodation for recreational purposes or the restoration of their health. The Lucy Rose and Loveridge Trusts were conjoined by a court scheme in 1991. The trustee wished to improve the property in the Latham Trust and purchase an adjacent unit. However, because there were insufficient funds in this trust, it proposed that it should be conjoined with the other two trusts the funds of which would be used to refurbish the existing properties of all three trusts, with any surplus funds being directed to the Bishop of Melbourne's Fund of the Anglican Diocese of Melbourne. The *cy-pres* scheme for which the trustee sought court approval under section 2 of the Charities Act 1978 (Vic) would also regulate the use of the accommodation by adding to the original beneficiaries holders of Anglican lay office, their families and persons in need. It was also intended to increase commercial occupation of the properties. The Supreme Court of Victoria found a general charitable intention in all the donors to the three trusts to supply Anglican clergy in Victoria and their families with accommodation for recreational and therapeutic purposes at a nominal fee. However, the judge maintained that since the financial situation of the clergy was still precarious the spirit of the original gift was as relevant today as when the trusts were established. He considered that the proposed increase in commercial use would violate the spirit of the gift, and objected to the diversion of surplus funds to the Bishop of Melbourne's Fund on the grounds that these should be used to purchase further residential property to be used for the purposes of the trust and not applied to wider objectives not sanctioned by the Charities Act.

(*Melbourne Anglican Trust Corporation v Attorney-General* [2005] VSC 481, 13th December 2005)

2. The national governing body for yachting in Australia claimed exemption from state payroll tax under section 10(1)(j) of the Payroll-Tax Act 1971 (NSW) for wages paid by a non-profit organisation having as one of its objects a charitable purpose. Its constitution provided that, inter alia, its objects were to promote and

administer the sport of yachting. The applicant sought exemption on the basis that it was heavily involved in educational activities, such as providing the only system of nationally endorsed training and certification to a common standard for recreational sail and power boat users, and helping to develop a safety and sea survival course for the crews of racing yachts. The tax authority rejected the claim on the basis that its objects as stated in its constitution were too narrow to include its educational and training courses. On appeal, the Administrative Decisions Tribunal considered that the objects of an organisation could encompass its unwritten goals such that the tribunal could take into accounts its activities during the relevant period. These activities were not confined merely to the sport of yachting; they were educational and contributed to the welfare of the public. Accordingly, the applicant was entitled to the exemption.

(*Yachting Australia Inc v Chief Commissioner of State Revenue* [2005] NSWADT 208, 26th August 2005)

3. The applicant body sought exemption from income tax under the Income Tax Assessment Act 1997 as a charitable institution. It was incorporated as a company limited by shares by the State of Tasmania and the University of Tasmania as the founding sole shareholders. Its objects provided, inter alia, that it was established to provide research and development facilities to help the Tasmanian business community to adopt electronic commerce and to compete in the international electronic marketplace. Although it charged fees to some of its clients, its finances relied mainly on grants from the federal government. The tax authority contended that, while the promotion of commerce may be charitable, the main purpose of the applicant was to assist individual businesses and not the community. The Administrative Appeals Tribunal considered that there was no evidence to indicate how long-term economic advantage to Tasmania's economy translates to a benefit to the public rather than to the individuals engaged in the businesses enjoying the benefits of the global online economy. The tax authority's decision to reject the claim for exemption was upheld.

(*Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2004] AATA 521, 24th May 2004)

4. The applicant body sought exemption from income tax under the Income Tax Assessment Act 1997 as a charitable institution. It was established as a not-for-profit organisation with the principal object of the promotion of a culture of innovation and entrepreneurship in Australia, particularly among the young, by visibly assisting innovators to commercialise their ideas. To this end it provided assistance to innovators with regard to activities such as the development of patents, prototypes, business plans, licensing agreements, venture capital projects and networking, and funding for public educational programmes and schools competitions. The tax authority denied the exemption, but the taxpayer's appeal was upheld by the

Administrative Appeals Tribunal. The Federal Court of Australia rejected the tax authority's appeal, holding that the object is capable of being charitable as being within the spirit and intendment of the preamble to the Statute of Elizabeth. The applicant's services were available to a relevant section of the public without discrimination, since it was open to anyone to seek its assistance and the limitation of its help to the inventors who were likely to be the best exemplars of innovation was a rational one in keeping with its main object. The court concluded that its essential object was charitable under the fourth head and it was not necessary to consider whether it advanced education.

(*Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319, 16th September 2005)

5. The testatrix left a property to the trustees of an unincorporated society for crippled children for use as a home or hospital for crippled children subject to the proviso that, should the property cease to be used for those purposes at any time, it then reverts to her next-of-kin at that time. The applicant foundation, a corporation which had assumed the charitable functions, assets and liabilities of the unincorporated society, owned two properties adjacent to the original property and used all three properties originally as a residential facility for crippled children and subsequently as a nursing home for disabled children and adults. In the light of current state government policy, which required such care to be provide through smaller group homes in the community rather than in large institutions, the applicant proposed to sell the three properties and use the proceeds to provide accommodation, goods and services to disabled people in the district. The applicant sought court approval of a *cy-pres* scheme for the administration of the original property. The New South Wales Supreme Court approved the scheme, holding that:

- the gift of the original property was a valid charitable gift;

- the foundation was the successor of the unincorporated society;

- the gift over was void for perpetuity, because the event that triggered the gift over might occur outside the perpetuity period (although if the gift to the society were for a limited period or until the occurrence of a particular event, the possibility of reverter would not infringe the rule);

- the original purposes of the gift have ceased to provide a suitable and effective method of using the trust property having regard to the spirit of the trust;

- the gift was an absolute gift to charity subject to a gift over on the happening of a condition subsequent, which condition being void for perpetuity the gift

took effect unconditionally.

Accordingly, the judge concluded that the gift was absolute and the testator's intention did not exclude the availability of a *cy-pres* scheme.

(*Cram Foundation v Corbett-Jones* [2006] NSWSC 495, 26th May 2006)

6. The High Court of Australia (Australia's final court of appeal) has held unanimously that an association of general medical practitioners is a charitable body entitled to exemption from state payroll tax, reversing the decision of the majority of the Court of Appeal in Victoria (see the report in CL&PR Vol. 8 No. 3 [2005] at page 55). The High Court reviewed the development in Australia of the judicial approach to the meaning of charity based on the decision of the House of Lords in the *Pemsel* case, and affirmed this approach. In the instant case, the Court concluded that there was no evidence to support the contention that the appellant body was controlled by government; the fact that the appellant was almost exclusively funded by government and that its purposes coincided with purposes of the Government did not preclude charitable status.

(*Central Bayside General Practice Association Ltd v Commissioner of State Revenue,* [2006] HCA 43, 31st August 2006)

Canada

1. An amateur youth soccer association, established to promote 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. On appeal to the Federal Court of Appeal, the association contended that its application was supported by the common law of Ontario based on the decision of the Ontario High Court in *Re Laidlaw* (1984) 13 D.L.R. (4th) 491 that the promotion of amateur sport involving the pursuit of physical fitness is a charitable purpose.

The court rejected the 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.

(*A.Y.S.A. Amateur Youth Soccer Association v Canada Revenue Agency* [2006] FCA 136)

2. A Canadian registered charity, which had been established to support a related Israeli organisation, appointed an Israeli resident individual as its agent to enable it to carry out charitable activities in Israel involving the operation of three institutions for orphans. The agent was part of the controlling body of the Israeli organisation. The Canadian charity had no staff in Israel, and merely approved requests for funds by the agent that fell within the charity's guidelines. The funds were transferred to the agent who disbursed them in Israel.

The tax authority revoked the registration of the charity on the grounds that it was not carrying on the foreign activities itself, as required by the federal Income Tax Act.

The Federal Court of Appeal rejected the charity's appeal against revocation on the basis that, although the acts of an agent are deemed under common law to be the activities of the principal, it was the Israeli organisation rather than the agent that was carrying out the charitable activities in Israel and there was no evidence that the agent exercised any control over those activities in his capacity as agent.

(*Bayit Lepletot v Minister of National Revenue* [2006] FCA 128)

European Union

1. (a) Facts: The plaintiff was an Italian law foundation resident in Italy. According to the foundation's statutes, it solely serves educational purposes, inter alia, in the fields of musicology and the building of string instruments. Its activities comprised mainly the granting of scholarships to young people from Switzerland to enable them to study in Italy. The plaintiff owned a piece of real estate in Germany, from which it derived German-source rental income liable, in the case of the foundation as a non-resident, to limited German tax liability. The German tax authorities subjected this income to corporate income tax, which the plaintiff unsuccessfully objected to before the tax authorities and the tax court of Munich.

Under Sec. 5(1) No. 9 of the Corporate Income Tax Law (*Körperschaftsteuergesetz*, or KStG) - as applied in the relevant year (1997) - corporations, which according to their statutes and their effective management exclusively and directly serve non-profit, charitable or church purposes, are exempt from corporate income tax. However, under Sec. 5(2) No. 3 (now, No. 2) of the KStG, the exemption is not available for taxpayers subject to limited German tax liability.

(b) Issue: The issue was whether or not it is compatible with the freedom of establishment, the freedom to provide services and/or the free movement of capital protected by the EC Treaty if a non-profit foundation established under the laws of another EU Member State, which is subject to limited German tax liability in respect of its German-source rental income, is subject to German corporate income tax, whilst a domestic non-profit foundation subject to unlimited German tax liability deriving such income is exempt from corporate income tax.

The German Federal Tax Court (*Bundesfinanzhof*) expressed doubts as to whether or not the unequal treatment is compatible with the basic freedoms contained in the EC Treaty. Specifically, the Federal Tax Court stated that the plaintiff, despite being a non-profit corporation, did not constitute a "non-profit-making" company excluded from the basic freedoms under Art. 58(2) (now Art. 48(2)) of the EC Treaty. According to the Federal Tax Court, falling within the scope of the basic freedoms does not require the maximisation of profits provided that, in addition to other activities, a company performs services for compensation, as the plaintiff did by renting out real estate. With regard to a justification for the unequal treatment, the Federal Tax Court, inter alia, rejected fiscal cohesion considerations and the argument that the rules on public utility activities were made with a view to the furtherance of the German (not foreign) common welfare.

Consequently, the Federal Tax Court issued a decision in which it requested a preliminary ruling from the European Court of Justice (ECJ) regarding the compatibility of the taxation of foreign non-profit private law foundations with the basic freedoms contained in the EC Treaty (case No. I R 94/02, decision of 14th July 2004).

(c) Advocate General's opinion: On 15th December 2005, Advocate General Stix-Hackl delivered her opinion. The Advocate General considered that the freedom of establishment, in principle, applies to a case such as that in question, as the renting out of a property, provided that it is carried out for consideration, constitutes business activity. As, in the case in question, the foreign foundation had no permanent office in Germany, the freedom of establishment did not apply. The free movement of capital, however, applied to the facts of the case, as the owning of and the deriving of income from real estate qualifies as capital investment, which falls within the scope of this freedom irrespective of the individual characteristics of the investor.

A fiscal provision, which differentiates between taxpayers based on their place of residence, is only compatible with the free movement of capital if the resident and non-resident taxpayers are not in a comparable situation or the differential treatment is objectively justified by overriding reasons of public interest and it is proportionate. In the case in question, the non-profit foundation status of the foreign entity had been recognized and, therefore, it was in a comparable situation to a German non-profit

foundation. The differential treatment of recognised foreign non-profit foundations thereby constituted discrimination. The Advocate General emphasized that the breach of the free movement of capital is dependant on the recognition of the non-profit status of the foundation in Germany.

The Advocate General stated that the differential treatment could not be justified by the principle of fiscal cohesion, as the taxation of the foreign foundation's rental income in Germany was not compensated for by any advantage granted to the foreign foundation. The Advocate General also rejected the justification based on a lack of control possibilities regarding a foreign foundation's status by referring to the Mutual Assistance Directive (Directive 77/799/EEC), which provides sufficient means to exchange information. In addition, the control problem only arises in respect of unrecognized foreign non-profit making foundations. Finally, the Advocate General rejected the justification based on anti-abuse reasons in stating that a general exclusion of foreign non-profit making foundations from a tax exemption is disproportionate.

The Advocate General concluded that the provisions on the free movement of capital in the EC Treaty (Arts. 56 and 58) preclude a national rule of an EU Member State, which taxes a non-profit private law foundation of another EU Member State, which is recognized as such under its domestic law, in the way described in (a). A national rule of an EU Member State, which treats foreign non-profit entities, which are not recognized under its national law as non-profit foundations, differently from resident non-profit foundations, is not, however, incompatible with the free movement of capital.

(d) Decision: On 14th September 2006, the European Court of Justice (ECJ) gave its decision. As the foundation did not have a permanent presence in Germany from where the immovable property generating the income in question was actively managed, the ECJ concluded that the freedom of establishment did not apply. As, however, investments in real estate by non-residents are part of the nomenclature of Annex I to Directive 88/361, which has indicative value for the purposes of defining the notion of capital movements, the ECJ, by referring to previous case law, affirmed that it is the free movement of capital that applied in this case. Consequently, the applicability of the freedom to provide services was not further considered.

The ECJ established that it constitutes a restriction to the free movement of capital if a tax exemption for rental income is granted to charitable foundations solely on the basis of their residence in Germany. The Court reiterated that such a restriction is legitimate only if the situations of resident and non-resident charitable foundations are not objectively comparable or if the restriction is justified by overriding reasons in the general interest, provided that this restriction does not go beyond what is necessary. The ECJ rejected all the arguments and justifications put forward by the tax authority and the German and UK governments.

The argument that the foundation was not in an objectively comparable situation with a German charitable foundation, as it only benefited foreign nationals and generally conditions for granting tax benefits for charitable foundations vary between EU Member States, was rejected on the following grounds:

- whilst the EU Member States are entitled to require a sufficiently close link between charitable status for purposes of a tax exemption and the activities pursued by charitable foundations, the German legal provisions do not require that the activities should be carried out in the national territory or must benefit the German general public; and

- whilst it is true that an EU Member State does not have to automatically acknowledge the charitable status of foundations that are classified as such in their EU Member State of origin, nevertheless, the Italian foundation also satisfies the requirements for charitable status under German law and cannot therefore be treated differently solely on the ground that it is established outside Germany.

Second, in terms of the effectiveness of fiscal supervision the ECJ affirmed, by referring to its settled case law, that in principle this may provide an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms. Because, however, of the measures and tools available in the case in question, such as the requirement to provide annual accounts and activity reports and the possibility to obtain the relevant information under the Mutual Assistance Directive 77/799/EEC, a denial of tax benefits for non-resident charitable foundations would go beyond what is necessary to achieve effective fiscal supervision.

Third, the ECJ concluded that fiscal cohesion is not impaired in the case in question. The ECJ stressed that, in order to justify a restriction on the grounds of fiscal cohesion, a direct link between the granted tax advantage and the offsetting of that advantage by a particular tax levy would have been necessary.

Finally, the arguments for protection of the tax base was rejected, as reductions in tax revenue cannot be regarded as an overriding reason in the public interest. With regard to the justification of combating criminal abuse of foundation structures for money laundering and illegal transfers, the ECJ reiterated that the establishment of foundations in other EU Member States cannot give rise to a general assumption of criminal activity. In view of the available measures to monitor accounts and activities of foundations, the denial of tax benefits is disproportionate.

Consequently, the ECJ held that the free movement of capital precludes any national regulation denying tax exemption of rental income to non-resident charitable foundations if they would have enjoyed such a benefit if resident. In particular, the

ECJ held that Article 73b [now Art. 56] of the EC Treaty, in conjunction with Article 73d [now Art. 58] of the EC Treaty, must be interpreted as precluding a Member State which exempts from corporation tax rental income received in its territory by charitable foundations which, in principle, have unlimited tax liability if they are established in that Member State, from refusing to grant the same exemption in respect of similar income to a charitable foundation established under private law solely on the ground that, as it is established in another Member State, that foundation has only limited tax liability in its territory.

(*Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, Case C-386/04, Judgment 14th September 2006)

2. Advocate General Stix-Häckl of the European Court of Justice (ECJ) gave a combined Opinion on 21st September 2006 in two cases concerning the compatibility of the German legislation regarding the deductibility of school fees paid to foreign private schools.

Under Sec. 10(1) No. 9 of the German Income Tax Law (*Einkommen-steuergesetz*), taxpayers may deduct 30% of the fees paid to certain German private schools and supplementary schools for a child in respect of which the taxpayer is entitled to child allowance or child tax credit as special expenses if the German *Länder* recognizes the school as providing public education. Fees paid for the attendance of foreign private schools and supplementary schools do not, however, qualify for the deduction.

(i) *Commission v. Germany*, Case C-318/05

The European Commission announced on 7th January 2004 that it had requested Germany to end its discrimination regarding the deductibility of school fees. The requests were in the form of a reasoned opinion, which is the second stage of the infringement procedure under Art. 226 of the EC Treaty. If no satisfactory response is notified to the Commission within 2 months, the Commission may refer the matter to the European Court of Justice. Germany did not satisfactorily respond to the reasoned opinion. The European Commission decided on 15 July 2005 to refer Germany to the European Court of Justice (ECJ) regarding the non-deductibility of fees paid to foreign schools.

In the Commission's opinion, these rules discriminate against parents who would like their children to be educated in another EU Member State and German individuals moving to work abroad who remain subject to worldwide German tax liability whose children attend schools abroad (violation of Art. 18 (right to move and reside freely), Art. 39 (the free movement of workers) and Art. 43 (freedom of establishment) of the EC Treaty). The Commission also considers that these rules discriminate against foreign schools as opposed to German schools in providing services (violation of Art.

49 of the EC Treaty).

In her opinion of 21st September 2006, Advocate General Stix-Häckl concluded that Germany infringes its obligations under Arts. 18, 39, 43 and 49 of the EC Treaty by excluding, without any exception, school fees paid to schools located in another EU Member State from the tax deduction for income tax purposes provided under Sec. 10(1), No. 9 of the EStG).

(ii) Case C-76/05, *Herbert Schwarz & Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*

The same issue arose in a separate case brought before the German courts. The plaintiffs were German resident spouses jointly assessed to German income tax. In the relevant years (1998 and 1999), they paid school fees to a private (charitable) school in Scotland, which their children attended. The German tax authorities denied the deduction as special expenses for income tax purposes that the parents claimed in respect of the school fees paid.

According to established case law of the German Federal Tax Court (*Bundesfinanzhof*, or BFH), the non-deductibility of fees paid to foreign schools described above does not violate the basic freedoms under the EC Treaty. The BFH recently confirmed its opinion in a decision of 14th December 2004 (case XI R 66/03). In this decision, the court stated that in the underlying case the non-deductibility of fees paid to a foreign private school is not discriminatory because the fees would not have qualified for the deduction if they had been paid to a comparable German school. (*Note* A German school comparable with the school in question would also not be recognized; hence, Sec. 10(1) No. 9 of the Income Tax Law would not apply and accordingly 30% of the fees would not be deductible if paid to that German school.)

The instant case was heard by the Tax Court of First Instance of Cologne (case 10 K 7404/01, decision of 27th January 2005). The court followed the reasoning of the European Commission, which had sent a reasoned opinion to Germany, requesting it to end the alleged discrimination regarding the deductibility of school fees (see (i) above).
The Tax Court of First Instance thus stayed the proceedings and referred the following question to the ECJ:

> "*Is it contrary to Arts. 18 (right to move and reside freely within the EU), 43 (freedom of establishment), 39 (free movement of workers) and 49 (freedom to provide services) of the EC Treaty to treat payments of school fees to certain German schools, but not payments of school fees to schools in the rest of the European Community area, as special expenditure leading to a reduction of*

income tax, pursuant to Sec. 10(1) No. 9 of the Income Tax Law as applicable in 1998 and 1999?"

In substance, Advocate General Stix-Häckl concluded that:

- the freedom to provide services set out in Art. 49 of the EC Treaty prevents the application of national legislation that grants a 30% deduction regarding the payment of school fees to certain German schools, but disallows such a deduction for payments made to schools located in another EU Member State; and

- national legislators, taking into account the current state of EU law, remain free to limit the tax benefits granted to private schools or to establish objective criteria so as to determine the eligibility conditions of these schools to benefit from these tax advantages.

(*Commission v. Germany*, Case C-318/05, Opinion 21st September 2006; *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*, Case C-76/05, Opinion 21st September 2006)

3. Following the European Commission's state aid investigation of various direct tax reliefs granted to Italian banking foundations as part of the privatization and restructuring of the Italian savings banks in the 1990s, the Commission ruled in August 2002 that the state aid rules were inapplicable to the banking foundations concerned. However, the Italian tax authorities continued to maintain that the banking foundations did not qualify for a domestic law exemption from withholding tax on dividends paid to charitable foundations because their main purpose was to control and manage banking enterprises. When the case reached the Italian Supreme Court, the court referred to the ECJ the question whether the tax exemption in issue could represent unlawful state aid. Although the relevant Italian laws had been subsequently amended to satisfy the Commission's concerns, the ECJ ruled that the original laws could constitute unlawful state aid in so far as the foundations were engaged in economic activity by reason of their control of their banking subsidiaries and could be regarded as undertakings for the purposes of the state aid rules. While the holding and managing of even a controlling shareholding does not qualify as an economic activity if it is limited to the exercise of shareholding rights and the receipt of dividends, a shareholder that exercises its control and is involved directly or indirectly in the management of the company must be considered to be taking part in the economic activity of the company. When a foundation carries out its charitable activities, it does not act as an undertaking; however, when it carries out financial, commercial, real estate or securities operations that are necessary to realize its social aims, it acts an undertaking even if it does not realise any profits on these operations, because it

provides goods or services in competition with other businesses. With regard to the tax reliefs concerned, these were selective in their application and likely to distort Community trade, and could therefore be classified as state aid. The Court referred the matter to the Italian courts to decide the case after an appropriate examination of the facts.

(*Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA*, Case C-222/04, 10th January 2006; European Commission Decision of 22nd August 2002, OJ L 55, 1st March 2003, p.56).

New Zealand

1. The will of the testatrix provided for the executor to hold the residue of her estate on trust to pay in perpetuity part of the income from the residue to the Roman Catholic Bishop of Christchurch for such charitable purposes in connection with his work among old people in the Province of Canterbury as he shall from time to time decide. The amount of the payment was left to the executor's discretion subject to a limit of 80% of the net annual income from the residue. The net annual income remaining after the payment to the Bishop was to be accumulated and added to the capital of the residuary estate. The executor sought directions from the High Court concerning the validity of the trust and the direction to accumulate. The court held that the delegation of a general power of appointment to a specific and identifiable individual who was confined in the exercise of that power to the purpose of benefiting old people created a valid charitable trust. The direction to accumulate was void as being contrary to the rule against perpetuities; such a direction did not fall within the umbrella of a charitable trust because the funds could not be used by the charity. However, the court detected in the will a general charitable intention to give the entire income, including the income to be accumulated, to the purpose of benefiting old people. The court therefore utilised its inherent jurisdiction to direct a *cy-pres* modification of the will to give effect to that purpose and to avoid an intestacy as to the accumulated income.

(*Perpetual Trust Ltd v Roman Catholic Bishop of Christchurch,* High Court, [2005] 1 NZLR 282, 23rd August 2005)

2. A charitable trust was established to promote the Karma Kagytipa lineage of Tibetan Buddhism in New Zealand. Following the death of the 16th Karmapa, a dispute arose as to the identity of the 17th Karmapa. The plaintiff, who claimed that title, purported to dismiss the trustees of the trust who did not recognise his title, and brought a declaratory action to declare that the trustees had been validly dismissed. The court held that it had jurisdiction to hear the case in that it involved a New Zealand trust and assets in New Zealand. It was the court's duty to deal with

questions of civil rights relating to property, but it would adjudicate on religious differences only to the extent that it could not otherwise perform its functions. The trust deed gave the spiritual director of the trust power to appoint and dismiss trustees, and the plaintiff had been duly appointed spiritual director by the 16th Karmapa. There was no evidence to suggest that Buddhist law followed English law in saying that agency terminated with the death of the principal, so the trustees' argument that the plaintiff's authority had terminated was rejected. Accordingly, the court declared that the plaintiff's dismissal of the trustees was lawful and effective.

(*Khyentse v Hope,* High Court, [2005] 3 NZLR 501, 30th May 2005)

South Africa

A US non-profit corporation established to set safety standards for the construction and maintenance of merchant ships had a branch in South Africa which carried on these activities for the benefit of the South African maritime community. Under Article XI of the original USA/South Africa income tax treaty, the taxpayer qualified for exemption from South African income tax. Following the abrogation of this treaty in 1987 and prior to the entry into force of a new income tax treaty which included a similar exemption, the taxpayer claimed exemption under section 10(1)(cA) of the Income Tax Act 58 of 1962 on the basis that it was "an institution, board or body…established by or under any law…" within the terms of the section. The tax authority accepted that the taxpayer was a charitable organisation which would be exempt if it had been established in South Africa, but refused the exemption. The Tax Court dismissed the appeal, holding that the words concerned required the taxpayer to have been established under a South African statute.

(Case 10849, Tax Court in Pretoria, 2005)

USA

1. Following a series of claims that its priests abused children, the Archdiocese of Portland declared itself bankrupt under the federal law procedure known as Chapter 11. The Tort Claimants Committee (TCC) commenced a series of actions in the Oregon Bankruptcy Court to determine which assets were available to meet claims. The Archdiocese was a corporation sole established under Oregon nonprofit corporation laws. Within the Archdiocese were 124 parishes, only one of which was separately incorporated as a nonprofit corporation, and three high schools, which were not connected to any parish and were not separately incorporated.

The Archdiocese claimed that, although it held legal title to large amounts of cash and

real estate, most of these assets were held in trust and not available for creditors.

With regard to this issue the court held that:

- there was no impediment, under the requirement of the First Amendment to the US Constitution or the Religious Freedom and Restoration Act of 1993 (RFRA) to protect religious freedom, to the court's jurisdiction to determine whether property in which the debtor held title belonged to the bankruptcy estate;

- neither federal law nor the Oregon state non-profit corporation laws nor the debtor's articles of incorporation required the application of canon law to determine whether the disputed assets form part of the bankruptcy estate;

- under civil law the parishes and high schools were not separate civil law entities that have the capacity to sue and be sued or to be beneficiaries of trusts;

- using the bankruptcy trustee's rights and powers as a hypothetical bona fide purchaser of the real estate assets to avoid the unrecorded equitable interests in certain of these assets (the test properties) would not substantially burden the defendants' exercise of their religion in breach of the RFRA, and therefore both the legal and equitable title to those properties belong to the bankruptcy estate.

The Archdiocese also claimed that a Perpetual Endowment Fund created in 1981 constituted a charitable trust separate from the bankruptcy estate. The fund was established by a declaration of trust by the then Archbishop of Portland. The income of the fund was to be applied in meeting first the operating expenses of the Chancery of the Archdiocese, second the support of religious, charitable and educational programs of the Archdiocese, and lastly in supporting other segments of the Catholic Church in the USA and throughout the world. The fund was expressed to be intended to be perpetual, but the Archbishop was given power to amend or modify any provision of the trust. The TCC argued that it was a self-settled revocable trust with the debtor as its sole beneficiary, and therefore not a valid charitable trust under Oregon law. The court declined to construe the power to modify the trust as a right of revocation, and held that the power to modify is reserved to the Archbishop as an ecclesiastical office, not to the debtor corporation sole. It was clear from the language used in the declaration that it was intended to benefit not only the Archdiocese but also the community that it serves and the national and international church; the fact that the debtor controlled the application of the fund did not make it the sole beneficiary. The debtor's beneficial interest in the income of the fund formed part of the bankruptcy estate, subject to any restrictions on the use of that income that were

enforceable under non-bankruptcy law. The debtor's power as trustee to direct distribution of the income of the fund was also property of the estate, subject to enforceable restrictions on use in the declaration of trust.

(*In Re Roman Catholic Archdiocese of Portland in Oregon*, Oregon District Bankruptcy Court, Case No. 04-37154-elp11, Memorandum Opinions on Second, Third and Fourth Motions for Partial Summary Judgment, 30th December 2005, 24th January 2006 and 20th July 2006)

2. A non-profit public benefit corporation made a gift to a university foundation to establish a chair in cardiothoracic surgery. The agreement between the parties provided that the funds must be used by holders of the chair who meet specific criteria, and that if the surgery program ceased to exist or the university breached the terms of the agreement the funds would be transferred to support an endowed chair at another university. Three years later, the donor sued the university foundation and the Regent of the university for specific performance of the agreement, alleging that they had failed to appoint suitably qualified individuals to the chair and refused to transfer the fund to a medical school at another university. The trial court ruled that the donor's suit cold not proceed because the agreement had created a charitable trust, and only the Attorney General could sue to enforce it. On appeal, the Court of Appeal found that the donor had not created a charitable trust; it had merely transferred property subject to a condition subsequent that if the transferee failed to perform a specific act the transferee's interest would be forfeited either to the transferor or to a designated third party. Accordingly, the donor could sue to enforce the conditions of the agreement. The court also stated that, had it concluded that the gift created a charitable trust, it would have held that the Attorney General's power to enforce the trust did not in this type of case deprive the donor of standing to sue, the donor being a person with a sufficient special interest in ensuring that the gift was used for the intended purpose.

(*LB Research and Education Foundation v The UCLA Foundation*, California Court of Appeal, 130 Cal. App. 4th 171, 29 Cal. Rptr. 3d 710, Cal. App. Dist., 14th June 2005)