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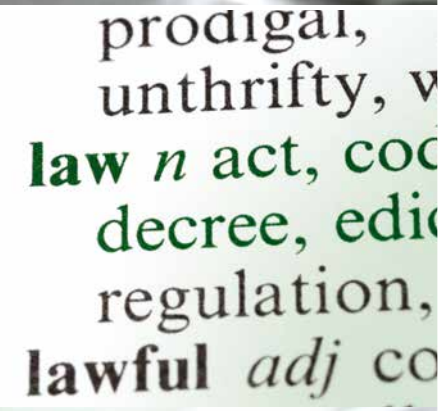
The Australian Nonprofit Sector Legal and Accounting Almanac 2015



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QUT justice connect Charity Law Association of Australia and New Zealand

EDITED BY MYLES MCGREGOR-LOWNDES

The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS)
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Working Paper No. ACPNS 68

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Edited by Myles McGregor-Lowndes

The Australian Centre for Philanthropy and Nonprofit Studies

Queensland University of Technology

Brisbane, Australia

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You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.

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1.0 INTRODUCTION

For seven years, Professor Myles McGregor-Lowndes, Frances Hannah and Anne Overell have compiled short summaries of cases involving nonprofit organisations in Australia and overseas, and published them on The Australian Centre for Philanthropy and Nonprofit Studies, Developing Your Organisation (DYO) website.[1] You can be alerted of new case summaries as they are posted to the DYO website by subscribing to the ACPNS RSS feed or the ACPNS twitter service.[2] Cases are then drawn together, along with news about legislative changes in each jurisdiction in Australia, in one volume each year and made available online.

Our thanks to two supporting organisations Justice Connect and The Charity Law Association of Australia and New Zealand for their helpful suggestions and input, and assistance in disseminating the publication.

Cases of note

There were some significant cases during 2015, including several disputes with State Revenue Authorities about exemption from payroll taxes. Notable among these were *Grain Growers Limited v Chief Commissioner of State Revenue* (see below, 2.8.4); *Law Institute of Victoria v Commissioner of State Revenue* (see case 2.1.6); *Robson & Ors v Commissioner of Taxation* (case 2.4.2); *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* (case 2.8.5). Another interesting case, which throws some light on church unincorporated associations, and gives a salutary warning about shortcomings in governance is *Anglican Development Fund Diocese of Bathurst in its own capacity and as trustee of Anglican Development Fund Diocese of Bathurst (recvrs and mngrs apptd) v Rev Palmer, Bishop of Bathurst; Commonwealth Bank v Bishop of Bathurst* (case 2.4.1).

Contenders for the most 'interesting' case of 2015 included disputes about whether the NZ Jedi Society qualified as a religious charity (case 2.1.5); whether a UK gun club was charitable (case 2.1.1); and the prosecution of a Singaporean mega-church pastor following misdirection of at least $24 million to support the pop singing career of his wife (case 2.7.3). However, my pick was *Secretary for Justice v Chinachem Charitable Foundation* (case 2.9.15). Lord Walker of Gestingthorpe gave the judgment, serving as a Non-permanent Judge of the Hong Kong Court of Final Appeal. Nina Wang was the richest woman in Asia and the world's 35th richest person. She died, leaving an estate of HK$82 billion and a contentious home-made will, containing only four clauses. Clause 1 gifted her property to a Foundation. Clause 2 set out provisions for appointing a managing organisation to supervise the Foundation, and funding 'a Chinese prize of worldwide significance similar to that of the Nobel Prize'. Although wording about the prize was vague, the Court determined that the Foundation held the fortune on trust to comply with clauses 2, 3 and 4. The prize was deemed to have a charitable purpose, i.e. 'for the public good, in encouraging the general public to strive for excellence in scientific, social and cultural activities which are beneficial to mankind'; the public good being in encouraging 'hundreds of thousands of people who do not win the prize…'.

A number of cases summarised in this Almanac are working their way through the appeals process, and care should be taken when considering their application to any matters. In addition, some of the cases are from

[1] https://wiki.qut.edu.au/display/CPNS/Legal+Case+Notes

[2] Follow Twitter via http://twitter.com/CPNSinsides. Or click on ACPNS RSS feed at https://wiki.qut.edu.au/display/CPNS/ACPNS+Wiki+Home. You can also 'watch' some or all pages, https://wiki.qut.edu.au/display/CPNS/Legal+Case+Notes?watchingPage=false&watchingSpace=false&watchingBlogs=false&isAdmin=false&isBlogPost=false.

jurisdictions outside Australia, and readers should exercise caution when considering the implications of these cases for Australian law.

Legislation

The Almanac includes a review of major statutory amendments during 2015, which are relevant to the nonprofit sector in all Australian jurisdictions. Special thanks must go to the Justice Connect team for providing legislative updates for Victoria; and Colin Huntly for legislative updates in Western Australia. No doubt the cases with State Revenue Authorities played some part in legislative amendments to the definition of charity for state tax purposes in some jurisdictions.

Download

This complete publication is available in PDF format through QUT e-prints.[3] Earlier editions are also available through e-prints, and from the DYO website.[4]

Myles McGregor-Lowndes

[3] http://eprints.qut.edu.au/. Search for all of: nonprofit legal almanac 2015.
[4] https://wiki.qut.edu.au/display/CPNS/Legal+Case+Notes.

2.0 CASES BY CATEGORY

Cases in this section are presented alphabetically within subject categories. Any cases which do not fit under a named category are presented in the 'Miscellaneous' category which appears at the end of this section. A table of cases is provided above.

2.1 CHARITIES AND CHARITABLE STATUS

2.1.1 CAMBRIDGESHIRE TARGET SHOOTING ASSOCIATION V THE CHARITY COMMISSION FOR ENGLAND AND WALES (FIRST TIER TRIBUNAL (CHARITY), GENERAL REGULATORY CHAMBER, LANE J, 23 NOVEMBER 2015)

Charitable purpose – object to provide facilities for target shooting – whether health benefits

This was an appeal against the decision of the Charity Commission for England and Wales (the Commission) to not register the appellant as a charity. The appellant's constitution contains the following objects clause:

> 3. The objects of the Charity are for the public benefit:
>
> 3.1 to promote community participation in healthy recreation, in particular by the provision of facilities for participation in target shooting ('facilities' means land, buildings, equipment, organisation of sporting activities);
> 3.2 the advancement of education, particularly, without limitation, children and young people whether or not undergoing formal education;
> 3.3 the relief of the disabled by the promotion and encouragement of inclusive participation in the sport of target shooting;
> 3.4 to encourage skill in target shooting by providing instruction and practice in the use of firearms amongst members of the cadet forces and to any of Her Majesty's subjects so that they will be better fitted to serve their country in the armed forces, territorial army or any other organisation in which their services may be required in defence of the realm in times of peril.

The Commission took the view that the first of these objects was not a charitable purpose, and that the last was not appropriate and should be removed. The latter point was not in contention. The issue therefore was to what extent object 3.1 was charitable. To what extent did target shooting promote health by involving physical or mental exertion or skill? If target shooting did promote health, to what extent was there a public benefit?

Evidence was taken from both the association's representative and from expert witnesses. The Tribunal rejected the notion that there was health promotion involved (at [57]):

> Having reviewed all the evidence, the Tribunal finds that the objects of the appellant encompass discrete activities, namely prone shooting and, in particular, bench shooting involving rests. These activities, which represent a material proportion of the overall shooting activities with which we are concerned, have not been shown to have any physical skill or exertion, such as to promote general health.

The Tribunal noted that the expert evidence was not backed by any recognised research (at [61]):

> Neither the Commission nor the Tribunal should lightly reach findings, which result in the advantages of charitable status being conferred in respect of activities for which the science base is less than robust.

Whilst it was important to consider the health benefits holistically, as consisting of both physical and mental health benefits, the mental health benefits of target shooting were also unable to be substantiated (at [66]):

> …on the evidence before us the appellant has failed to show on balance that there is sufficient mental skill or exertion necessarily involved in the range of shooting activities promoted in pursuance of the appellant's objects. The appellant has, on the evidence, failed to show that the mental element promotes health. The mental element thus not only fails on its own terms to get the appellant home; it also has nothing material to add to the *de minimis* character of the physical element.

The appeal was dismissed.

The case may be viewed at: http://www.charity.tribunals.gov.uk/documents/decisions/cambridgeshire-target-shooting-assoc-decision-23nov-amend-7dec.pdf

Implications of this case

The Commission pointed out that the appellant association did have objects which were charitable (at [75]):

> Amongst the objects of the appellant are those which would, in the Commission's view, meet the statutory requirements. Paragraph 3.2 concerns the advancement of education, whilst paragraph 3.3 concerns the relief of the disabled by promotion and encouragement of inclusive participation in the sport of target shooting. (Paragraph 3.4 relating to the defence of the realm is to be dropped.) A body which had only these as its objects may well be charitable.

The implication was that an amended object 3.1 might meet the statutory requirements and enable the association to be registered as a charity. The appellant association subsequently proposed amended object 3.1 as: 'the advancement of amateur sport by the provision of facilities, coaching and instruction in target shooting'. The effect of this change has not yet been tested.

In Australia, the ATO's view that sporting or recreational purposes are not charitable is set out in TR2011/4, *Income Tax and Fringe Benefits Tax: Charities*. Specifically, it rejects the argument that ordinary rifle and pistol clubs may be charitable as promoting the defence of the nation, any such link described as being 'too remote' (para 268).

2.1.2 CHARITY COMMISSION FOR NORTHERN IRELAND V BANGOR PROVIDENT TRUST [2015] NICA 21 (NORTHERN IRELAND COURT OF APPEAL, MORGAN LCJ, GIRVAN LJ AND GILLEN LJ, 24 APRIL 2015)

Whether organisation charitable and therefore subject to inquiry by Charity Commission – rule including acts 'conducive' to achievement of objects – whether rule enables non-charitable purposes

This was an appeal from *The Charity Commission for Northern Ireland v Bangor Provident Trust Ltd* [2014] NICh 19. The Charity Commission for Northern Ireland (the Commission) is a body established under Section 6 of the Charities Act (Northern Ireland) 2008 (the Act). On 8 August 2012 the Commission instituted an inquiry into the Bangor Provident Trust Limited (Bangor). On 17 September 2012 Bangor applied to the Charity Tribunal for Northern Ireland (the Tribunal), a body established under section 12 of the Act, for a review of the Commission's decision to institute an inquiry. Under section 12 of the Act (together with Schedule 3 paragraphs 3 and 4, and the Table in paragraph 5), the Tribunal is empowered to direct the Commission to end

such an inquiry. On 10 May 2013, the Tribunal allowed the application by Bangor and directed the Commission to end its inquiry in relation to Bangor, pursuant to Schedule 3 of the Act. It did so on the basis that Bangor was not in law a charity, and not, therefore, subject to the jurisdiction of the Commission for that or other purposes. An appeal on this point was then made to the High Court of Justice. The High Court held that Bangor was a charity, and that therefore an inquiry could be made into it.

Bangor Provident Trust Ltd is an industrial and provident society registered in Northern Ireland, originally under the Industrial and Provident Societies Act 1893. It was later deemed to have been registered under the Industrial and Provident Societies Act (NI) 1969 (the 1969 Act). As is evident from its name, Bangor is an incorporated body. Its main object was to provide housing for the aged and poor in Rule 2 of its Rules as follows:

> The objects of the Society shall be to erect, provide, improve and manage housing accommodation in Northern Ireland for persons of advanced years and limited means who are eligible to occupy or use housing accommodation provided under the Housing Acts (NI) 1890-1953 (or under any acts amending or substituted for the said Acts) on terms appropriate to their means and to provide such amenities as the Society shall think fit for the occupiers of such accommodation and to do all other things as are incidental or conducive to the attainment of the above objects.

The High Court of Justice decision

In the decisions below, there was no doubt that the provision of housing to the aged and poor was a charitable object. However, the Tribunal found that Bangor's objects were not exclusively charitable. The basis of this finding was the use of word 'conducive' in Rule 2, which was found to be indicative of the possibility of non-charitable objects. On balance, the Tribunal held that Bangor was not charitable and therefore, the Commission could not instigate an inquiry into it.

In the High Court decision, the issue of whether Bangor was in fact charitable was reconsidered. Section 1(1) of the Act provides that:

> For the purposes of the law of Northern Ireland, "charity" means an institution which—
> (a) is established for charitable purposes only, and
> (b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities.

His Honour in the High Court was quite clear that Bangor was a charity (at [30] of the decision below):

> In the light of this case law and bearing it in mind I return to the Rules of the Bangor Provident Trust Ltd. Rule 2 has been set out above. I state quite plainly that it seems to me that in its natural and ordinary meaning, in the context of a body set up to provide housing 'for persons of advanced years in limited means' the natural and ordinary meaning of it is that the third clause was to facilitate such objects and not to allow the Society to launch into non-charitable activities.

The interpretation of the use of 'conducive' in Bangor's Rules was not such as to indicate non-charitable activities as an object (at [35]–[36] of the decision below):

> Finally, I observe that the Shorter Oxford English Dictionary defines 'conducive' as 'tending to promote or encourage'. While mindful of the judicial observations on its meaning the starting point, it seems to me...is that this language of 'incidental or conducive to the attainment of the above objects' is not inconsistent with merely allowing the Society to engage in activities ancillary to its main and indisputably charitable objects. It may be that they would include the lobbying of the legislature in regard to the provision of housing to the aged of limited means. That would

> not, on a proper reading of these rules, at the time the Society came into existence, lead one to conclude that its objects were not exclusively charitable. In the light of all the factors before the court I consider that the Charity Tribunal erred in finding that Bangor was not a charity. I allow the appeal of the Charity Commission which is at liberty to proceed to discharge its statutory functions in regard to Bangor Provident Trust Ltd.

Therefore, since Bangor was a charity, the Commission could conduct an inquiry into it. Bangor appealed to the Northern Ireland Court of Appeal.

The Court of Appeal decision

The grounds of appeal were that the learned judge erred:

> (i) in holding that the objects set out in Rule 2 of the appellant's Rules did not extend to purposes which were not exclusively charitable in law or incidental or ancillary thereto;
> (ii) in finding that the use of the words '*incidental or conducive to the attainment of the above objects*' in the appellant's objects clause did not prevent the appellant's objects from being exclusively charitable;
> (iii) in failing to distinguish between exclusively charitable objects and mere powers to do acts which are incidental, ancillary or conducive to charitable objects;
> (iv) in failing to distinguish between the objects of a charity and other provisions in its constitution which might empower it to carry out non-charitable activities or use funds for non-charitable purposes where to do so in the relevant context was a means, or alternatively an involuntary or necessary incident, of furthering the charitable object;
> (v) in law in distinguishing the case of *McGovern v Attorney-General* [1982] Ch 321 from the appellant's case; and
> (vi) in failing to take sufficient account of other provisions within the appellant's Rules, and in particular to the dissolution provision in Rule 90 which does not confine the application of the funds in the event of dissolution to charitable institutions or purposes only.

In the Act, section 2 provides that a charitable purpose is a purpose which (a) falls within subsection (2), and (b) is for the public benefit (defined in section 3). Section 2(2) lists a number of purposes which include 'the prevention or relief of poverty' (section 2(2)(a)) and 'the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage' (section 2(2)(j)). Section 22 of the Act provides for the Commission's general power to institute inquiries:

> (1) The Commission may institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes.

Was Bangor a charity, and therefore subject to an inquiry under the Act? The Court of Appeal said that only Rule 2 was relevant to this determination (at [27]):

> The objects clause of an incorporated body such as the appellant establishes the lawful powers (vires) of the body beyond which it is not legally entitled to go. It must act intra vires and is not permitted to act outside its objects clause. The powers of a body corporate in its objects clause are to be distinguished from the powers of its directors and agents which emerge from express or implied powers contained elsewhere within the constitutional documentation. The powers of the agents must be exercised within the vires of the body corporate and cannot permit the agents to exceed what is permitted by the objects clause. Thus nothing in the rules outside Clause 2 can detract from the charitable status of the company if Clause 2 gives rise to exclusively charitable objects and powers for the rest of the Rules must be construed and acted upon in a way which is compatible with and *intra vires* the objects clause. Hence no real assistance in determining the question in this appeal can be

> obtained from the provisions outside Clause 2. If it imposes an exclusive charitable purpose on the body then actions outside the exclusively charitable purpose would be *ultra vires* and a breach of fiduciary duty on the part of the directors and members of the governing committee.

However, was the reference to 'conducive' in the objects clause, such as to widen the scope of the purposes of Bangor beyond the charitable? This was purely a question of construction (at [32]). The Court considered the relevant authorities and concluded (at [37]):

> Reading Clause 2 as a whole set in the context of the document (which on its front page indicates a clear intention to create a charitable body) we have no doubt that the words in question fall to be considered as incidental to the main purposes which are clearly exclusively and admittedly charitable in nature. The power to do acts incidental or conducive to the charitable objective set out earlier in Clause 2 does not envisage the Society undertaking some activity inconsistent with those charitable purposes.

Therefore, Bangor was a charity, and could be subject to an inquiry by the Commission. The appeal was dismissed.

This decision may be viewed at: http://www.bailii.org/nie/cases/NICA/2015/21.html

The case in the High Court may be viewed at: http://www.bailii.org/nie/cases/NIHC/Ch/2014/19.html

Implications of this decision

In the High Court of Northern Ireland the case was considered in the context of the possible objects which might be encompassed by the word 'conducive' in the objects clause of Bangor. How wide could these objects go? Was there a 'political' dimension to the objects of the Bangor Trust, indicated by the use of the word 'conducive'? Deeny J considered the well-known case of *McGovern v Attorney General* [1982] Ch 321, a case concerning Amnesty International. Although not itself a charity, Amnesty sought to set up a Trust with a view to obtaining charitable status for some of its activities. Slade J refused a declaration that the Trust ought to be registered as a charity, finding that although a trust set up for the relief of human suffering and distress would be capable of being charitable in nature it would not be charitable if any of its main objects were of a political nature; that trusts for the purpose of seeking to alter the laws of the United Kingdom or a foreign country or persuading a country's government to alter its policies or administrative decisions were political in nature; and that, accordingly, the object of the trust to secure the release of prisoners of conscience by procuring the reversal of governmental policy or decisions by lawful persuasion was of a political nature and since that object affected all the trusts of the trustee, the trust was not a charitable one. However, Deeny J at first instance held that the object clauses of the Trust set up by Amnesty were very different from the rules of Bangor, so that the decision was 'clearly distinguishable' (at [15] of the decision below). The Court of Appeal did not consider this dimension of the case. It held that Bangor was charitable purely on a contextual reading of its Rule 2 objects, taking into consideration its status as an incorporated body, and what this meant for the powers that its directors had.

2.1.3 **FAMILY FIRST NEW ZEALAND** [2015] NZHC 1493 (HIGH COURT OF NEW ZEALAND, COLLINS J, 30 JUNE 2015)

Advocacy and political purposes – whether organisation having political purposes is charitable

This was an appeal against a decision of the New Zealand Charities Board (the Board) not to register Family First New Zealand (FF) as a charity. FF's trust deed, dated 26 March 2006, set out six purposes:

- to promote and advance research and policy supporting marriage and family as foundational to a strong and enduring society;
- to educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible;
- to participate in social analysis;
- to produce and publish relevant and stimulating material in newspapers, magazines, and other media;
- to be a voice for the family in the media;
- to carry out such other charitable purposes within New Zealand as the Trust shall determine.

On 6 April 2006, FF was incorporated under the *Charitable Trusts Act 1957*. FF was approved as a charitable entity by the then Charities Commission (the Commission) and registered under the *Charities Act 2005* (the Act) on 18 May 2007. On 21 February 2008, the Commission enquired as to the extent of advocacy undertaken by FF. In New Zealand at that time, advocacy activities were not a charitable purpose. FF replied that its focus was not on advocacy such as lobbying ministers or others, but rather on education, research and encouraging public debate. The Commission carried out a review of FF's operations, and concluded on 16 March 2010 that FF was still eligible to be registered as a charitable entity.

On 24 February 2012, the *Charities Amendment Act 2012* came into force in New Zealand. The amending Act disestablished the Charities Commission and transferred the functions of the Commission to the Department of Internal Affairs (the Department) and the Charities Board. On 11 September 2012, the Department advised FF that it intended recommending to the Board that FF be removed from the charities register under section 32(1)(a) of the Act. The Department's position was that FF's purposes included advocating and promoting a political viewpoint, which was not a charitable purpose. FF was deregistered as a charity on 15 April 2013. FF filed a notice of appeal in the High Court on 27 May 2013. On 17 June 2013, the High Court made an interim order under section 60 of the Act that FF remain on the register of charitable entities pending the outcome of its appeal. The parties then agreed that FF's appeal be deferred until after the Supreme Court delivered its judgment in *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 (*Greenpeace*), which was delivered on 6 August 2014.

In New Zealand, charitable purposes are defined in the same manner as under the common law in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] UKHL 1. Section 5(1) of the Act provides that 'charitable purpose' includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community'. To be charitable, the entity's purpose must be for the public benefit, as established by the relevant case law. It is assumed, unless there is evidence to the contrary, that the charity is for the public benefit when the first three categories of charitable purpose are involved. Where the fourth category of charitable purpose is relied upon, public benefit must be expressly established. Any private benefit derived from an entity's activities must be a means of achieving an ultimate public benefit.

A non-charitable purpose will not preclude registration if that non-charitable purpose is merely ancillary to a charitable purpose. Sections 5(3) and (4) of the Act provide:

> (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
> (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
>
> > (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
> > (b) not an independent purpose of the trust, society, or institution.

The Greenpeace decision in the Supreme Court

Greenpeace NZ Inc (Greenpeace) was refused registration as a charity because it had a 'political' purpose which was not charitable. Greenpeace's objectives included:

- the promotion of conservation, peace [and] nuclear disarmament; and
- the promotion of legislation, policies, rules, regulations and plans which further the objects of the Society...and support their enforcement or implementation through political or judicial processes as necessary.

The Supreme Court held that:

1. To qualify as charitable, a purpose had not only to be for the public benefit, but had also to be a 'charitable purpose' as determined by analogy with objects already held to be charitable.
2. Section 5(3) of the Charities Act was directed towards excluding political activity that could not itself be characterised as a charitable purpose.
3. Political purposes and charitable purposes were not mutually exclusive. Whether advocacy or promotion of a cause was a charitable purpose depended on consideration of the end advocated, the means promoted to achieve that end and the manner in which the cause was promoted in order to assess whether the purpose could be said to be a public benefit within the spirit and intendment of the Statute of Elizabeth I.
4. It was not a criterion for registration as a charity that the advocacy undertaken or views expressed by the entity were generally acceptable and not 'controversial'. The Chief Justice said that the Supreme Court was unable to agree with the NZ Court of Appeal's suggestion that views generally acceptable may be charitable, while those which are highly controversial are not (at [75]).
5. The Court had no adequate means of judging the public benefit of the promotion of nuclear disarmament and the elimination of all weapons of mass destruction. The Chief Justice explained that whether the promotion of Greenpeace's ideas 'is beneficial is a matter of opinion in which public benefit is not self-evident and which seems unlikely to be capable of demonstration by evidence' (at [101]).

The decision of the Charities Board to deregister FF

The decision of the Board to deregister FF was taken before the decision in *Greenpeace*. The grounds advanced by the Board were:

1. FF's main purpose was to promote points of view about family life. The Charities Board concluded that this was a non-charitable political purpose that did not have a public benefit.
2. FF had an independent purpose to procure government action consonant with FF's points of view. The Charities Board said this purpose was also a non-charitable political purpose that was not ancillary to any valid charitable purpose.
3. FF's purpose of promoting points of view about family life was not a charitable purpose to advance religion or education.
4. FF did not qualify as a charity because its purposes did not come within 'any other matter beneficial to the community' in the definition of charitable purpose in section 5(1) of the Act.

Political purpose

The Board said that political purposes could never be charitable because they could never have a public benefit. There were three categories of political purpose:

1. The furtherance of the interests of a political party or representative.

2. The promotion of a point of view, the public benefit of which is not self-evident as a matter of law.
3. The procurement of government action, including legislation.

At issue in this case were the second and third of these types of purpose. The point of view in question was described on FF's website (<https://www.familyfirst.org.nz/about- us/frequently-asked-questions>) as follows:

> …a 'natural family', not the individual, is the fundamental social unit…[a] 'natural family' is: ... the union of a man and a woman through marriage for the purposes of sharing love and joy, raising children, providing their moral education, building a vital home economy, offering security in times of trouble, and binding the generations.

The Board took the view that this was an opinion or value judgement on what is best for families and civil society, and a 'controversial' point of view in the sense used by the Court of Appeal in *Greenpeace*. In the Board's view, FF's activities to promote its point of view did not qualify as dissemination of the results of educational research or provide any other charitable benefit for the community. On the third type of political purpose, the Board said that FF's promotion of its point of view was propaganda based on opinion rather than research. Procuring government action based on this opinion was political activity.

Therefore, although FF did have charitable purposes under the fourth head of charity in *Pemsel* (these being improving the moral and spiritual welfare of the community and promoting good citizenship), these were not its primary purposes. The Board was satisfied FF's main purpose was to promote its point of view about families. It said that this activity was not a charitable purpose and that this role was 'so pervasive and predominant it [could] not realistically be considered ancillary to any valid charitable purpose' (at [99]] of the deregistration decision). Thus, seeking political outcomes was 'at the forefront of its overall endeavour' (at [100] of the deregistration decision).

His Honour in this case followed the decision in *Greenpeace*, saying that (at [84]–[85]):

> The Charities Board's fundamental position that Family First's political objectives could never be charitable cannot be reconciled with the approach taken by the majority of the Supreme Court in *Greenpeace*. The Charities Board's decision was based upon a fundamental legal proposition that has subsequently been found to be incorrect. The Charities Board's view that political purposes could not be charitable underpinned its decision. In view of the Supreme Court's explanation that political purposes are not irreconcilable with charitable purposes, it is appropriate for the Charities Board to reconsider the position of Family First in light of the Supreme Court's judgment. In addition, the Charities Board's analysis that Family First's advocacy role is 'controversial' and therefore not self-evidently of benefit to the public will need to be reconsidered in light of the approach taken by the majority of the Supreme Court in *Greenpeace*.

In determining public purpose, His Honour said that the Board needed to determine this point by analogy (at [88]–[89]):

> I am not suggesting the Charities Board must accept Family First's purposes are for the benefit of the public when it reconsiders Family First's case. I am saying, however, that the analogical analysis which the Charities Board must undertake should be informed by examining whether Family First's activities are objectively directed at promoting the moral improvement of society. This exercise should not be conflated with a subjective assessment of the merits of Family First's views. Members of the Charities Board may personally disagree with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and in good faith.

FF had also a possible educational purpose which could be classified as charitable. It had undertaken research of a substantive nature. This would need to be taken into account by the Board in reconsidering FF's case (at [90]–[94]):

> The Charities Board concluded Family First advanced its polemic points of view under the guise of research and that it was not genuinely involved in the advancement of education. To be a charitable education activity, the entity must, in addition to conferring a public benefit, promote learning which may be undertaken through a variety of means such as training programmes, conferences or by carrying out or disseminating research that improves knowledge about a particular issue. Mr Gunn [counsel for the Board] submitted that the Charities Board correctly concluded Family First's purposes did not include the advancement of education because its activities involved indoctrination or dissemination of propaganda. Mr Gunn submitted that with one exception, Family First's reports had a 'tenacious or polemic character'. Mr Gunn properly acknowledged however, that a report Family First commissioned from the New Zealand Institute of Economic Research (NZIER) was a legitimate piece of research. That report, called 'The Value of Family: Fiscal Benefits of Marriage and Reducing Family Breakdown in New Zealand' contained significant research which Mr Gunn acknowledged had not been undertaken previously. The NZIER report was not referred to by the Charities Board in its decision. When the Charities Board reconsiders Family First's case it will need to carefully examine the NZIER report and determine whether that report is sufficient to qualify Family First's activities as including the advancement of education for the public benefit.

The appeal was allowed. It was held that the Charities Board had to reconsider its decision to deregister Family First. In reconsidering its decision the Charities Board had to give effect to the judgment of the Supreme Court in *Greenpeace* and this judgment.

The case may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2015/1493.html

The Greenpeace decision may be viewed at: http://www.nzlii.org/nz/cases/NZSC/2014/105.html

Implications of this case

The outcome of this judgement is that the Charities Board has to reconsider its decision to deregister Family First. The decision is that the purposes of Family First are charitable (in the same manner as those in the *Greenpeace* case), and so it should be registered as a charitable entity in New Zealand. This continues New Zealand's move to settle the question of whether purposes which are political, including those that advocate certain views, can be charitable. In *Greenpeace*, the Supreme Court of New Zealand, by a majority of three to two, held that there should no longer be a political purpose exclusion applied to New Zealand charities.

2.1.4 HUMANE SOCIETY OF CANADA V CANADA (NATIONAL REVENUE), 2015 FCA 178 (CANLII) (FEDERAL COURT OF APPEAL (CANADA), GAUTHIER, RYER, NEAR JJA, 17 AUGUST 2015)

De-registration of charity – director's personal expenses being reimbursed by charity – revenue not being applied to charitable purposes

This was an appeal by the Humane Society of Canada for the Protection of Animals and the Environment (HSC) pursuant to paragraph 172(3)(a.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) from a decision of the Minister of National Revenue (the Minister), dated 22 January 2013 (the confirmation decision), confirming the Minister's proposal to revoke HSC's registration as a charitable organisation in Canada.

HSC was incorporated in 1993 under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32, and registered as a charitable organisation in that year. In 2007, the Canada Revenue Agency (CRA) undertook an audit of HSC's 2006 taxation year. In the course of the audit, the CRA identified the following concerns:

> a) a large portion of HSC's resources did not seem to have been devoted to the charitable purposes for which it was registered;
> b) personal expenditures of one of its directors were being reimbursed by HSC; and
> c) the books and records of HSC did not separate the director's personal expenditures from HSC's charitable expenditures, and they did not demonstrate a direct linkage between the HSC's expenditures and its charitable activities.

The personal expenditures identified by the CRA, which were about $70,000 of a possible doubtful $250,000 paid to the director, included payments for meals, comic books purchased through Paypal, liquor purchases, grocery purchases, tickets to entertainment events in the UK and the USA, and expenses of the director and his family at Disneyland. This issue gave rise to various correspondence between the parties, and eventually, on 17 February 2010, to the issue of a notice of intention to revoke (NIR) HSC's registration as a charitable organisation under section 168(1) of the Act.

The CRA stated that the revocation was proposed for the following reasons:

> a) HSC had not devoted all of its resources to the charitable activities for which it was formed;
> b) HSC had conferred an undue benefit on a member of its governing board;
> c) HSC improperly completed an information return that was required to be filed with the Minister; and
> d) HSC failed to maintain adequate books and records to support its activities.

The latter point was of particular importance because HSC's own admissions indicated that, in addition to its failure to categorise the expenses reimbursed to its director properly, it had failed to account properly for at least 30 of the 42 charitable programs in which it was engaged at the time. After an objections process had been completed, the Appeals Directorate confirmed the Minister's decision to issue the NIR. The stated reasons for this confirmation decision were that HSC had:

> a) failed to demonstrate that it devoted all of its resources to charitable activities;
> b) provided part of its income for the personal benefit of a member of the governing board; and
> c) failed to comply with or contravened any of sections 230 to 231.5 of the Act.

A convoluted appeals process then ensued, with the issues for appeal somewhat unsettled. The only ground of appeal which eventually emerged intact in this decision was whether the Minister's confirmation decision was reasonable. The Court held that the decision, based on the three grounds above, was reasonable on all of the grounds. It was clear from the CRA's audit that HSC had failed to maintain books and records that could support the contention that it was devoting all of its resources to its charitable activities. Moreover, the organisation's failure to separate the director's personal expenses from his legitimate expenses was manifest. Moreover, HSC had consistently tried to maintain that the personal expenses of its director had some kind of tangible connection with that director's duties at the organisation (at [76]–[78]):

> The admission of the Appellant that it could only directly link its expenditures to 12 of its 42 programs supports the Appeals Directorate's conclusion that the Appellant was unable to establish that it was devoting all of its resources to the charitable purposes for which it was formed. Similarly, the intermingling of [the director's] personal expenses with the Appellant's expenses in the accounting records indicates an inability on the Appellant's part to demonstrate that no part of its income was provided to [the director] as a personal benefit. These failures made it impossible for the Minister to verify that the Appellant was in ongoing compliance with its registration requirements, as stipulated

> in the definition of charitable organization in subsection 149.1(1). The Appellant's submissions give the impression of a general view that everything [the director] did was on behalf of the Appellant, whether eating with others, eating alone, or purchasing items at the [liquor store] and other establishments (….). The record before this Court included Paypal receipts for various forms of memorabilia, other types of receipts marked with a brief notation purporting to denote the alleged nature of the expense (e.g. "WM" for Working Meal), and various credit card statements. The Appellant submitted that this was sufficient evidence of the expenses' charitable nature and thus demonstrated that the Appellant kept adequate books and records.

The Court disagreed that adequate books and records were kept by HSC, and therefore held that the confirmation decision to deregister HSC as a charitable organisation was reasonable. The appeal was dismissed.

The case may be viewed at: http://www.canlii.org/en/ca/fca/doc/2015/2015fca178/2015fca178.html

Implications of this case

This case demonstrates the importance of maintaining proper books and records in nonprofit organisations in any jurisdiction, and of keeping control of expenses incurred by officers and directors of such organisations. As the Federal Court of Appeal in Canada pointed out (at [80]):

> Given the significant privileges that flow from registration under the Act as a charitable organisation, the Minister must be able to monitor the continuing entitlement of the charitable organisation to those privileges. In that regard, I agree with the Minister that the obligation of a charitable organisation to maintain adequate books and records is foundational.

The same principle is true in Australia.

2.1.5 THE JEDI SOCIETY INCORPORATED (REGISTRATION DECISION, CHARITIES REGISTRATION BOARD – NEW ZEALAND, 14 SEPTEMBER 2015)

NZ organisation dedicated to Hollywood movie – whether charitable purpose of advancement of religion – nothing but a loose collection of ideas – no structured belief system

The Charities Registration Board of New Zealand (the Board) was asked to register the Jedi Society Incorporated (JS) as a charity. The Board declined to register JS on the ground that it did not meet the requirements for registration under the Charities Act 2005 (NZ) (the Act).

JS was incorporated under the Incorporated Societies Act 1908 (NZ) on 16 April 2014. Its purposes include:

- To advance and teach the tenets, doctrines and culture associated with the Jedi
- Advancement of the Jedi
- Promotion of the Jedi
- To promote and enable understanding of the Force
- To be Guardians of the peace
- To enable eternal vigilance of the Sith and their activities

The Board had to consider if JS had as a charitable purpose – the advancement of religion (for which public benefit is assumed) – or was otherwise a charity by having a purpose under the fourth head of charity (for which public benefit had to be proved). The Board could discern no such purposes within section 5(1) of the Act.

On the issue of advancement of religion, the Board said that there were three questions to be considered (at [24]):

1. Is the system of beliefs of the entity capable of advancing religion?
2. Do the entity's activities advance religion?
3. Does the purpose advance a charitable public benefit in law?

Was the JS system of beliefs capable of advancing religion? The Board considered the relevant case law from Australia and England, accepting both as influential in their decision-making process. Specifically, the Board said that a religion had to have a body of doctrines that (at [29]):

- concerns the place of humankind in the universe and its relationship with the infinite
- goes beyond that which can be perceived by the senses or ascertained through scientific method
- contains canons of conduct around which adherents are to structure their lives
- are sufficiently structured, cogent and serious so as to be capable of advancing religion

The Board recognised that JS had tenets and requirements that met the first three of these indicia, but found that JS failed on the last.

As to whether JS could actually advance religion, the lack of a sufficient structure, cogency or seriousness meant that it could not. JS is based on the content of a movie, and at present represents a loose collection of ideas rather than a structured belief system. The Board recognised, however, that it might develop the required structure over time (at [41]).

Therefore, although JS was not a religion, and could not serve to advance religion, could it have as its purpose the advancement of moral or spiritual improvement? This would place JS within the 'other purposes beneficial to the community' class of charitable purpose. The Board noted that the case authorities gave inconsistent guidance on this point. The Board decided that the following were necessary characteristics of an entity that promotes moral or spiritual improvement (at [44]):

- Identifiable content that:
    - addresses weighty and substantial aspects of human behaviour
    - relates to moral or spiritual systems and their application to human life
    - can be accessed and applied within the community, according to individual choice and judgement
- the beneficial nature of the content should be shown (and demonstrated to be accepted) on the basis of a consensus of opinion amongst people who are informed, fair-minded and free from prejudice or bias.

The Board held that JS met the first requirement, but, as a loose collection of ideas based on the movie Star Wars, it was not sufficiently structured, cogent or serious to qualify as an entity that addressed moral or spiritual improvement.

Therefore, JS was not a charitable entity as it did not have a charitable purpose. Moreover, its non-charitable purpose was held to be its pervasive purpose, so it failed to meet the requirements of a charity under either section 5(1) of the Act (as to charitable purpose), or under section 5(3) of the Act (as to a non-charitable purpose being a main purpose).

The decision can be viewed at: https://www.charities.govt.nz/assets/Uploads/Jedi-Society-Incorporated.pdf

2.1.6 LAW INSTITUTE OF VICTORIA V COMMISSIONER OF STATE REVENUE [2015] VSC (SUPREME COURT OF VICTORIA, DIGBY J, 21 OCTOBER 2015)

Professional association – whether dominant purposes charitable or for benefit of members

This case dealt with the issue of whether the Law Institute of Victoria (LIV) was a nonprofit organisation having as its sole or dominant purpose a charitable purpose. If so, LIV would have been exempt from state payroll tax under section 48 of the *Payroll Tax Act 2007* (Vic) (the Act). It was held that LIV was not such an organisation and was therefore not exempt from payroll tax in Victoria.

LIV had objected to assessments of payroll tax over two periods from 1 July 2008 to 30 June 2012 (when a former version of section 48 applied) and from 1 July 2012 to 30 June 2013 (when an amended section 48 applied). It had also applied for repayment of payroll tax paid during those periods in the amount of $2,514,414.48.

The former section 48(1((c) referred to a 'non-profit organisation having as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose'. The former section 48(2) referred to wages paid 'for work performed in connection with the religious, charitable, benevolent, philanthropic or patriotic purposes of an institution of body' where the wages were paid 'to a person exclusively engaged in that kind of work'. LIV claimed that it fell under both these provisions for the period to 30 June 2012.

The amended version of section 48 provided in section 48(1)(a)(iii) that exemption applied to a 'non-profit organisation having as its whole and dominant purpose a charitable, benevolent, philanthropic or patriotic purpose', and at section 48(1)(b) that the wages had to be paid 'to a person engaged exclusively in work of a religious, charitable, benevolent, philanthropic or patriotic nature for the institution or non-profit organisation'. LIV claimed that these new provisions applied to it for the period from 1 July 2012 to 30 June 2013.

The Commissioner accepted that LIV was both a nonprofit organisation, and that its purpose, the maintenance and the sustenance of the law, was a charitable purpose. However, did LIV fall within section 48 of the Act? LIV's contention was that its dominant purpose was to promote the development of the law and the legal profession for the benefit of the public. During the relevant period, LIV's activities included:

(i) advocacy-related activities, including policy development, advocating for access to justice, aiding law reform, funding legal aid, and promoting dispute resolution;
(ii) referral services, including a pro bono referral service;
(iii) education and professional development for legal practitioners;
(iv) publications, including the *Law Institute Journal*;
(v) delegated services, delegated by the Legal Services Board, and the Legal Services Commissioner;
(vi) provision of information and practice resources, including a bookshop, services to lawyers, and a library;
(vii) marketing, including a website and electronic communications.

LIV's assertion was that these activities were predominantly charitable, and that any benefit to LIV members was incidental. LIV maintained that all its staff were engaged in work of a charitable nature. Any commercial activities engaged in were either in furtherance of LIV's charitable purpose, or incidental to its charitable purpose. The Commissioner's view was that the activities of LIV were for the benefit of its members.

The court considered the meaning of both 'dominant purpose' and 'charitable purpose'. As to the meaning of 'charitable purpose' there was no contention between the parties, and the common law on the issue was applied. LIV submitted that its purpose fell within the fourth head of charity in *Pemsel's* case i.e. a purpose

beneficial to the community. The Commissioner accepted that the maintenance and sustenance of the law was a charitable purpose.

Therefore, whilst it was accepted that LIV had a charitable purpose, was such a purpose its dominant purpose? His Honour held that 'dominant' had its ordinary meaning of prevailing or ruling. In that context, a dominant purpose was one which was the main objective of the organisation in question. LIV contended that its dominant purpose should be considered holistically, having regard to its objects, the history of its formation and the activities it had undertaken since its formation.

The objects considered were those in Part A clause 2 of LIV's 2012 constitution. LIV's contention was that these objects (paraphrased in part above in terms of activities) were directed at legal education, maintenance of the integrity of the law profession, and law reform throughout the relevant tax period. Professional support for its members was part of 'something higher and larger' that LIV was engaged in. Thus, LIV was arguing that its dominant purpose was not to support its members, but to promote the development of the law and the legal profession.

The Commissioner accepted that LIV had some charitable objects. However, it also had professional and regulatory objects. The Commissioner took the view that these latter were not charitable objects, but correctly pointed out that the authorities on regulatory objects were divided on the point. His Honour agreed that the regulatory objects were not charitable (at [144]):

> In my view the LIV's regulatory activities and the LIV's Constitutional Objects under which those activities are pursued are in the nature of independent non-charitable objects and activities.

The court said that it was preferable to look at all the objects as a whole in their correct context (at [164]). This is the holistic approach (at [173]). His Honour then identified three charitable objects, two regulatory objects, and six which were designed to promote the members' interests. The question of which was/were the dominant purpose/s was a matter of degree (at [184]). There was a heavy focus on the promotion of members' interests, a lesser one on regulatory matters, and finally, a charitable purpose (at [185]). Whilst His Honour was unable, with any clarity, and on the balance of probabilities, to determine which objects in the Constitution were in fact the dominant ones, he was satisfied that the three charitable objects were not the dominant objects (at [186]).

Given the lack of guidance from LIV's Constitution, the court turned to a consideration of LIV's activities. LIV is a professional society with 18,120 members and 133 staff. Detailed evidence of activities and finances was taken. Its activities during the period in question were held to be largely directed to its members' benefit. Membership (professional) activities were a 'substantial independent objective' of LIV and one of its 'main drivers and focuses' (at [355]). These activities did not have any real bearing on its few charitable objects. Nor did the regulatory activities, which were also an independent non-charitable objective.

His Honour said that this conclusion was not just a quantitative exercise, but based on a consideration of LIV's raison d'être. Therefore, LIV was not a nonprofit organisation which had as its dominant purpose a charitable purpose, and it was not exempt from payroll tax.

The case may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSC/2015/604.html

Implications of this case

His Honour's modus operandi in this case was first to consider the objects as stated in the organisation's Constitution. These were viewed holistically. His Honour performed a quantitative analysis of the types of objects, but stated that he was not relying on this as his sole determinant of the nature of the organisation. When the objects did not present a clear answer to whether the organisation fell within the exempt category

for payroll tax purposes, His Honour went on to consider relevant background matters and the activities of the organisation. The dominant nature of LIV's membership and regulatory activities suggested that it could not be charitable. The considerable amounts of money generated by the latter activities also suggested that they could never be merely 'minor or ancillary or incidental, supplemental or subservient to LIV's charitable objects' (at [362]).

2.1.7 QUEENSLAND CHAMBER OF COMMERCE AND INDUSTRY V COMMISSIONER OF STATE REVENUE [2015] QSC 77 (SUPREME COURT OF QUEENSLAND, JACKSON J, 15 APRIL 2015)

See below, casenote 2.8.5

2.1.8 WILFRID VERNOR-MILES AND ORS V THE CHARITY COMMISSION FOR ENGLAND AND WALES [2015] UKFTT (GRC) (FIRST TIER TRIBUNAL (CHARITY), GENERAL AND REGULATORY CHAMBER, LANE J, MCKENNA J, ELIZABETH HYDE OBE, 15 JUNE 2015)

Charitable purpose – to promote ethical standards in conduct of journalism – whether purpose sufficiently defined – whether public benefit

The appellants are the trustees of the Independent Press Regulation Trust (IPRT) in the UK. The IPRT was established by a Declaration of Trust dated 8 November 2013. On 16 October 2014, the Charity Commission for England and Wales (the Commission) refused to enter the IPRT on the Register of Charities. This was the appeal from that decision.

The IPRT was established after various press-related scandals in the UK, and in accordance with the recommendations of the subsequent Leveson Report, which delved into the factual issues raised by the scandals, and made recommendations as to possible regulation. The objects of the IPRT are contained in clause 3 of its Declaration of Trust, as follows:

> 3.1 The Objects of the Charity are to promote, for the benefit of the public, high standards of ethical conduct and best practice in journalism and the editing and publication of news in the print and other media, having regard to the need to act within the law and to protect both the privacy of individuals and freedom of expression.
> 3.2 The Trustees shall further the Objects by such means as they think fit from time to time which may include the provision of financial assistance towards the establishment and support of an independent press regulator or independent press regulators to be established and conducted for the whole of any part of the United Kingdom in accordance with the recommendations and principles set out in the Leveson report.
> 3.3 The income and, at the Trustees' discretion, the capital of the Trust Fund shall be applied in furthering the Objects.
> 3.4 Any part of the Trust Fund not required for application in pursuit of the Objects shall be invested in trust for the Charity or remain uninvested [if] the Trustees are so advised.

The Commission's principal reason for refusing the IPRT registration as a charity was that its purposes were as yet too vague and uncertain to allow for the conclusion that the purpose for which the IPRT was established was exclusively charitable for the public benefit.

Section 1(1) of the Charities Act 2011 (the Act) in England and Wales defines a charity as an institution which is established for charitable purposes only. Section 2(1) of the Act defines a 'charitable purpose' as one which

falls within section 3(1) of the Act and is for the public benefit. Section 3(1) of the Act sets out a list of 13 charitable purposes. Section 3(1)(m) describes the thirteenth charitable purpose as including 'any (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes…under the old law'. Section 3(4) of the Act provides that 'the old law' in section 3(1)(m)(i) means 'the law relating to charities in England and Wales as in force immediately before 1 April 2008'.

A charitable purpose must be for the public benefit. Section 4 of the Act provides that there is to be no presumption that a purpose is for the public benefit and that any reference to public benefit is a reference to public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

The appellants sought to draw an analogy between the purposes of the IPRT and trusts for the maintenance of proper standards in the medical profession, trusts to promote the ethical and moral improvement of the community, trusts for the promotion of compliance with the law, or the advancement of human rights of conflict resolution, and trusts for objects of general public utility. It was accepted by the Charity Commission that promoting ethical standards within the media industry may be analogous to the promotion of moral improvement of the community if the purpose is sufficiently clear and unambiguous and it is for the public benefit.

The Tribunal said that it did not agree that the IPRT's purposes were not clear and unambiguous (at [34]). The purpose was clearly stated in clause 3.1 of the Declaration of Trust. Clause 3.2 did not represent a collateral purpose giving rise to ambiguity (at [36]):

> …we are satisfied that the particular purpose of IPRT, as set out in clause 3.1, is analogous to trusts tending to promote the ethical and moral improvement of the community. This is a description of a charitable purpose which was recognised under the 'old law' referred to…above, in which the courts have recognised as charitable trusts to promote temperance, promoting mental and moral discipline through the teachings of Rudolph Steiner, and promoting the study and dissemination of ethical principles and the cultivation of a rational religious sentiment. Accordingly, we are satisfied that the particular purpose of IPRT falls within the description of a charitable purpose under s. 3(1)(m)(i) of the Act.

The Commission rejected the appellants' submission relating to analogies with trusts to promote the maintenance of proper standards in the medical profession, trusts for the promotion of compliance with the law, or the advancement of human rights or conflict resolution, or trusts for objects of general public utility. The Tribunal agreed that the Commission was correct to reject those analogies.

Thus, it was held that the IPRT's purposes fell within section 3(1)(m)(i) of the Act by analogy with decided case law. This was sufficient to decide the charitable purpose issue. It then remained to consider whether the IPRT was established for the public benefit. There was no evidence of private benefit. The Commission was referred to the Upper Tribunal's decision in *ISC v Charity Commission* [2011] UKUT 421 (TCC). The Upper Tribunal commented in the ISC case (at [23]) that the concept of what is for the public benefit is not fixed but necessarily changes over time. Public benefit had been held by the Upper Tribunal in the ISC case to have two aspects: firstly, a requirement that the purpose must be beneficial and, secondly, that it must benefit the public in general or a sufficient section of it. Was that the case here?

It was agreed by the parties that the question of public benefit fell to be decided on the basis of evidence before the Tribunal. Evidence was given that a system of regulation of journalism and the news media is underpinned by the right to freedom of expression in Article 10 of the European Convention on Human Rights. This was not an absolute right, but one which must be balanced against other interests, such as national security and public order. Journalists had a privileged status within the legal framework, and the history of

attempts by bodies such as the Press Complaints Commission to develop ethical codes for journalists had been shown to be lacking by the Leveson Report. It was possible that another press regulator was required.

The Tribunal said (at [40]):

> …we are satisfied on the basis of the unchallenged evidence before us that the objects set out in clause 3.1 of the Declaration of Trust are for the public benefit under the first limb of the test described in the ISC decision. [The particular evidence in question]…was not available to the Charity Commission when it made its decision, but we found it persuasive in its assessment of the public benefit which will result from the establishment of a Leveson compliant regulator…We note that Lord Justice Leveson's recommendation for the establishment of an independent press regulator was made following a thorough-going public inquiry and public outrage at some of the press practices he uncovered. We also note that his recommendations were supported by all parties in Parliament. We take into account the fact that, if such a regulator cannot be established by the Government for constitutional reasons and ought not to be established by the industry itself for reasons of propriety and public confidence, then the charity sector is uniquely placed to be able to offer both the mechanism and the means by which a benefit to the community as a whole can be achieved.

Therefore, the appeal was allowed and the Tribunal directed the Commission to register the IPRT as a charity.

The case may be viewed at: http://www.charity.tribunals.gov.uk/documents/decisions/Vernor-Miles-decision-15-Jun-15.pdf

Implications of this case

The charitable purpose in this case was determined by reference to older decided cases under section 3(1)(m)(i) of the Charities Act 2011. This section refers to finding charitable purposes by reference to the 'old law' (before April 2008) relating to charity.

2.2 DISCRIMINATION

2.2.1 **DUGGAN V BELMONT 16 FOOT SAILING CLUB LTD** [2015] NSWCATAD 226 (NEW SOUTH WALES CIVIL AND ADMINISTRATIVE TRIBUNAL – ADMINISTRATIVE AND EQUAL OPPORTUNITY DIVISION, J LUCY (SENIOR MEMBER) AND M O'HALLORAN (GENERAL MEMBER), 28 OCTOBER 2015)

Age discrimination – sailing club competition – rule imposing new age limit on one class of competition

This case concerned alleged age discrimination by the Belmont 16 Foot Sailing Club Ltd (the Club). The Club is a registered club in New South Wales. The applicant is 51 years old and complained that the Club had limited sailing and competition in the Cherub class of vessel to persons aged under 25 years through the introduction of a new rule. The Club maintained that it had the right to introduce the new rule.

The applicant had been sailing and competing in the Cherub class for at least ten years at the time of the rule change. The President of the Club gave evidence that the Cherub class was introduced in 1988 or 1989 to transition sailors from the junior VJ class to the 16 foot Skiff class. The 16ft Skiff class is the premier class within the Club. The Club's constitution provides that the objects of the club include 'to promote the sport of sailing generally, and, in particular, the 16 ft skiff sailing class'.

In 2011 the Club developed a strategic plan which included reducing the Cherub class and another class, the 29er skiff class, to one class. In early June 2012, the Club's Sailing Sub-Committee (being a subcommittee of the Board) resolved that 'the Cherub Class be discontinued as a fleet supported by Belmont 16ft Sailing Club after the 2015/2016 sailing season'. In late June 2012, the Club resolved to adopt the decision of the Sailing Sub-Committee to discontinue the Cherub class. Following this resolution, submissions were received from members of the Club who had concerns about the discontinuation of the class, particularly as it related to developing the sailing skills of younger members.

As a result of these submissions, at a meeting on 25 March 2014, the Board of the Club resolved to continue the Cherub class for members aged under 25 years. There was to be some 'limited support for' sailors over the age of 25 years. Rules were drafted accordingly for the 2014-2015 sailing season. In particular rule 3.7.2 provided:

> Any competitor in the Cherub class who has attained their 25th birthday on or before the 1st September of the current season, may still be accepted as a Registered Crew of a Registered boat however the Boat shall not score points in the Club Championship series or most fastest times trophy.

This meant that the applicant was excluded from competition for the Club Championship or for the 'most fastest times' trophy. However, he could still compete for the handicap trophy. On 14 November 2014 the applicant made a complaint to the President of the New South Wales Anti-Discrimination Board, alleging discrimination on the ground of age. In his complaint, the applicant stated that the Cherub class had been raced at the Club for 25 years by sailors of all ages. He said that each sailing class, including the Cherub class, had a yearly club championship of about eight races with a trophy which was listed on the wall of the Sailing Club. He also stated that there was no age restriction in the National or State Cherub Association rules and the class had sailors up to 75 years of age sailing in it. The complaint was referred the Tribunal for consideration under the *Anti-Discrimination Act 1977* (NSW) (the Act).

Part 4G of the Act deals with age discrimination. Section 49ZYA describes what constitutes age discrimination:

> (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of age if the perpetrator:

(a) on the ground of the aggrieved person's age or the age of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who is not of that age or age group or who does not have such a relative or associate who is that age or age group.

….

(2) For the purposes of subsection (1)(a), something is done on the ground of a person's age if it is done on the ground of the person's age or age group, a characteristic that appertains generally to persons who are that age or age group or a characteristic that is generally imputed to persons who are of that age or age group.

Section 49ZYP applies this definition to registered clubs providing:

(2) It is unlawful for a registered club to discriminate against a member of the registered club on the ground of age:

(a) by denying or limiting access to any benefit provided by the club, or

(b) by depriving the member of membership of the club or varying the terms of that membership, or

(c) by subjecting the member to any other detriment.

Section 49ZYR (special needs programs and activities) and section 49ZYW (sport) were also considered by the Tribunal.

Since the Club is a registered club, section 49ZYP applied. Was section 49ZYP breached by the Club? The Tribunal agreed that section 49ZYP(2)(a) was breached and other subsections did not need to be considered. The applicant was denied the ability to gain points in competition, and was deprived of the benefit of winning either of the trophies excluded. The Club's argument that the rule change was to help younger members gain points and win trophies by excluding older members in the Cherub class was not accepted.

Had the Club therefore discriminated against the applicant because of his age? The applicant relied on section 49ZYA(1)(a). The Tribunal agreed that there was discrimination, and said on this issue (at [34]):

> We are satisfied that, by the imposition of r 3.7.2, the Sailing Club has treated Mr Duggan less favourably than in the same circumstances, or in circumstances which are not materially different, the Sailing Club treats or would treat a person who is not of that age or age group (the relevant age group being people over the age of 25). It has done this by excluding him from eligibility to earn points towards the club championship trophy and the 'most fastest time' trophy. We are also satisfied that it has done so on the ground of Mr Duggan's age (that is, on the ground that he is over 25 years old). So much is clear from the terms of r 3.7.2.

The 'special needs' exception in section 49ZYR was held not to apply. The Club argued that it was attempting to build up the skills of the 17–25 year age group, so that more sailors could move to the more prestigious 16 ft Skiff class. The Club was concerned that too many members were staying in the Cherub class and not progressing, but the Tribunal did not accept these concerns as valid.

The 'sport' exception in section 49ZYW also did not apply. Section 49ZYW provides that nothing in Part 4G of the Act renders unlawful the exclusion of persons of particular ages from participation in any sporting activity. The exclusion here was in competition and awards for over 25s. This was discrimination. The Tribunal said on this point (at [54]):

> Having regard to the language and purpose of s 49ZYW, it is our view that the words 'exclusion of persons of particular ages from participation in any sporting activity' refer to excluding people of

particular ages from physical participation in a sporting activity, and not to the way in which such participation is assessed or rewarded. That is the ordinary meaning of the words.

Therefore, the applicant's complaint of age discrimination was upheld. Both the opportunity to compete for the club championship trophy and the opportunity to compete for the 'most fastest times' trophy conferred substantive benefits on members. The Club was enjoined from continuing or repeating the conduct of making and applying sailing competition rules in the Cherub class which precluded competitors over the age of 25, or the boat of competitors over the age of 25, from scoring points in the Club Championship series or the most fastest times trophy, and rules to the same or similar effect.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCATAD/2015/226.html

2.3 EMPLOYMENT AND WORKPLACE RELATIONS

2.3.1 **FAIR WORK OMBUDSMAN V CROCMEDIA PTY LTD** [2015] FCCA 140 (FEDERAL CIRCUIT COURT OF AUSTRALIA, REITHMULLER J, 29 JANUARY 2015)

Workers retained following unpaid work experience – failure to pay proper wage rates as employees – whether volunteers

This case concerned the position of 'volunteer' workers. The respondent, Crocmedia Pty Ltd (Crocmedia), carries on business in the sports media and entertainment sector. Crocmedia develops radio and television programs in Victoria which it provides to media partners for broadcast. It derives its income from advertisers whose advertisements are placed within the media programs, rather than from the broadcasters. As at November 2014 Crocmedia Pty Ltd employed 46 people, 10 of whom were casual employees.

The two workers in the case were first engaged at Crocmedia on work experience whilst they were university students. Both workers performed unpaid work experience for three weeks, following which they were employed on a casual basis. On the main radio program on which they worked, they were characterised as 'volunteers'. On another, one of them was characterised as a 'contract worker'. However, it was admitted on the facts that neither of these characterisations was true. The workers in this case were neither volunteers nor contract workers after the first three weeks of their placement. They were employees. The court considered the nature of the work, the provision of equipment, and the extent of control by the employer exercised over the arrangements to arrive at this conclusion.

Payments characterised as payment of 'expenses' had been made to the employees. These were amounts of between $75 and $120 per shift, totalling $13,970 for the male employee and $3,750 for the female employee. Based on minimum wage rates, the payments due to the two employees for the same amount of work totalled $22,168.08. After an investigation by the Fair Work Ombudsman, they were paid the total amount of wages owing, and were also able to retain the 'expenses' already paid, as it was determined that these could not be offset against the wages owing.

This case was to determine the amount of pecuniary penalty that should be ordered against the respondent for the breaches of the Act which had occurred. These breaches were:

- failure to pay minimum wages (section 293);
- failure to pay casual loadings (section 293);
- failure to pay in full, at least monthly (section 323(1));
- failure to provide pay slips (section 536(1)).

In ordering a pecuniary penalty, the court takes into account relevant factors. These were:

- Circumstances in which the conduct took place and the nature and extent of the conduct – the circumstances did not look favourable for the respondent. His Honour said (at 27):
  > …the Respondent cannot avoid the proposition that it is, at best, dishonourable to profit from the work of volunteers, and at worst, exploitative.
- The nature and extent of the loss – the loss was put at 20% of the total amount of wages owing (at [28]).
- Previous similar conduct – there was no evidence of previous similar conduct (at [29]).
- Size of Business – the business was medium sized, and well able to pay proper remuneration (at [30]).
- Whether the conduct was deliberate – there was no evidence of actual deliberation, though the usage of the employees had been 'exploitative' (at [32]).
- Involvement of senior management – there was no evidence of such involvement (at [33]).
- Contrition, corrective action and cooperation – the respondent had acted quickly to correct the position, and cooperated with all investigations (at [37]).

- Deterrence – the contrite nature of the respondent's behaviour had some influence, but nevertheless financial penalties did not need to be applied with a 'light hand' (at [40]).

After consideration of these relevant factors, the court ordered a pecuniary penalty (a type of fine without any criminal overtones) of $24,000. Under section 546(1) of the Act this amount has to be paid into the Consolidated Revenue Fund of the Commonwealth.

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCCA/2015/140.html

Implications of this case

Section 12 of the *Fair Work Act 2009* (Cth) (the Act) contains a 'vocational placement' exception to key provisions regarding work terms and conditions. Vocational placement is defined as:

> (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
> (b) undertaken as a requirement of an education or training course; and
> (c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

However, employers have to careful to avoid exploitation. This decision demonstrates the need for employers to classify their employees correctly, and ensure that they meet the minimum entitlements necessary under national employment legislation. The court acknowledged the difficulties involved with work experience arrangements, but warned that 'profiting from "volunteers" is not acceptable conduct' within Australia's industrial relations scheme (at [45]), and that penalties for future contraventions are likely to increase significantly (at [40]).

2.3.2 **SHARPE V THE BISHOP OF WORCESTER** [2015] EWCA CIV 399 (COURT OF APPEAL, ARDEN, DAVIS, LEWISON LLJ, 30 APRIL 2015)

Parish rector of Church of England – whether governed by employment contract

This case concerned the nature of the work of a parish rector of the Church of England. Reverend Sharpe was the rector of a parish in the diocese of Worcester in England from 2005 until 2009 when he was dismissed for what he alleged were improper motives. The issue before the Court of Appeal was whether he could be classed as an 'employee'. If not, he had no rights to claim unfair dismissal.

The Bishop of Worcester (the Bishop) was successful before the Employment Tribunal (ET) (Employment Judge McCarry) which dismissed Reverend Sharpe's claim on the basis that he failed to meet the threshold tests, i.e. he was not an employee. The employment judge at first instance held that there was no contract, express or implied, between the parties. However, the Bishop lost on appeal by Reverend Sharpe to the Employment Appeal Tribunal (EAT) (Cox J) which set aside the order of the ET. The EAT remitted the matter for further findings to the ET. This appeal followed on the point of law relating to employment status. The Court of Appeal was unanimous in upholding the decision of the ET.

The facts were not in contention. Reverend Sharpe applied for the post of Rector of Teme Valley South in the Diocese of Worcester. The right to present (or nominate) a member of the clergy to this living was vested in Mr and Mrs Miles (though only Mrs Miles appears to have been involved on this occasion), but a person could not be nominated without the Bishop's approval, which was given. The Bishop conducted a ceremony of 'installation' to complete the formalities of the appointment. After that, Reverend Sharpe became responsible for looking after the spiritual needs of parishioners unless the Bishop chose to intervene. Following his appointment, Reverend Sharpe received a set of papers, called 'the Bishop's Papers', assembled into book

form with an introduction. The Bishop's Papers dealt with a large number of matters, including such employment-like issues as when holidays could be taken. However, the Court of Appeal found the relationship was not a contract of employment.

The nature of the relationship of an appointee to office in the Church of England has a long history. The Church of England (the Church) is not a legal person. Its functions are carried out by a series of different legal persons and bodies. The Church and its officers are governed by ecclesiastical law. Ecclesiastical law includes 'the Canons of the Church of England'. Canon law, that is, the law of the canons and generally the divine law of the Church, is part of the law of the land. Legislation for the Church takes the form of Measures, which receive royal assent after approval by Parliament.

The Church consists of a number of geographical dioceses, each headed by a bishop. A priest cannot minister in a diocese without the consent of the bishop of the diocese. The office of rector or vicar (the differences between these terms were regarded by the Court of Appeal as material) in a particular parish is known as a benefice. It carries with it the freehold interest in the parsonage house. Originally, a rector could not be removed from office in his lifetime: the right to the office was said to be 'freehold'; but since the Ecclesiastical Offices (Age Limit) Measure 1975 a rector has had to retire at seventy.

The appointment of a priest as rector to a vacant benefice is now governed by the Patronage (Benefices) Measure 1986 (PBM). The process involves nomination, institution, and induction in accordance with the Canons. In this case the right to nominate a priest for appointment as Rector of Teme Valley South belonged to Mr and Mrs Miles as patrons of the parish. The patron must consult the parish, obtain the consent of two elected representatives of the parochial church council (PCC) and of the Bishop, before offering the living to a particular priest. The Bishop could not countermand an offer after it had been made or refuse to institute a rector, unless the appointee lacked capacity. There is often an interview at which the patron, the bishop's representative, and representatives of the PCC are all present.

The position of rector was offered to Reverend Sharpe by Mrs Miles by letter, and Reverend Sharpe accepted. By law, the appointment was not finalised until 'institution' occurred, and Reverend Sharpe had been 'inducted' or 'installed' by the Bishop. Before being admitted to office, the rector had to:

a) make a declaration of assent to the faith of the Church;
b) take an oath of allegiance to the Sovereign;
c) make an oath of Canonical obedience to the Bishop.

All the formalities took place as required, and Reverend Sharpe became the 'incumbent' of the parish from 8 January 2005 when his stipend (see below) began to be paid.

The duties of parish clergy are set out in ecclesiastical legislation, particularly in the Canons and the Ordinal (part of the Book of Common Prayer containing rules to be observed, and the forms of service to be used for ordinations and consecrations). The incumbent could determine which duties to perform, how to perform them and, with the exception of Sunday services, when to perform them.

Payment for duties is in the form of a stipend, a fixed flat rate amount, paid under statutory authority. There is no provision for determining any particular sum to be paid, but each diocese has discretion to fix the amount, in light of recommendations from the central stipends authority. In the Worcester diocese, the rate was set by the Diocesan Resources Board, established by the Diocesan synod and the Worcester Diocesan Board of Finance. There was no opportunity for an individual to negotiate the level of stipend, and no scale rising with experience, service, or size of the parish. Incumbents also received various statutory fees, for example for weddings and funerals, but these were effectively assigned to the diocese and set off against the stipend. The Church Commissioners are responsible for the payment of the stipend and national insurance contributions.

The Church of England Pensions Board is responsible for the payment of pensions. Stipend and pension contributions are paid from monies provided by the diocesan board of finance.

Other employment issues in the Diocese included:

- Rectors were entitled to apply for a car loan from the Church Commissioners.
- There was no regulation of work hours or days rostered off.
- There was no regulation of holidays, and no record was kept of holidays taken.
- Statutory sick pay was available. When that had expired, a further 24 weeks of stipend was paid at half rate.
- There was no grievance procedure available.
- Redundancy was possible because of parish reorganisation. Full compensation for loss of office, stipend and housing was payable until retirement age if the priest was not appointed to another office, unless he unreasonably refused to accept another appointment.

In the ET, the employment judge did not find that there could be a contractual relationship between Reverend Sharpe and the Bishop. The Bishop had not undertaken to pay any remuneration and had no control over the necessary funds. His powers to instruct or supervise Reverend Sharpe were not extensive and were defined by law. They did not arise from any consensual arrangement. The employment judge went on to hold that he would not have concluded that any contract was a contract of employment for three reasons: (1) the lack of supervision and control by the Bishop; (2) Reverend Sharpe's power to delegate, which meant that he was not agreeing to act personally; and (3) although Reverend Sharpe invoked custom and practice, that supported the conclusion that there was no contract of employment between a rector and his Bishop. This finding was overturned by the EAT.

The Court of Appeal discussed the nature of the office of priest. Originally, since this was an 'office' of a spiritual nature, there could not be any question of there being an employment relationship between a priest and his/her Bishop. However, the position had moved on. The fact that a person is an office holder does not mean that he/she cannot be an employee today (at [91]). However, Arden LJ (at [108]) said:

> I accept it is essential that the court looks at the substance of the matter to do full justice in this case. In a situation where the shadows of history and tradition are as long as they are here, the court has to be sure that the form does not obscure the present day substance…. A rector assumes office not simply because he or she is selected at interview but because he or she is installed as rector. That is not to be discounted as just another ceremony. As a clergyman, Reverend Sharpe must as part of his installation demonstrate his commitment to follow his calling by making the oath of Canonical obedience in the presence of the Bishop and his parishioners. In exchange for that, the Church provides him with the facilities to discharge his calling – stipend, housing, assistance with cars, and guidance on holidays and so on: there is an open offer by the appropriate organs of the Church to make those facilities available so there is no need for them to be discussed. They are taken as read. Any incumbent is expected to behave responsibly and given considerable freedom to take care of the souls of his parishioners in the way he considers appropriate. But, for a mixture of historical and ideological or theological reasons, the Church has little power of control over the way an incumbent discharges his functions or to remove him from his post. The reality is that that is not the point of the appointment. Put another way, by accepting office as rector he or she agrees to follow their calling. They do not enter into an agreement to do work for the purposes and benefit of the Church as a commercial transaction. On the facts as found by the employment judge, the Church, personified in these proceedings by the Bishop (in his corporate capacity), provides the institutional structure in which the incumbent can indeed follow his or her calling to be part of the ministry. The office of rector is governed by a regime which is a part of ecclesiastical law. It is not the result of a contractual arrangement.

Davis LJ agreed with this analysis. Lewison LJ also agreed, acknowledging too the difficulties of the case (at [134]):

> In my judgment this case is not just about a man and his job. It also raises questions about the interface between two parallel systems of justice (ecclesiastical and secular) and about the exercise of a property right to present an incumbent to a benefice (an advowson).

Lewison LJ traced the history of advowsons and benefices in some detail. He concluded (at [179]–[182]):

> The manner in which Rev Sharpe was engaged was by the exercise of a proprietary right by the lay impropriator [in this case Mrs Mills]. He was not chosen either by the bishop or the diocesan board of finance. The bishop (as well as the PCC) had the right to withhold approval for cause, but if they had done so the patron and the presentee had the right of appeal. In conducting the ceremonial aspects of Rev Sharpe's installation, the bishop was doing no more than giving effect to Mrs Miles' exercise of her proprietary right, having no grounds on which to refuse to do so. The deed of installation is couched in the language of grant; not the language of contract. That method of appointment militates strongly against any contract between Rev Sharpe and the bishop. The duties imposed on Rev Sharpe derive principally from the Ecclesiastical Canons and Measures, and not from any private agreement between him and the bishop. His entitlement to stipend derives from statute and not any agreement between him and the bishop. The bishop has no power to dismiss Rev Sharpe; and is not even the initiator of disciplinary proceedings, which as I understand it is the sole method by which Rev Sharpe could have been deprived of his benefice against his will. His powers to declare a benefice vacant in cases of serious pastoral breakdown or incapacity are entirely dependent on the findings of an independent tribunal. In my judgment there are no features of the method of Rev Sharpe's appointment, the duties imposed upon him by law or the means by which he could be deprived of his benefice which would support the existence of a contract between him and either the bishop or the diocesan board of finance.

Therefore, the Court of Appeal held that Reverend Sharpe was neither a party to a contract of employment nor a worker. Thus, he had no statutory protection from dismissal.

The case may be viewed at: http://www.bailii.org/ew/cases/EWCA/Civ/2015/399.html

Implications of this case

Since the events in this appeal, the legal position of rectors has changed. The Ecclesiastical Offices (Terms of Service) Measure 2009 and the Ecclesiastical Offices (Terms of Service) Regulations 2009 came into force on 31 January 2011. The regulations now set out terms of service under which incumbents hold office. The measures include the right not to be unfairly dismissed from office on the grounds of ‘capability’ (as defined), and this right is enforceable in employment tribunals. However, section 9(6) of the 2009 Measure states that it does not create an employment relationship between office holders and any other person. So these enactments assume that an office holder will not be an employee. Transitional provisions were made. These changes mean that there may now be only a limited number of clergy to whom the same issues as arose on this appeal could apply in future.

2.4 DISSOLUTION, WINDING UP AND INSOLVENCY

2.4.1 ANGLICAN DEVELOPMENT FUND DIOCESE OF BATHURST IN ITS OWN CAPACITY AND AS TRUSTEE OF THE ANGLICAN DEVELOPMENT FUND DIOCESE OF BATHURST (RECEIVERS AND MANAGERS APPTD) V THE RIGHT REV. IAN PALMER, BISHOP OF THE DIOCESE OF BATHURST; COMMONWEALTH BANK OF AUSTRALIA V THE RIGHT REV. IAN PALMER, BISHOP OF THE DIOCESE OF BATHURST [2015] NSWSC 1856 (SUPREME COURT OF NEW SOUTH WALES, HAMMERSCHLAG J, 10 DECEMBER 2015)

Letter of Comfort – whether legally binding to assure payment of outstanding debt

This was a complex case involving borrowings of an Anglican Church fund from the Commonwealth Bank of Australia. It is important to note firstly that the Anglican Church as an institution does not have its own corporate existence. It consists of a series of unincorporated voluntary associations at national, provincial, diocesan and parish levels. The Diocese of Bathurst (the Diocese) is one of 23 Anglican dioceses in Australia. The Diocese has its own Synod, which publishes Ordinances which are part of the rules of its voluntary association or part of that association's consensual compact. Under its governance structure the Anglican Church sets up bodies corporate to undertake some of its work. In New South Wales those bodies corporate are governed by the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW) (the Act), which is an Act to make provision for and with respect to the constitution of bodies corporate for the purposes of managing, governing and controlling institutions and organisations of the Anglican Church.

The Anglican Development Fund Diocese of Bathurst (ADF) was founded in its current form in 2004 as a body corporate under section 4(3) of the Act. The ADF, which operated under its own Diocesan Ordinance, was originally set up to receive deposits from persons or organisations (not being diocesan organisations, corporations or parishes) and to invest such monies for the purposes of returning a surplus to be used to provide financial support for ministry objectives for the Diocese. However, in 2007 it was decided that the ADF would become a sort of 'central banker' for the Diocese. This was to avoid the necessity of Diocesan bodies having to borrow money individually from commercial banks. Thus the ADF would borrow all the funds needed and lend them to Diocesan bodies at higher interest rates in order to generate a profit. The ADF Ordinance was amended to give its Board the power to lend and advance money or give credit to any parish, school or any organisation subject to the control of Synod, whether on security or not, and to take security (if any) for money lent or advanced or credit given by it. The ADF Ordinance included a provision requiring its Board to adopt a Prudential Code of Practice.

The Commonwealth Bank of Australia was chosen to provide the funds facility to the ADF. At the time, the Bank had a particular lending policy which applied to extending credit facilities to religious organisations. The Bank classified religious organisations into two groups, A and B. Group A religious organisations were entities where special arrangements had been agreed to which dispensed with the need for security. Group A organisations were the Anglican Church, the Baptist Church, the Roman Catholic Church, the Church of Christ, the Presbyterian Church and the Uniting Church of Australia. Sole security required from group A organisations was a letter of acknowledgment on the letterhead of the religious organisation, executed by its authorised representatives. Group B religious organisations were all other religious organisations where no special security arrangements had been agreed to. In their case, a first ranking mortgage over the religious organisation's freehold land and improvements had to be obtained.

Under these arrangements, the CBA offered ADF a facility of $50.1 million on 22 November 2007. This was accepted by ADF on 11 December 2007. The facility limit was reduced to $40 million at ADF's request on 7 April 2008. The only security required and taken by the CBA for repayment of the loan was a letter dated 24 April 2008, under the hand and seal of the Right Reverend Richard Hurford, Bishop of the Diocese at the time. This type of security is referred to as a Bishop's Letter, Bishop's Guarantee, Bishop's Certificate, Episcopal

Certificate, Letter of Comfort or Letter of Acknowledgement. In this case, the court preferred the term Letter of Comfort.

The Anglican Property Trust Diocese of Bathurst (APT) is a Diocesan corporate entity. APT was constituted as a body politic and corporate under the provisions of the *Church of England Trust Property Incorporation Act 1881* (44 Victoria) (NSW). The APT is trustee of a significant amount of property in the Diocese. The ADF Board comprises the Bishop of the Diocese, the Bishop's Registrar, members of APT, and members appointed by APT. Under the ADF Ordinance, the Diocese is its guarantor.

ADF borrowed the $40 million from the CBA and spent more than $28 million of it on two new schools, the Macquarie Anglican Grammar School (MAGS) and the Orange Anglican Grammar School (OAGS). The loans were given with a Bishop's certificate naming the Diocese as guarantor. However, the schools did not do well and could not meet their obligations. Receivers were appointed on 23 October 2013. ADF subsequently defaulted. The assets of the schools were sold to the Sydney Anglican Schools Corporation for, in the case of MAGS, $7.1 million for its land and $160,000 for its business, and in the case of OAGS, $3.59 million for its land and $150,000 for its business. After adjustments for long service leave and other items, both MAGS and OAGS owed money back to the buyer.

When Synod of the Diocese is in recess, its powers are delegated to a committee known as Bishop-in-Council (BIC). The current Ordinance regulating BIC is the *Anglican Diocese of Bathurst Administration Ordinance 2003–2011*. On 24 February 2014, the CBA wrote to all the members of BIC that it had obtained judgement against ADF, and asserting that the facilities provided to ADF were secured by the Letter of Comfort. The CBA demanded that BIC take all necessary steps in accordance with its obligations under the Letter of Comfort and the ADF Ordinance to make good the shortfall suffered by the bank. CBA demanded that BIC issue Ordinances for the sale of Diocesan assets.

As at 14 April 2015, ADF had a deficiency on creditors' claims of $25,363,074.92. This gave rise to three actions. The first of these actions in which ADF (by its receivers) sued the members of the ADF Board for compensation, alleging breaches of the *Corporations Act 2001* (Cth) sections 180(1) and 181(1), was settled in favour of ADF for $11.3 million. The result was that the total ADF deficiency was reduced to $14,063,074.92. In the second action, CBA sued BIC as guarantor of the shortfall, and in the third action, ADF sued BIC as guarantor of the shortfall. The latter two actions were heard together in this hearing.

The CBA's position was that the Letter of Comfort, both by the express obligations undertaken in it and by virtue of the Certificate given in it, created contractual obligations, binding and specifically performable at its suit, on BIC to ensure that the amount owed by ADF was paid from church trust property held on behalf of the Diocese. In the alternative, the CBA claimed damages. The ADF contended that there was a contractual obligation on BIC, supported by the Bishops' Certificates, to pay its debts. BIC's position was that the Letter of Comfort did not give rise to legal relations. The Diocese was not a legal entity and therefore could not enter contracts. Bishop Hurford had acted for a non-existent principal. In the alternative, if there was a counterparty to the contract, that party was a fluctuating class of members of a voluntary association. Only those members of BIC who held office at the date of the Letter of Comfort should be sued and not members who joined BIC later. The Bank had thus sued the wrong parties.

His Honour was unmoved by BIC's contentions. As he put it (at [182]):

> A general synopsis of BIC's position… might be the following. It denies the existence of the Diocese as an institution capable of incurring obligations which it formally and solemnly undertook. It denies the authority of its former Bishop and titular and spiritual head to have incurred obligations on its behalf which he formally and solemnly undertook. It denies that obligations formally and solemnly undertaken are legally binding. It denies the existence of formal documents of obligation where there

> is clear and cogent evidence of their existence. It denies that ordinances passed to give protection to lenders including Diocesan lenders in the event of borrowers' default are effective to give any such protection. It denies that enabling legislation passed to give it control over church trust property gives it such control. It denies that its present Bishop would exercise powers and authority vested in him to discharge obligations formally and solemnly undertaken by his predecessor, even if he could do so. It denies the existence of any church trust property available to be used to discharge obligations it may be found to owe.

All of these contentions were rejected by the court in a detailed analysis of the issues. The Letter of Comfort was binding. BIC was bound by its terms. ADF was entitled to support under the Bishop's Certificates issued. There was church trust property available, both real and personal, which could be utilised to honour the Letter of Comfort and make up ADF's deficiency without breaching any trust. As His Honour put it (at [610]):

> I have found that the Letter of Comfort and each of the Certificates relied upon by ADF gives rise to obligations legally binding on BIC. In my opinion, declarations in appropriate terms should be made.

The specific terms of any order to be made were held over to a date in 2016.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/1856.html

Implications of this case

The Diocese of Bathurst, as a voluntary association, does not have any existence apart from its members. Consequently, all real and personal property held for the benefit of the church in the Diocese (that is, church trust property) is vested in trustees. In this case most of the church trust property was held by APT, a corporate trustee. As such, it had the obligation to use the trust property to discharge ADF's debts. His Honour could see no alternative (at [412]):

> Putting aside the dim, even unrealistic, prospect that funds might be raised by BIC from the pockets of parishioners by the imposition of a levy on individual communicant members (even if this could be done in some binding fashion – which I highly doubt – seeing as they are free to give up their membership at any time), the only realistic source of revenue which might be utilised to ensure that ADF meets its financial commitment to the Bank is what can be obtained from the realisation of church trust property.

2.4.2 ROBSON AND ORS V COMMISSIONER OF TAXATION [2015] QSC 76 (SUPREME COURT OF QUEENSLAND, JACKSON J, 27 APRIL 2015)

Winding up of incorporated association – whether Pt 5.7B Corporations Act 2001 (Cth) applies by virtue of s 91 Associations Incorporation Act 1981 (Qld)

This case concerned the winding up of an association for insolvency. Under section 91(2) of Part 10 of the *Associations Incorporation Act 1981* (Qld) (AIA), winding up of an association is to be done in accordance with the provisions of Pt 5.7 of the *Corporations Act 2001* (Cth) (CA). The provisions of the CA are applied as if they were laws of the State. The question for consideration in this case was whether section 91(2) of the AIA also applied Pt 5.7B of the CA to associations in Queensland.

The Regional Community Association was wound up in insolvency on 2 August 2013. The first plaintiff was the liquidator appointed for the winding up. The liquidator claimed that payments to the Commissioner of Taxation (the Commissioner) of a total of $117,616 were unfair preferences under section 588FA of Pt 5.7B of the CA. If the payments made to the Commissioner were unfair preferences under section 588FA, then they

would be voidable under section 588FE, and an order could be sought under section 588FF(1) for the amounts to be repaid to the liquidator.

The liquidator's contention was that the payments to the Commissioner were insolvent transactions under section 588FC (i.e. made while the association was actually insolvent), and put the Commissioner in a preferential position as against other creditors (making an unfair preference). Under section 588FE(2) of the CA insolvent transactions entered into during the six months ending on the relationship-back day are voidable.

In response to this contention, the Commissioner notified the former management committee members of the plaintiff association that under section 588FGA(2) of the CA the Commissioner would seek to claim indemnity from them in respect of any loss or damage resulting from an order that the court might make in the plaintiffs' favour.

Did the undoubted application of Pt 5.7 CA to the AIA, also encompass the application of Pt 5.7B? His Honour held that it did not. Pt 5.7 CA applies to a 'Pt 5.7 body'. This includes a 'registrable body' which is a 'registrable Australian body'. A 'registrable Australian body' is a body corporate or unincorporated association that can sue or be sued or hold property in its place of formation, but that is not a company or a foreign company. Within Pt 5.7, sections 582 and 583 make provision for the winding up of a Pt 5.7 body. His Honour said that some of Pt 5.6 would be 'picked up' by these provisions (at [29]):

> In my view, as a matter of construction of s 582 and s 583 of the CA, many of the provisions of Pt 5.6 of the CA will be picked up in relation to the winding up of a Part 5.7 body. In reaching that conclusion, an obvious point is that some of the central provisions of the CA that apply in the winding up of a company are not contained within Pt 5.7 of the CA. For example, Pt 5.6 of the CA contains provisions dealing with winding up generally, including provisions for the appointment of liquidators and their rights and obligations, as well as the proof and ranking of claims, including provisions relating to secured creditors. The fundamental provisions as to the debts which are provable (s 553), the pari passu rights of unsecured creditors (s 555) and the priority payments which are to be made to some unsecured creditors (s 556), are all contained in Pt 5.6 of the CA. It is clear that most or all of those are provisions of Ch 5 that apply in the winding up of a Part 5.7 body.

However, Pt 5.7B was different in its application (at [31]). Although Pt 5.7B expressly applies to a Pt 5.7 body (by section 588FF), there is no source of power for a liquidator to apply under Pt 5.7B outside Pt 5.7B itself. A 'Pt 5.7 body' in Pt 5.7B is a 'company', and section 588FF refers to a 'company's transaction' and a 'company's liquidation' (at [37]):

> In my view, on the proper construction of the CA, taken as a matter of the text of the whole of the legislation and as presently enacted, neither s 582 nor s 583 of the CA is the source of the liquidator's power to apply for or the source of the Court's power to make an order under s 588FF of the CA. Instead, the source of those powers in the case of a Part 5.7 body lies in the provisions of Pt 5.7B and s 588FF themselves, by reason of the defined meanings of 'company' and 'transaction' in s 9 of the CA.

Section 91(2) of the AIA refers to Pt 5.7 only (with any subsequent changes). Did the changes envisaged under section 91(2) include the additional reference to Pt 5.7B? His Honour held they did not (at [47]–[48]) [emphasis added]:

> The plaintiffs submitted that the references to a 'Part 5.7 body' in par (c) of the definition of 'company' and in the definition of 'transaction' in s 9 should be changed to 'incorporated association' under s 91(3) of the AIA for s 91(2). If that submission were accepted, it would follow that 'company', as defined in par (c) of the definition and so changed, would include an incorporated association in both Pt 5.7B and Pt 5.8. **However, as provided for under s 91(2) of the AIA, the changes to be made**

> **to the text of the CA are 'changes to the provisions of Part 5.7'. The definitions of 'company' and 'transaction' are not provisions of Pt 5.7. That is, s 91(2) applies Pt 5.7 of the CA, not the CA as a whole. The changes in the text made by s 91(3) are to the text of Pt 5.7.** The plaintiffs' submission on this point fails because s 91(3) does not alter the text of s 9.

His Honour went on to hold that (at [58], [69]):

> The mischief which s 91 of the AIA is intended to remedy is the need to provide rules, rights and obligations of those affected in the winding up of an incorporated association. The methodology adopted is to treat the winding up as if it were a winding up of a Part 5.7 body. However, the precise mechanism adopted by s 91(2) of the AIA does not appear to pick up one aspect of the rules, rights and obligations that apply in the winding up of a Part 5.7 body, namely the application of Pt 5.7B, including s 588FF of the CA, through the definitions of 'company' and 'transaction' in s 9 of the CA…. I conclude that, properly construed, s 91(2) of the AIA does not pick up and apply Pt 5.7B of the CA, including s 588FF(1)(a), to the winding up of an incorporated association under s 90 of the AIA, because neither s 582 nor s 583 of the CA applies Pt 5.7 or s 588FF to a Part 5.7 body in the first place.

His Honour referred to the history of the CA. When the original sharing of corporations power between the Commonwealth and the States was put in place in 1989, there was neither a Pt 5.7 nor a Pt 5.7B. Subsequently, upon alteration of the arrangements between the Commonwealth and the States in 2001, there was a Pt 5.7 but still no Pt 5.7B. It was therefore possible that the current position was unintentional. The effect could be reversed if section 91(2) of the AIA were amended to provide for the application of Pt 5.7B to associations in Queensland, but that was a matter for the legislature.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2015/76.html

Implications of this case

His Honour was of the view that the current position was not absurd nor a mistake. It could be unintentional because of the complex history of the Corporations Act over the period from 1989. If it became a matter for the legislature in Queensland to consider, 'section 91(2) of the AIA could be amended to provide or construed to mean' (at [63]):

> (2) The winding-up of an incorporated association under section 90 is declared to be an applied Corporations legislation matter for the *Corporations (Ancillary Provisions) Act 2001*, part 3, in relation to the Corporations Act, part 5.7 and part 5.7B, subject to the following changes to the provisions of part 5.7 and part 5.7B—
>
> (a) the changes referred to in subsection (3);
>
> (b) any other changes, within the meaning of the *Corporations (Ancillary Provisions) Act 2001*, part 3 that are prescribed under a regulation.

2.5 MEMBERSHIP AND OFFICE

2.5.1 **FALKINGHAM V PENINSULA KINGSWOOD COUNTRY GOLF CLUB** [2015] VSCA 16 (SUPREME COURT OF VICTORIA, COURT OF APPEAL, WARREN CJ, WHELAN, BEACH JJA, 16 FEBRUARY 2015)

Oppression by majority – applicability of defence of laches – delay not excessive, but potential for serious damage to defendant and third party

This case concerned oppression proceedings under section 232 of the *Corporations Act 2001* (Cth) (the Act). The Kingswood Golf Club Ltd (Kingswood), a company limited by guarantee, was located at Dingley in Victoria. The club had an 18 hole golf course on land that it had owned since the 1930s. In 2013, its land was valued at approximately $52 million, and if re-zoned residential, would be worth $71 million. As at 30 June 2013, Kingswood had approximately 900 members. The Peninsula Country Golf Club (Peninsula), an incorporated association, was located at Frankston. It had two 18 hole courses. In 2013, its land was valued at approximately $54 million, and if re-zoned residential, approximately $72 million. In 2013, Peninsula had about 1705 members. Both clubs were facing future financial difficulties because of falling membership and other factors.

At a general meeting of Kingswood held on 17 September 2013, the members voted by ordinary resolution to proceed with a merger with Peninsula, by a margin of 63% in favour and 27% against. The merger was achieved by the members of Peninsula becoming members of Kingswood. The plaintiff at first instance (now the appellant), Mr Falkingham, strongly opposed the merger. His application relied on alleged oppression by the Peninsula Kingswood Country Golf Club Ltd of the appellant and, by inference, other members who opposed the merger. The alleged oppression consisted in admitting to membership of Kingswood the members of Peninsula. Admission of members was dealt with in clause 8 of the constitution of Kingswood.

His Honour agreed with the plaintiff that the admission of the Peninsula members was not permissible under clause 8 of the Constitution. His Honour said that the purpose of giving the board power to admit new members could only be exercised for the purpose for which it was given. There were two possible purposes for the admission of the Peninsula members: to add to the membership for the benefit of the club and the existing members, and to give effect to the merger of Kingswood with Peninsula. His Honour said that the operative question was which was the substantial purpose? The High Court in *Whitehouse v Carlton Hotels Ltd* [1987] HCA 11 said (at [93]–[94]) that the relevant question to be asked is whether, but for the purpose's existence, the power would have been exercised.

It was held that there should have been a special resolution requiring a majority of 75% to effect the merger with Kingswood, rather than the ordinary resolution (at [95]–[96]). This was so even though the members of Kingswood had voted by majority (63%) for the merger. Section 232 of the Act requires the action complained of be unfair to the member complaining, as a member. His Honour found that this was so (at [98]). Thus, the actions of the board were voidable because of oppression, though not void.

The defendant club pleaded laches, acquiescence and delay. This is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution of prosecution of his case, has either: (a), acquiesced in the defendant's conduct; or (b) caused the defendant to alter his position in reasonable reliance and the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. The admission of new members from Peninsula took place in October 2013. The plaintiff did not retain solicitors until March 2014, and did not institute proceedings until August 2014. The board was due to make its decision as the successful bidder for the Dingley land on 24 August 2014. Although there had not, objectively, been a long delay on the part of the plaintiff, the potential for damage to the defendant club, and the potential

buyers of the land was substantial (at [111] of the decision at first instance). Therefore, although oppression was held to exist, no remedy was forthcoming because of the delay of the plaintiff in bringing his action, and the consequent potential for damage to be suffered by the defendant and third parties. The plaintiff's application was dismissed.

On appeal, both parties to the appeal accepted that the trial judge's decision on laches, acquiescence and delay was a discretionary judgment. The court dismissed the appeal, holding that the appellant had failed to establish error of the kind necessary to overturn the judgment. However, although the court of appeal held that this conclusion was sufficient to determine the appeal, it also concluded that the trial judge was correct in finding that the board had exercised its power to admit new members for a purpose other than that for which that power had been conferred by the Constitution (at [104]–[106] per Whelan JA who delivered the judgement for the court):

> I agree with the trial judge that the Constitution did not envisage or provide for the steps which were intended to be taken in order to effectuate the merger as described in the information pack and which were the subject of the ordinary resolution passed by the members on 17 September 2013. It seems to me that the idea that the directors could use the specific power to admit members nominated under clause 8 for the purpose of admitting en masse the entire membership of a different club with a view to then selling the existing golf course, adopting a new Constitution (which did not require member approval for sale of the golf course), and changing the club's name, only has to be stated to be rejected. The proposal may well have been a prudent and sound one, as I am sure the directors considered that it was. The fact that the merger may well have been an excellent idea is not relevant to the question of whether the directors had power to implement it in the way in which they did. The resolution of 17 September 2013 was itself valid but, as the trial judge said, it did not authorise the directors to take any step which they did not have power to take under the Constitution. The absence of any element of self-interest in directors does not make the admission of the Peninsula members valid.

Despite this, the overall appeal was dismissed on the basis of the correctness of the trial judge's finding on the issue of delay.

This appeal decision may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSCA/2015/16.html

The case at first instance may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSC/2014/437.html

2.5.2 **MCCLEVERTY V AUSTRALIAN KARTING ASSOCIATION LTD** [2015] QSC 323 (SUPREME COURT OF QUEENSLAND, DALTON J, 20 NOVEMBER 2015)

Suspension from membership – breach of rules of disciplinary proceedings – amounting to breach of contract between members (Constitution)

The Australian Karting Association Ltd (AKAL) is a company limited by guarantee and the national body for karting associations. The applicant was the president of the Australian Karting Association (Qld) Inc. (AKAQI), an incorporated association in Queensland. AKAQI took exception to a course of conduct of the applicant and complained to AKAL about it in October 2014. AKAL then purported to suspend the applicant from both AKAL and AKAQI for a period of 10 years in two decisions: one of its tribunal (13 February 2015) and one of its board (23 March 2015). The applicant challenged these decisions.

A court will not generally interfere with the internal affairs of a corporate body, unless grounds can be found for such interference. Since AKAL is a company limited by guarantee, section 140 of the *Corporations Act 2001* (Cth) (the Act) applies to it. Section 140 of the Act provides that a corporation's constitution has effect as a

contract between the company and each member. This was sufficient basis for the court's jurisdiction, since contractual rights were in issue.

AKAL had four classes of members under rule 2 of its constitution. Individuals were classed as provisional members. Therefore, the applicant was a provisional member. AKAL had at first denied that the applicant was a member of any kind, then admitted in argument that he was a provisional member, and then attempted to adopt the position that he was merely in a consensual compact with AKAL, with no intention to create legal relations. Her Honour observed the latter argument with 'disapproval' (at [4]) and said that it was 'plainly incorrect' (at [5]).

Thus the applicant was a member of AKAL and was bound by its rules. Equally, AKAL was bound to observe its rules in response. Rule 6 provided for disciplinary proceedings, including suspension. Strict procedure was laid down, involving procedural fairness. Rule 8 allowed for the creation of a 'Member Protection Policy' (the Policy), to prevent 'harassment' of any member, or the 'creation of a hostile environment' within the sport. The Policy provided for complaints to be made to the CEO, for the CEO to appoint someone to investigate complaints, and for the investigation to include tribunal proceedings. The tribunal had to observe natural justice (defined inclusively as allowing the subject of allegations to be fully informed, to be allowed full response to allegations, and to have a fair and unbiased hearing), and proceed with expedition to a conclusion.

AKAQI complained to the CEO in October 2014 with respect to allegations of sending 'obnoxious emails in order to harass people and destabilise the then current office holders of Karting Queensland' (at [11]). The emails amounted to 140 pages. At the tribunal hearing, the CEO attended with two other members who were unknown to the applicant. The tribunal relied on only 12 emails from the 140 pages in total. The applicant was not given time to peruse these. He was permitted to make a statement in which he described his views about the poor management of AKAQI and explained that he was involved in a power struggle with other members of the Queensland executive. The hearing took one hour.

The result of this hearing was issued on 13 February 2015. The tribunal found that the applicant was bullying and harassing other members of AKAQI and of AKAL. The findings included that the conduct of the applicant was bringing the sport of karting into disrepute; that the documents written by him contained misleading or false misrepresentations, and that his conduct was responsible for various members resigning from the Queensland Karting Association (at [14]). Submissions on penalty were sought. The applicant wrote that he would accept appropriate admonishment for his emails. However, the tribunal issued a penalty of suspension for ten years with the addition of statements about the applicant lying to the tribunal.

The court held that the decision must be set aside. Although the tribunal was properly convened under the Policy, some of its conduct was improper, or perhaps, wrong. However, Her Honour did not ultimately deal with that issue (at [21]):

> I would prefer not to decide whether or not a failure to act upon proper or sufficient evidence could amount to a failure to accord natural justice. The finding is strictly unnecessary as it does appear that that decision of the tribunal must be set aside…. Nor do I venture an opinion upon whether or not the penalty suggested by the tribunal was, as submissions on behalf of Mr McCleverty had it, 'manifestly excessive'. I am not persuaded that this Court has jurisdiction to deal with errors (if it is an error) of this type made by domestic tribunals.

The basis for setting aside the suspension was purely breach of the contract between members and AKAL (i.e. the constitution). The board, in making its decision to approve the suspension, did not follow the provisions of rule 6 as to procedure. The decision was void for being in breach of the constitution of the AKAL.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2015/323.html

Implications of this case

The basis for a constitutional contract in a company is entirely statutory. In the *Corporations Act 2001* (Cth) a company's internal affairs may be governed by the Act's replaceable rules, by a constitution, or by a combination of both (section 134). Whichever of these applies, the effect is that of a statutory contract 'under which each person agrees to observe and perform the constitution and rules so far as they apply to that person' (section 140(1)). The contract takes effect between members and the company, and members and other members.

2.5.3 **RAGLESS V STOKES** [2015] SAEOT 1 (SOUTH AUSTRALIAN EQUAL OPPORTUNITY COMMISSION, COSTELLO J, 15 MARCH 2015)

Member's claim of whistleblower protection – whether disclosure of public interest information

This case concerned internal matters of the South Australian Field and Game Association, Southern Branch, a gun club. The claimant said that he had been victimised because of his disclosure of information about his treatment at the club. To be protected by section 5 the *Whistleblowers' Protection Act 1993* (SA) (WPA), the type of information disclosed has to be 'public interest information'. In this case, His Honour held that the evidence revealed not public interest information, but rather personal animosity within the club.

Section 4 of the WPA defines public interest information in very serious terms. Such information includes information that tends to show a person has been involved in:

(i) an illegal activity; or
(ii) an irregular and unauthorised use of public money; or
(iii) substantial mismanagement of public resources; or
(iv) conduct that causes a substantial risk to public health or safety, or to the environment.

Victimisation is defined in section 9 as a detriment which may include injury, damage or loss, intimidation or harassment, or threats of reprisal.

The complainant asserted that he had disclosed (and been victimised) for public interest information relating to an incident on the firearms range at the club. The incident occurred between himself and the club secretary and involved an exchange of insults. The claimant said that after he reported the incident to the club President, in accordance with the club's constitution, club officials including the respondent (the then Assistant Secretary) tried to 'cover-up' the incident and victimise him by, *inter alia*, attempting to portray him as mentally unstable.

His Honour held that on the evidence there had been no disclosure of public interest information within the meaning of the WPA, and dismissed the complaint as being without substance.

The case may be viewed at: http://www.austlii.edu.au/au/cases/sa/SAEOT/2015/1.html

2.5.4 **SANDHU V SIRI GURU NANAK SIKH GURDWARA OF ALBERTA**, 2015 ABCA 101 (COURT OF APPEAL OF ALBERTA, MARTIN, BIELBY, ROSS JJ, 11 MARCH 2015)

Oppressive conduct – unfair and biased refusal of membership – whether court could intervene in nonreligious dispute in religious society

The respondents (Sandhu and Hundle) in this case had alleged that they had suffered oppressive conduct at the hands of the Siri Guru Nanak Sikh Gurdwara of Alberta (the Society). The Society became an incorporated

congregation under the *Religious Societies' Land Act*, RSA 2000, c R-15 (RSLA) in 1990. It owns and operates a Sikh temple located in the Edmonton area of Alberta in Canada.

The Society is governed by two committees, the Religious Committee and the Executive Committee. The Religious Committee evaluates membership applications and determines membership eligibility, purportedly in accordance with the Society's bylaws. The Society's bylaws provide that the Executive Committee is appointed by the Religious Committee and, in turn, replacement members of the Religious Committee are appointed after nomination by the Executive Committee and approval by the general membership. No mechanism provides for the election to the Religious Committee of any person other than those nominated by the Executive Committee, and no mechanism exists for selecting members of the Religious Committee if the general membership refuses to approve those nominated by the Executive Committee.

The respondents brought an application to wind up the Society, a remedy for oppression, although draconian. (This remedy is also available in Australia.) The application alleged that numerous eligible Sikhs had improperly been refused membership, and that the Society had failed to hold elections in accordance with its by-laws. This was the result of an internal factional struggle between an 'insider' group in power within the temple, and others. The judge in chambers found there was oppressive conduct, and had ordered the restructuring of the Society's process for approving applications for membership and amended its governing bylaws: *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2013 ABQB 646 (CanLII). He subsequently refused to stay the results of his decision: 2014 ABQB 169 (CanLII). However, the Court of Appeal granted a stay of that decision, pending release of the present decision: 2014 ABCA 181 (CanLII). In this decision, the appeal was refused.

The following issues were raised on appeal:

1. Did the chambers judge have jurisdiction to restructure the Society's election process and otherwise amend its bylaws as a remedy to finding it had engaged in acts of oppression?

The Court of Appeal held that he did (at [46]).

2. Did the chambers judge erroneously grant an order of judicial review?

The Court of Appeal said that the chambers judge did not purport to grant judicial review nor did he do so (at [47]).

3. What is the correct test for oppression, and does it change where triggered by the actions of a religious society?

In Canada, the two-part test for oppression against the shareholder of a corporation requires that shareholder to (i) have had its reasonable expectations breached, and (ii) that breach amounted to 'oppression', 'unfair prejudice' or 'unfair disregard'. The Court of Appeal held that (at [49]):

> While the chambers judge did not expressly describe the test for granting an oppression remedy, his findings and conclusions demonstrated that he correctly understood and applied that test, in the absence of any evidence or argument suggesting that the issues in dispute arose from doctrinal or theological concerns, but was rather a dispute over the temporal aspects of the management of the Society's affairs.

There was no suggestion that this was not a 'usual' oppression situation, rather than something particularly to do with religion (at [52]–[54]):

> To be clear, the test for oppression may differ where the nature of a dispute among members of a religious society is, at its heart, religious. Membership in a society is not fundamentally a religious issue, even where the society exists for spiritual purposes, whereas here it is governed by a

> constitution and bylaws. Here the chambers judge characterized the evidence as describing the dispute as arising from Society politics, as opposed to religious practice. That finding is entitled to our deference. Put simply, not all disputes within a religious society are religious. A religious society which chooses to be incorporated thereby is required to abide by its constitution, its bylaws and procedural fairness. Simply because a society exists for religious purposes does not give it *carte blanche* to deny membership to those to whom its bylaws would extend membership. The courts can and do intervene in the workings of incorporated religious bodies in order to ensure compliance with their constitution and bylaws and fair election process where elections are required, where the heart of the dispute is not religious differences. Such intervention is not uncommon….

4. Was the evidence sufficient to meet the requirements of this test and thus to support the chambers judge's finding of oppression?

The chambers judge found that the Society rejected the 80 applications for membership in a manner that showed bias and unfairly oppressed the respondents and their supporters. He also interpreted the Society's bylaws, which were admittedly ambiguous, to suggest that elections were required to be held for members of the Executive Committee even though it was conceded that no such elections have ever been held. He concluded that Sandhu and Hundle established that they had been oppressed by the actions of the Society. The Court of Appeal could find no 'palpable and overriding error' in this decision.

5. Did the chambers judge make a palpable and overriding error in imposing the remedies he chose?

The Society argued that the chambers judge exceeded his jurisdiction by awarding a remedy that went beyond rectifying the established oppressive conduct, and beyond established principles regarding judicial intervention in the activities of voluntary religious societies. There was no case law in Alberta dealing with the scope of the oppression remedy in relation to a society incorporated under the RSLA (at [65]–[66]):

> However, the intention of the Legislature to extend oppression remedies to religious societies is the only inference supportable from the fact that it passed the *RSLA*, which expressly incorporates the winding-up and oppression provisions of the [*Business Corporations Act*, RSA 2000 c B-9]. Further, there is nothing in the *RSLA* which suggests that the Legislature intended to limit the scope of the right of a member of a religious society to seek a remedy in oppression at least where the dispute is triggered by secular concerns alone.

The Court of Appeal said that this conclusion was similar to that of the Supreme Court of the United Kingdom (UKSC) in the recent decision of *Shergill and others v Khaira and others* [2014] UKSC 33, a case which arose from another Gurdwara dispute. The Supreme Court stated (at [47] of that decision):

> The governing bodies of a religious voluntary association obtain their powers over its members by contract. They must act within the powers conferred by the association's contractual constitution.

The UKSC went on to conclude that the jurisdiction of the courts is not excluded because the cause of a disciplinary procedure is a dispute about theology or ecclesiology. The civil court does not resolve the religious dispute, but rather keeps the parties to their contract. Therefore, the Court of Appeal concluded that the restructuring remedies imposed by the chambers judge were appropriate.

6. Did the chambers judge err in making a determination on the basis of conflicting affidavit evidence?

In other words should the issue have gone to a full trial? The Court of Appeal said that the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 had determined that the fact that some conflict exists in the affidavit evidence of opposing parties in an application for summary judgment does not mandate setting the matter for trial in every situation. Where the judge finds that he or she can make a fair

and just determination on the merits of the application, it should proceed without oral evidence. This is often a proportionate, more expeditious and less expensive way to achieve a just result than a trial. Therefore, the decision of the chambers judge to proceed on affidavit evidence was reasonable and proper.

The case may be viewed at: http://www.canlii.org/en/ab/abca/doc/2015/2015abca101/2015abca101.html

Implications of this case

This case illustrates that the courts in Canada can and do intervene in the workings of incorporated religious bodies in order to ensure compliance with their constitution and bylaws and fair election process where elections are required, where the heart of the dispute is not religious differences, but rather some temporal issue. In delivering the judgement of the Court of Appeal Bielby J said (at [55]):

> In so saying I am not suggesting whether and when a court can or should get involved in finding oppressive conduct in acts arising from the execution of the fundamental mandate of a religious society, or when it should even pass comment on decisions or actions truly grounded in or taken for religious reasons. It is not necessary to do so on the facts of this appeal. The evidence did not reveal a dispute founded on religious differences; the chambers judge found otherwise. There is no suggestion that what the chambers judge found to be merely temporal was a sanitization of what was actually a religious dispute. Nor was argument made, here or below, to the effect that the test for oppression arising in a corporate situation should not apply here because the dispute was religious in nature.

2.6 NONPROFIT STRUCTURE AND GOVERNANCE

2.6.1 **BULL V AUSTRALIAN QUARTER HORSE ASSOCIATION** [2015] NSWCA 354 (COURT OF APPEAL NEW SOUTH WALES, BATHURST CJ, BEAZLEY P, SACKVILLE AJA, 19 NOVEMBER 2015)

Amendments to association's regulations – implied terms of contract between members – whether amendments made properly – whether proper notification

The relevant part of this case concerned the issue of implied terms in an association's constitution. The appellant is a breeder of quarter horses, and the respondent (AQHA) is the breed registration body for quarter horses in Australia. It is a company limited by guarantee. Registrations are recorded in AQHA's Stud Book. The issue arose as to whether a particular imported cloned horse (the horse) was capable of registration in Australia.

AQHA asserted that the appellant's application for registration did not meet the requirements of its Regulations. The Regulations were published in what was known as AQHA's Black Book. The closest publication date of the Black Book to the dispute between the parties was 1 August 2010. However, AQHA's Board of Directors (the Board) had purportedly amended these Regulations by way of resolution at board meetings in December 2010 and April 2011. The appellant applied to register the horse after its importation from the US in April 2011. This application was rejected by AQHA on 15 September 2011.

Regulation 10 in its unamended form applied to applications to be registered on the Stud Book in Australia. Regulation 10.3 applied to imported horses and Regulation 10.5 to horses not born in Australia and residing outside Australia, as follows:

> 10.3 Any imported horse registered with an international Stud Book recognised by the Association provided that such horse meets all registration requirements outlined in the Association's rules which include Genetic testings as described in Rule 15.10 and 16.
> 10.5 Any horse not born in Australia and residing outside Australia will be recognised by the Association provided that such horse meets all registration requirements outlined in the Association's rules which include Genetic testings as described in Rule 15.10 and 16. If the horse is registered with one of the international Stud Books recognised by the Association, then the rules for Imported Horses Rule 18 must be adhered to.

Under Regulation 22 before the Regulations were amended by the Board, cloned horses could be registered if they otherwise met the requirements of registration. The purported amendments replaced Regulation 22 with a provision that 'No cloned horse will be eligible for registration'. In addition, alterations were made to Regulations 10 and 18 so that imported horses had to have been registered previously on a recognised Stud Book in either the US or New Zealand before importation to Australia.

Was the horse eligible for registration under the unamended regulations? The Court of Appeal said that Regulation 10.5 could not apply to the horse, because it was not residing outside Australia at the time of the application for registration. The horse was an imported horse which could be registered if it fell within the requirements of Regulation 10.3, but it did not comply with that Regulation because it was not registered with an international Stud Book. Nor, as a cloned horse, did it otherwise meet the unamended Regulations. It was therefore correct that the horse could not be registered under the Regulations prior to amendment.

As to its possible registration under the amended Regulations, Regulation 22 in its amended form completely precluded the horse's registration. Nor would the horse have met the amended forms of Regulations 10 and 18, even if it was not completely ineligible as a cloned horse.

The question then became whether the Regulations had been amended properly by the Board of AQHA. The primary judge had held that, pursuant to the *Corporations Act 2001* (Cth) (the Act) at section 1322(4), the resolutions passed at the December 2010 and April 2011 Board meetings were not invalid resolutions due to any procedural irregularity. This was not contested on appeal. The sole issue on appeal in respect of the resolutions was the date on which those resolutions became binding on members of AQHA.

The appellant was a long-time member of AQHA. There was no question that the constitution of AQHA was a valid contract as between each member of AQHA and the company: section 140 of the Act. The appellant alleged that there was an implied term in that contract as follows:

> ... any change to the terms of the contract that exists between the AQHA and its members cannot be given full force and effect as a matter of principle until such time as the members are aware of the terms of the change....

In oral argument, counsel for the appellant re-formulated the implied term as requiring that an alteration to the Regulations must be '*unequivocally expressed*' to be an amendment to the terms of the contract, and that notification must be to the '*membership at large*'. However, the updated version of the Regulations was notified on the AQHA website. In particular the website had the following notice posted on its notices section after the April 2011 alteration:

> FROM THE APRIL 2011 MEETING OF THE BOARD
> CLONING
> The AQHA will not register Clones.

It was clear from the company's constitution that the Board had full power to alter the Regulations: clause 14 (particularly at clause 14.5). However, there was no time or date specified as to when a resolution became operative, nor was there any requirement in the Constitution for the giving of notice to the members of the passing of a resolution by the directors, either at all or as a condition of the resolution becoming binding. Indeed the Regulations themselves provided, in Regulation 3, for their amendment in the following terms:

> Alterations of these Regulations by addition, deletion or amendment may be affected [sic] by resolution of the Board in accordance with the Constitution.

Where the relationship between the parties occurs in a formal context, it is accepted that for a term to be implied into a contract, five conditions must be satisfied. The term to be implied must:

(1) be reasonable and equitable;
(2) be necessary to give business efficacy to the contract;
(3) be so obvious that '*it goes without saying*';
(4) be capable of clear expression; and
(5) not contradict any express term of the contract.

Beazley P (with whom the other judges agreed) said on this point (at [52]):

> A contract between a large association such as AQHA, which amongst other things is directed to the maintenance and preservation of the pedigree of quarter horses in Australia and therefore to the protection of the commercial interests and investment of its members in their quarter horses, is properly to be regarded as a formal contract to which these principles apply. This is to be contrasted with an informal contract, where the test for implied terms is less rigorous.

The resolutions effecting the alteration to the Regulations had been made properly. There was no implied term as contended for by the appellant, for the main reason that such a term would contradict the express terms of the contract. Her Honour was clear that an amended resolution, subject to any contrary indication in

the Constitution, is effective when the resolution is passed at a Board meeting (at [56]). It is the resolution that effects the amendment. AQHA's communication mechanisms, such as posting on AQHA's website, may have lagged behind the passing of resolutions that affected its members, but that did not affect their efficacy.

The appeal was dismissed with costs.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCA/2015/354.html

Implications of this case

It is interesting that the appellant contended that he was not affected by the amendments to the Regulations because they were not communicated to him. However, the amended Regulations were published on the association's website, albeit with a lag. There was also a more contemporaneous notice on the noticeboard of the website (published in the same month as the amendment was made) relating to the issue of cloned horses no longer being able to be registered. This was sufficient communication to members of the association. The alterations had been effected when made, not when put up on the website.

2.6.2 **IN RE LEMINGTON HOME FOR THE AGED** (UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT, PENNSYLVANIA, SMITH, VANASKIE, SCHWARTZ JJ, 26 JANUARY 2015)

Breach of fiduciary duty by officers and directors – gross mismanagement of aged care home – whether punitive damages should be awarded

This appeal decision from the US concerned mismanagement of a nonprofit aged care home (the home) for African-American elderly in Pennsylvania. Two former officers (the CEO and the CFO) and fourteen former directors had been found liable for breach of fiduciary duty and the ultimate insolvency of the home. Compensatory damages of $2.25 million were awarded. The two officers and five of the directors had also had punitive (extra) damages awarded against them in the lower court. The decision below was upheld on appeal, except for the punitive damages awarded against the five former directors.

The home had been established in 1883, but for many decades had suffered from both financial difficulties and, more recently, difficulties with meeting its obligations as a nursing home. Two patients had died in suspicious circumstances, and the home's billing, patient records, and other records were in a state of disarray. The home entered Chapter 11 bankruptcy in April 2005. In November 2005 the Bankruptcy Court recommended proceedings for breach of fiduciary duty against the defendants (who were the appellants in this proceeding).

The defendants argued that there was a lack of evidence of any breach of fiduciary duty. The Court of Appeal disagreed, saying that there was sufficient evidence to support a rational finding that there had been a breach of fiduciary duty because of failing to exercise reasonable diligence and prudence in the defendants' oversight and management of the home.

As to the officers, Pennsylvania law at 15 Pa. Cons. Stat. Ann. §5712(c) provides that:

> An officer shall perform his duties as an officer in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including with reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.

In addition, the duty of loyalty under Pennsylvania common law requires that an officer devote himself to corporate affairs with a view to the common interest and not his own: *Tyler v O'Neill*, 994 F. Supp. 603, 612

(E.D. Pa. 1998).

The CEO began her role in 1997. Throughout her tenure as CEO, the home was never in compliance with relevant federal and state regulations governing nursing homes. Apart from the lack of proper clinical records for patients, the CEO worked only part-time while continuing to collect her full-time salary. The CFO never maintained proper financial records, actively avoided attempts to review his records (including by locking himself in his office), and so conducted the affairs of the home that it did not collect at least $500,000 it was due from the US version of Medicare. In both cases, the Court of Appeal was satisfied that these matters represented more than sufficient evidence of breach of fiduciary duty.

As to the directors, the Court of Appeal found that there was also sufficient evidence of failure of duty of care, specifically the board's duty to remove the CEO and the CFO from their positions. The duty of a director of a nonprofit corporation was clear from 15 Pa. Cons. Stat. Ann. §5712 (a) and (b). Equally, the directors' breach of duty in this case was clear.

The issue of also causing the insolvency of the home to worsen was a tort under Pennsylvania law – the tort of deepening an insolvency. The Court of Appeal was satisfied that there had also been sufficient evidence put before the jury at trial that this tort had been committed by the defendants. There had been delay in seeking Chapter 11 bankruptcy, and the officers and directors had not been compliant in the bankruptcy process.

However, the Court of Appeal agreed with the director defendants against whom punitive damages had been awarded that there had not been sufficient evidence presented to support an order of punitive damages against them, even though 'a wealth of evidence' was not a prerequisite of such a finding under Pennsylvania law (at page 19). There was nevertheless a lack of 'evil intent' and this lack of 'state-of-mind' evidence was decisive (at page 26). The finding of punitive damages against the CEO and CFO was allowed to stand because of their mismanagement, their breach of their duty of loyalty, their evident self-dealing, their malfeasance, their obfuscation, and their generally outrageous conduct in relation to their duty as officers of a nonprofit corporation (at page 28).

The case may be viewed at: http://law.justia.com/cases/federal/appellate-courts/ca3/13-2707/13-2707-2015-01-26.html

Implications of this case

The court's decision in this US case demonstrates the need for proper corporate governance for financially troubled nonprofit organisations. The decision demonstrates that governing boards of nonprofit corporations who have actual knowledge of mismanagement by the officers of the corporation and choose to ignore it, or not to take appropriate action, can be held financially liable for breach of their fiduciary duty of care (though not punitively). The decision carried special weight in the US because it reversed the long-held assumption that nonprofit directors are insulated from financial exposure, unless there is personal involvement in corruption, venality or fraud. Therefore, it showed that there are consequences for inattention or inaction by nonprofit directors in carrying out their responsibilities as directors.

2.6.3 **PUBLIC PROSECUTOR V LAM LENG HUNG AND ORS** [2015] SGDC 326 **(CONVICTION)** (STATE COURTS OF THE REPUBLIC OF SINGAPORE, PRESIDING JUDGE SEE KEE OON, 21 OCTOBER 2015)
PUBLIC PROSECUTOR V LAM LENG HUNG AND ORS [2015] SGDC 327 **(SENTENCING)** (STATE COURTS OF THE REPUBLIC OF SINGAPORE, PRESIDING JUDGE SEE KEE OON, 23 NOVEMBER 2015)

Misappropriation of funds by senior officers of charity – criminal breach of trust

This case concerned the affairs of the City Harvest Church (CHC) in Singapore. CHC was founded in 1997 and had grown to be one of Singapore's Christian mega-churches. One of its evangelistic operations was to use popular music and culture to reach out to young people. It had formed the 'Crossover Project' in 2002 to further this mission, particularly by using the singing services of the founder's wife. This project was approved by the Board as an appropriate use of church funds. In 2004, a decision was taken to launch the singing career of the founder's wife into the US, though this ultimately failed to eventuate.

The singing career had apparently been funded through various corporate vehicles which were subsidiaries of CHC. In addition, there was a building fund which was allegedly to support the building of new churches. CHC members contributed to this fund. A new round of building fund financing was launched in August 2005 (for $160 million over 7 years), which was extended to $310 million in 2010 (note: Singaporean and Australian dollars have almost par value). However, in 2010 the Commercial Affairs Department of Singapore conducted raids of CHC and its subsidiaries, and a fraud was discovered which spanned at least 2007 to 2009, although questions had been raised as early as 2003.

Six persons in charge of the CHC's affairs were convicted of criminal breach of trust on 21 October 2015, and sentenced on 23 November 2015 as follows: CHC leader Kong Hee (8 years), fund manager Chew Eng Han (6 years), deputy senior pastor Tan Ye Peng (5.5 years), finance manager Serina Wee (5 years), finance committee member John Lam (3 years), and finance manager Sharon Tan (21 months).

The criminal breach of trust (under section 405 of the Singapore Penal Code) involved the misappropriation of some $50 million dollars of CHC funds. At least $24 million of this amount was misdirected to support the pop singing career of Hong Kee's wife, Ho Yeow Sun. The remaining $26 million was used to attempt to cover up this misappropriation. All the accused were convicted on multiple charges of criminal breach of trust. In addition, Peng, Wee, Han and Tan were each convicted of four charges of falsification of accounts with intent to defraud auditors.

The trial was a cause celebre in Singapore, lasting 140 days, with evidence emerging of the extravagant lifestyle of CHC leader Kong Hee and his wife. The judge found that the fraud was conducted with intent, and that the accused had conspired to cause wrongful loss to CHC. The fraud involved a complex series of transactions beginning with the purchase of bonds in two companies, Xtron and Firna, which were vehicles to cover up the misdirection of funds to the singing career of Ho. However, Ho's album sales were so poor that not enough money was generated to redeem the bonds on time. This led to further misappropriation of funds to redeem the bonds and to cover up the cash flow problems which had arisen.

Presiding Judge See noted that CHC had undertaken some charitable work over the previous eight years and that this was not to be disparaged, but it was not the entire story (at [31] of the sentencing judgement):

> I have no desire to disparage or detract from the good work that CHC had done for the wider community, whether local or international, but it is necessary to set things in proper perspective. $15 million was set aside by CHC over eight years for charitable causes. As against this, much larger sums by far were wrongfully used for the sham investments and round-tripping in just under three years.

Given the size of the fraud, and the dishonesty of those involved, the sentences imposed were, in the judge's view, appropriate. It is interesting to note that the judge was not overly swayed by the prosecutor's submission that the misappropriation dealt with charity money given by church members so was more egregious (at [32] of the sentencing judgement):

> The main aggravating factors that stand out in this case are first, the large amounts of CHC donors' money misappropriated, at least in relation to the sham bond investment charges, and second, the fact that these were charity monies entrusted to one or more of the accused persons. All of them were in positions of trust and confidence within CHC. As to the second factor, though, care should be taken not to overstate it: as between an offender who is entrusted with charity monies and, say, an offender who is entrusted with the hard-earned income of impoverished foreign workers…I would be slow to conclude that, all things being equal, the former should be dealt with more severely than the latter just because the former was dealing with charity funds.

Other factors to be taken into account were that the convicted parties had not gained personally from the fraud, and that all monies had been returned to CHC.

The case may be viewed from: https://www.statecourts.gov.sg/Pages/default.aspx under 'resources', then 'judgements published by lawnet'.

Implications of this case

All sentences have been appealed as manifestly inadequate by the Attorney-General of Singapore. The Public Prosecutor requested sentences of 11 to 12 years for Hee, Han, Wee and Peng, 8 to 9 years for Lam, and 5 to 6 years for Tan. It should be noted that church members also largely funded the costs of the defence (calculated to be up to $10 million), and bail for each of the accused which ranged from $750,000 to $1 million each. The Commissioner of Charities in Singapore had previously warned CHC parties not to raise the defence funds through the church. However, church members had continued to fund the defence on a personal basis. The Commissioner of Charities had commenced removal proceedings against the convicted individuals before their sentencing, and this will resume now that sentencing has taken place.

2.6.4 RE RYDE EX-SERVICES MEMORIAL & COMMUNITY CLUB LIMITED (ADMINISTRATOR APPOINTED) [2015] NSWSC 226 (SUPREME COURT OF NEW SOUTH WALES, LINDSAY J, 17 MARCH 2015)

Resolution to sell company property – whether invalid for procedural irregularity

This case concerned the validity of a resolution passed at a general meeting of the Ryde Ex-Services Memorial & Community Club Ltd (the Club), a company limited by guarantee. The resolution was about selling land owned by the Club. The contention of invalidity rested on the procedure used in obtaining the vote from members. The vote was conducted on 23 November 2014 by a secret ballot that was allowed to continue at the start of, and during, the meeting, both before and after the motion was debated, and without any show of hands or demand for a poll. Members present did not formally oppose the procedure, though there were audible complaints from the floor of the meeting.

The Club, conscious of continuing opposition to the Board's proposal to sell off Club property, and of continuing complaints that the contested resolution of 23 November 2014 was invalid because of the voting procedure adopted, commenced these proceedings seeking relief from the court under section 1322(4) of the *Corporations Act 2001* (Cth) (the Act). Section 1322 states (in part):

Irregularities

(1) In this section, unless the contrary intention appears:

(a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and

(b) a reference to a procedural irregularity includes a reference to:

(i) the absence of a quorum at a meeting …; and

(ii) a defect, irregularity or deficiency of notice or time.

(2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

Relief is granted under section 1322(4) allowing the court to make (inter alia) an order validating a resolution. The Club claimed the following relief from the court:

(1) an order declaring that the resolution passed at the general meeting of the Club held on 23 November 2014 was valid.

(2) alternatively, an order declaring that, pursuant to section 1322(4) of the Act, the resolution was **not invalid**, notwithstanding:

(a) that the chairman of the meeting informed members shortly after the commencement of the meeting that, if they did not wish to stay for the duration of the meeting, members could vote on the resolution by marking their ballot papers and placing them in the ballot box;

(b) that members entered the meeting after it had formally commenced;

(c) that many members voted on the resolution by marking their ballot papers and placing them in the ballot box during the course of the meeting, thereafter leaving the meeting before questions and debate on the resolution had been completed; and

(d) that some members were informed prior to the meeting that they could attend and vote at the meeting without having to be present throughout the meeting.

The Club was under voluntary administration. His Honour had previously declared that the Club had properly appointed an administrator under section 436A of the Act, following controversy about the validity of the Board's resolution to that effect. At this point in the controversy, the Club, as a company limited by guarantee and a registered club, was governed by the C*orporations Act 2001* (Cth), the *Registered Clubs Act* 1976 (NSW), and its own Constitution. Although an association of persons, His Honour said (at [84]):

Allowance must be made for the context in which a particular association operates, including the nature of the association and the purpose, or purposes, for which it was formed. What may be essential to the effective operation of a commercial association (in which each member holds a share in a property-holding, profit-driven entity) may not work for a social, political or religious association in which members hold no proprietary right: e.g., *Cameron v Hogan* [1934] HCA 24; (1934) 51 CLR 358 at 370-371.

However, this was a corporation governed by the Act, and the Act contains numerous provisions governing meeting procedure in Part 2G.2, such as:

(a) the giving of formal notice of a meeting of members to members: e.g., sections 249H, 249J, 249L, 249LA and 249M.

(b) the rights of members to put resolutions to a general meeting of members: sections 249N–249P.

(c) the holding of a meeting of members: sections 249Q–249W.

(d) the manner of voting at meetings of members: sections 250E–250M.

The requirement in section 250J of the Act that '[a] resolution put to the vote at a meeting of a company's members must be decided on a show of hands unless a poll is demanded' is a 'replaceable rule' within the meaning of section 135(1) of the Act. It is therefore able to be 'displaced or modified' by a company's constitution: section 135(2). The Club's Constitution did replace this requirement, but its own rules (Article 4 of its Articles of Association) led to substantially the same legal requirement.

His Honour said that the Chairman's procedure in relation to the vote in question was 'easily characterised as irregular' (at [95]). There was no show of hands, or demand for a poll, nor was there debate of any kind before the vote was announced. Therefore, the resolution was invalid, and could not be saved by the operation of section 1322(2) of the Act. This was not just a procedural irregularity (at [117]):

> An unauthorised, unilateral decision taken by the chairman of a meeting of members of a company (governed by rules) to invite, and to treat as formal, votes cast in an unorthodox manner and outside the sequence of events advertised before the meeting as a parameter of debate leading to an orderly decision, on a question of vital importance, to bind all members entitled to vote (and, indeed, others involved in the company), is capable of operating (and, in this case, must be taken to have operated) as a denial of a right to have a vote taken at the appointed time and according to known rules. With apologies to Shakespeare (*Romeo and Juliet*, Act 2 Scene 2), *a rose by any other name may smell as sweet*, but not so a 'vote' irregularly taken. A method of voting to which members are entitled cannot readily be displaced by another method of voting imposed on them in denial of that entitlement.

Therefore, there was no validating order available to the Club under section 1322(4). His Honour also stated that even if he had held that the disputed resolution could be saved under section 1322(2), he would have found that the chairman's irregular voting procedure 'has caused or may cause substantial injustice that cannot be remedied by any order of the Court' and, accordingly, declared that the resolution was invalid on that account (at [125]).

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/226.html

Implications of this case

Argument in this case revealed that no provision of the *Corporations Act 2001* (Cth) or the Constitution of the Club dealt explicitly with the issue in question: whether a poll may commence to be taken during discussion or debate on a motion proposed for consideration. There was also a dearth of authority (previously decided cases) on the issue. His Honour remarked that in this context (at [61]):

> The apparent absence of any case directly in point reflects the infinite variety of factual settings in which questions about meeting procedure may arise; the fact-sensitive character of particular cases; the importance of identification of principles governing a determination of the proceedings; and the purposive character of the law.

The case turned on its own facts, but nevertheless provides a precedent for the future.

2.6.5 **RE VANCOUVER OPERA FOUNDATION,** 2015 BCSC 390 (SUPREME COURT OF BRITISH COLUMBIA, GRIFFIN J, 15 MARCH 2015)

Alteration of Foundation's constitution – unalterable provisions – whether Court's inherent jurisdiction over charities extended to permit alteration

This case concerned a petition for alteration of certain clauses of the constitution of the Vancouver Opera Foundation (the Foundation) which were expressed to be unalterable. There was no statutory provision

covering this issue in British Columbia, although some had been proposed. This meant changes could only be achieved by the court exercising its inherent jurisdiction.

The respondent in this case was the Attorney-General of British Columbia, exercising the Crown's *parens patriae* jurisdiction with respect to charities. The respondent submitted that the court's inherent jurisdiction in this type of case was much narrower than submitted by the petitioner, and that the evidence did not support the Court's exercise of its discretion with respect to the amendments sought. The Court held this was correct.

The Foundation had been a registered corporation and a registered charity since 1987. Its purposes, in part, are to advance and enhance the performance and understanding of opera and to hold endowments for the funding and support of the activities of the Vancouver Opera Association (VOA). The Foundation's constitution established three funds at clauses 4 to 6, the terms of which were unalterable:

> (a) the VOA Real Property Fund;
> (b) the VOA Endowment Fund; and
> (c) the VOA Capital Fund.

The petitioner proposed to amalgamate the VOA Real Property Fund and the VOA Capital Fund into a general fund. The proposed change would allow the Foundation to use the capital of the General Fund for general purposes, or to meet income tax obligations. This was proposed to be at the discretion of the Board, so long as it was in accord with the purposes of the Foundation. Also proposed was an alteration to the VOA Endowment Fund which would allow the Foundation to use the capital of that fund to meet income tax obligations, where approved by a two-thirds majority of the Board. All the proposed changes were to be alterable.

The Foundation submitted that the reason for the proposed amendments was that the Foundation had determined that the provisions of the constitution were incompatible with current standards in nonprofit governance and financial administration. It was of the view that these provisions unduly restricted the ability of the Foundation to manage its assets efficiently and appropriately in support of its charitable purposes. In particular, this inflexibility was restricting the Foundation from the best use of its grants and donations.

The relevant legislation in British Columbia (BC) was the *Society Act*, R.S.B.C. 1996, c. 433 (the Act), which provides the overall governance framework for societies in BC. Under section 22 of the Act, except for a society's name and purpose, a society's constitution must state whether a provision is alterable or unalterable. Section 22 provides that alterable provisions are alterable by special resolution of the Board, but is silent as to unalterable provisions. The inference is that unalterable provisions are incapable of alteration by any means.

There was a history of allowing unalterable provisions in constitutions of companies in BC. However, the BC legislature had previously amended section 264(3) of the *Business Corporations Act*, S.B.C. 2002, c. 57 to allow for unalterable provisions to be altered by order of the court or by unanimous resolution. A White Paper released by the provincial government in 2014 asked for comment on draft legislation that would allow societies to amend previously unalterable provisions by way of special resolution. However, there had been no legislative change at the date of hearing this case.

Under section 85 of the Act the court has the **statutory jurisdiction** to remedy **irregularities** in the conduct of a society's affairs. However, Her Honour held that there was nothing in this case which alleged an omission, defect, error or irregularity in the conduct of the affairs of the Foundation so that section 85 could not apply. The petitioner conceded that this was so but argued that the Court also had an inherent jurisdiction to fill 'gaps' in the applicable legislation. Her Honour said that this was not so (at [48]–[49], [51]):

> I agree with the respondent that there is no legislative gap here: the legislature has made a choice in the *Society Act* to only allow for amendment of a society's constitutional provisions stated to be alterable; and to only allow for corrections of such defects as are described in s. 85. If the legislature

> wished to allow for amendment of a society's provisions stated to be unalterable, it would amend the statute to allow for this. So far the legislature has not decided to amend the law. It is not for the Court to make this policy choice. Where there is legislation in place and there is no gap in regards to the pertinent issue, the BC Court of Appeal has found that the court should refrain from using its inherent jurisdiction to 'revise public policy'…. With the above principle in mind it is important to remember that inherent jurisdiction is subject to parliamentary supremacy….

With respect to the court's **inherent jurisdiction** over charities, charitable trusts, unlike private trusts, enjoy relaxed requirements for certainty of objects. A settlor is only required to describe the trust object as that of a charitable purpose or of a type of charitable activity. In light of this relaxed requirement of certainty, the courts have always regarded themselves as having an inherent jurisdiction to supply a specific purpose, where that need exists, so that the trust can be implemented. This is known as *cy près* jurisdiction.

Was this a case where such inherent jurisdiction applied? Her Honour said that it was not (at [73]) because there was no question of the Foundation needing assistance of this kind. Could the inherent jurisdiction be widened beyond the traditional *cy-près* type? Again Her Honour held that it could not. Indeed, Her Honour held that the unalterable provisions in question should not be altered because there were other ways around the structural financial issues the Foundation was dealing with, and the Foundation should avail itself of these measures. The fundamental question of dealing with unalterable provisions in a society's constitution was a question for the legislature. The provisions relating to unalterable clauses in the Foundation's constitution would have to await amendment of the relevant Act. The petition was dismissed.

The case may be viewed at: http://www.courts.gov.bc.ca/jdb-txt/SC/15/03/2015BCSC0390.htm

Implication of this case

It is well-established in Canada that the court has inherent jurisdiction with respect to charitable trusts: *Toronto Aged Men's and Women's Homes v Loyal True Blue and Orange Home* (2003), 68 O.R. (3d) 777 at [3]. However, this was not a case for such an exercise of inherent jurisdiction, but rather a case for legislative amendment. Her Honour held that the exercise of inherent jurisdiction over charities was limited to *cy-près* situations. In this case, the Board of the Foundation was seeking the exercise of inherent jurisdiction for its own convenience (at [75]), and this was not an appropriate exercise of the court's power.

2.7 TAXATION

2.7.1 **ASSOCIATION OF MINING AND EXPLORATION COMPANIES INC AND COMMISSIONER OF STATE REVENUE** [2015] WASAT 74 (STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA, SHARP J, 2 JULY 2015)

Payroll tax – setting date of exemption from liability

This case followed on from the decision of the State Administrative Tribunal of Western Australia (the Tribunal) in *Chamber of Commerce and Industry of Western Australia and Commissioner of State Revenue* [2012] WASAT 146 (the CCI decision). On 18 July 2012, the Tribunal held that the Chamber of Commerce and Industry of Western Australia was a charitable body and therefore entitled to an exemption from payroll tax. The exemption was granted to cover the previous five years, and this involved a refund of payroll tax (see at [106] of the CCI decision). Towards the end of 2012, the Association of Mining and Exploration Companies Inc (AMEC) applied for recognition as a charitable body and for payroll tax exemption.

AMEC was granted both recognition as a 'charitable body or institution' and exemption from payroll tax, in line with the CCI decision. At issue was the start date for the exemption from payroll tax under the *Payroll Tax Assessment Act 2012* (WA) (the PT Act), and under the Commissioner's Practice PT 3.0, 'Payroll Tax – Commencement date of an exemption from liability granted to a charitable body or organisation'. The Commissioner allowed the exemption from 1 July 2012. AMEC claimed exemption over a period of five years prior to the granting of the exemption in line with the CCI decision.

The issue arose because the PT Act provides that the Commissioner may specify any day, past present or future, as the date from which the exemption is to apply, but Commissioner's Practice PT 3.0 stated that 'generally' the Commissioner will only apply the exemption from the first day of the financial year in which the application is made. PT 3.0 was issued on 11 December 2012, and applies to exemptions granted after that date. AMEC applied for exemption on 20 December 2012.

The Tribunal held that the PT Act evidenced a very wide discretion as to starting date for payroll tax exemption. Granting the exemption only from the start of the financial year of the application did not fully reflect this wide discretion. However, the Tribunal held that (at [84]):

> …until AMEC made its application under s 41(1) of the PT Act and the exemption was granted, it was properly liable for payroll tax: *Chamber of Commerce and Industry of Western Australia (Inc) and Commissioner of State Revenue* [2013] WASAT 107 at [57]. Unlike, for example, a public benevolent institution which is exempt from liability to pay-roll tax by virtue of s 40 of the PT Act, a charitable body or organisation needs to be expressly exempted from liability under s 41. Until the exemption is granted, the body concerned is not exempt. Accordingly, I consider that the charitable status of AMEC prior to its making of an application for exemption is irrelevant to this issue. Most, if not all, entities [which] are given that exemption would be able to make that argument. If the intention of the Parliament was to apply the exemption from the date the entity could show that it was charitable, the PT Act would have so provided.

Therefore, the start date for exemption was properly 1 July 2012. The Tribunal went on to consider if there were any circumstances which would alter this finding. No such circumstances were in evidence. AMEC had based its case entirely on the precedent set by the CCI decision in July 2012. Justice Sharp was unmoved by this proposition (at [79]–[81]):

> AMEC says that I should determine its application by following the Tribunal's *CCI 2012 decision* and deciding that the commencement date for the exemption should be 1 July 2007 [five years prior]. In the *CCI 2012 decision*, Justice Chaney, the then President of the Tribunal, after finding that the

applicant in that case is a charitable body for the purpose of the PT Act, referred the matter back to the Commissioner to give notice to the applicant pursuant to s 41(2) of the PT Act. His Honour then went on to say, at [106], that '... there is no reason to deprive [CCI] of the entitlement to an exemption for the whole period in respect of which the exemption is sought', namely five years. I am sure that his Honour had his reasons for coming to this conclusion, but, with respect, I am unable to discern from the *CCI 2012 decision* what those reasons were. I therefore do not consider that the *CCI 2012 decision* is authority for the proposition that any exemption granted under s 41(2) of the PT Act should be made retrospective for five years.

The date of application of the exemption for AMEC was 1 July 2012.

This case may be viewed at: http://www.austlii.edu.au/au/cases/wa/WASAT/2015/74.html

The CCI decision (July 2012) may be viewed at:
http://www.austlii.edu.au/au/cases/wa/WASAT/2012/146.html

The ancillary CCI decision (2013) may be viewed at:
http://www.austlii.edu.au/au/cases/wa/WASAT/2013/107.html

Implications of this case

This case illustrated that although the PT Act in Western Australia gave a wide discretion as to the start of an exemption for a charitable body or institution, its validly made practice direction could be applied in appropriate circumstances, despite its difference from the PT Act. In addition, the decision illustrates that one Tribunal decision is not binding on another.

2.7.2 COMMISSIONER OF TAXATION V ARNOLD (NO. 2) [2015] FCA 34 (FEDERAL COURT OF AUSTRALIA, EDMONDS J, 4 FEBRUARY 2015)

Tax avoidance scheme – sham donation arrangement

This case involved a tax exploitation scheme. In 2009 and 2010, the respondent Arnold brought to Australia a scheme (referred to in court as the DWB scheme after one of the participants, Donors Without Borders) involving the purchase and donation of AIDS pharmaceuticals to charities with foreign operations in Africa. Arnold had previously been involved in a similar scheme in Canada. Taxpayer participants in the DWB scheme incurred a liability to pay for pharmaceuticals for use in foreign markets, but liability for payment of 92.5% of the purchase price was deferred for 50 years at very low interest. That is, participants paid 7.5%, but claimed immediate tax deductions for 100% of the purchase price.

The Commissioner of Taxation (the Commissioner) was successful in this case in seeking declaratory relief and civil penalties against the respondents pursuant to section 290-50(3) of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (TAA). The respondents were found to have attempted to exploit and profit from the tax system by generating deductions, associated with a donation arrangement, to which the donors were not entitled.

The relevant statutory provisions are contained in Division 290 of Schedule 1 to the TAA. The purpose of those provisions is to, inter alia, deter the promotion of tax avoidance schemes and tax evasion schemes. Section 290-50 prohibits an entity from being a promoter of such a scheme, section 290-60 defines a promoter, and section 290-65 defines a tax exploitation scheme.

The scheme operated with the following steps, which were similar to the steps in the Canadian scheme:

1. The pharmaceuticals were manufactured by a generic manufacturer, Hetero, in India. They were transported to the UK and held in a bonded warehouse there.
2. Solstar Ltd (Solstar), a company incorporated in Belize, acquired title to the pharmaceuticals. It sold them to a company called MedAid Pty Ltd (MedAid) under an 'umbrella' agreement, pursuant to which the price was $1,000 per unit, payable as to 5% on delivery with the balance deferred for 50 years at negligible interest.
3. MedAid sold the pharmaceuticals to the scheme participant at $2,000 per unit, payable as to 7.5% on signing the agreement with the balance deferred for 50 years at negligible interest (payable in advance).
4. Title to the pharmaceuticals was allegedly transferred while the pharmaceuticals remained in bond in the UK, from Solstar to MedAid, from MedAid to the participant, from the participant to a charity which operated in Africa.
5. The pharmaceuticals were subsequently shipped from the bonded warehouse in the UK to Africa.
6. The charity would issue the participant with a receipt in respect of the gifted pharmaceuticals.
7. The participant would claim a deduction for the donated pharmaceuticals of $2,000 per unit, as shown on an invoice generated by MedAid for the sale from it to the participant.

The Commissioner sought declarations that:

1. The first respondent (Arnold) engaged in conduct that resulted in himself, the second respondent (Leaf Capital) and the third respondent (Donors Without Borders) being promoters of a tax exploitation scheme in contravention of section 290-50(1) of Schedule 1 to the TAA;
2. Leaf Capital engaged in conduct that resulted in it being a promoter of a tax exploitation scheme in contravention of section 290-50(1) of Schedule 1 to the TAA; and
3. Donors Without Borders engaged in conduct that resulted in it being a promoter of a tax exploitation scheme in contravention of section 290-50(1) of Schedule 1 to the TAA.

The facts of the case were not in dispute. Arnold agreed that he had actively promoted the scheme. Leaf Capital was recognised as the principal corporate entity responsible for marketing and encouraging interest in the DWB Scheme. Donors Without Borders, a nonprofit entity, was also recognised as being part of the promotion and encouragement of the scheme. The result of Arnold's promotion was that 96 taxpayers participated in the DWB Scheme for 2010 year, entering into Purchase Agreements with MedAid for pharmaceuticals to a total invoice amount of $6,036,000, with total deductions claimed by these scheme participants in that aggregate amount. The participants paid a total cash amount of $741,802 up to 30 June 2010. Arnold and his wife received salary payments in excess of $180,000. Leaf Capital received $594,880 and Donors Without Borders received donations of $2,680.

His Honour concluded that the DWB scheme was a tax exploitation scheme with the meaning of the TAA. There were at least five grounds that could be relied on for the view that it was not reasonably arguable that the scheme benefit as identified was available at law. It was also held that Arnold, Leaf Capital Pty Ltd, and Donors Without Borders were all promoters of the scheme, and had all breached section 290-50 of the TAA. A civil penalty of $1.5 million was imposed by the court in favour of the Australian Taxation Office (ATO).

The case may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCA/2015/34.html

Implications of this case

This 'philanthropic' scheme was modelled on one which had previously been the subject of successful anti-avoidance litigation in Canada. There was negligible philanthropy involved, as participants paid only 7.5% of the purchase price of the pharmaceuticals involved, yet claimed 100% of the purchase price as a tax deduction. The ATO stated in its Non-profit News Service No 0417 that:

The decision helps protect the integrity of the not for profit sector and the community by penalising those who choose to promote tax schemes that exploit tax concessions designed to promote philanthropy.

2.7.3 **FRENCH V THE QUEEN,** 2015 TCC 35 (CANLII) (TAX COURT OF CANADA, C MILLER J, 11 FEBRUARY 2015)

Legal argument of bijuralism – whether civil law of Quebec affected common law of Canada – entitlement to tax credits for purported charitable donations

This Canadian case involved the appeals of 44 appellants (of which French was representative) in relation to a particular pleading which they were advancing in their appeals. The appeals all related to the same issue, being the appellants' entitlement to tax credits in connection with purported donations to Ideas Canada Foundation, a registered charity. Entitlement to a similar donation made to Ideas Canada Foundation was previously denied by the Tax Court of Canada, and affirmed by the Federal Court of Appeal (Kossow v R, 2013 FCA 283 (CanLII)). However, the appellants in this case added novel arguments in their appeals which were not made in Kossow, and they wished to be given an opportunity to make them. The respondent was particularly concerned with one of these arguments and sought to have the argument struck out on the basis that it was plain and obvious it had no chance of success: rule 53(1)(d) of Tax Court of Canada Rules (General Procedure) (the Rules).

The argument sought to be struck out dealt with references to the Civil Code of Québec (CCQ) and the Interpretation Act (the Act), sections 8.1 and 8.2. The paragraphs of argument (paras 23–26 of the pleadings) in issue were:

- In the alternative, the Appellant should be entitled to a deduction for that portion of each of the Donations that exceeded the value of any benefit or remuneration obtained from each of the Donation (excluding the value of any tax advantage).
- Under the civil law, Article 1810 of the CCQ expressly provides that 'a remunerative gift … constitutes a gift … for the value in excess of that of the remuneration'. Consequently, to the extent that the Loans or some aspect thereof may have constituted remuneration to the Appellant, the Donations less the remuneration constituted a 'gift' in Québec through operation of sections 8.1 and 8.2 of the Interpretation Act.
- Had the Appellant been resident of Québec during the Taxation Years, he would unquestionably be entitled under section 118.1 of the Act to a deduction of the portion of the Donations in excess of the remuneration.
- Parliament did not intend for section 118.1 of the Act to produce radically different results for taxpayers in Québec that would not apply to taxpayers in the rest of Canada.

None of the taxpayers involved had made his/her donations in Quebec. Therefore, this was what is referred to in Canada as a 'bijural' argument – that the civil law applicable in Quebec can be compared to and influence the common law applicable in the rest of Canada. His Honour comprehensively rejected this argument.

Sections 8.1 and 8.2 of the Interpretation Act provide that:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

> 8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

Based on these provisions, the Crown's position was that for the purposes of section 118.1 of the Income Tax Act, 'gift' as defined in Québec was to apply in Québec, and 'gift' as defined in common law jurisdictions was to apply in those jurisdictions. Thus, though the definition of gift is codified in Quebec in line with civil law practice, the Québec codified definition of gift could not apply in the rest of Canada and vice versa. His Honour said that this position was 'unassailable' (at [10]).

However, he turned his attention to the appellant's argument for completeness. The appellant first contended that his was a novel argument that the Tax Court of Canada could look to Québec law to assist in defining 'gift' in common law jurisdictions, if it is not clearly defined. The appellant suggested that this was particularly so where the area law is in the state of evolution, such as is the case with the implications of bijuralism generally. On this point His Honour said (at [13]):

> The Appellants' position may be novel, but I find reliance on Québec laws to interpret common law, when the common law is clear, is not arguable.

Complementarity, as envisaged by the Act, did not mean uniformity (at [14]):

> I have read nothing that the Appellants have provided to me that suggested, notwithstanding perhaps taxpayers' expectations, that a principle of bijuralism is uniformity. That is not its objective, and there has been nothing presented to me to suggest the evolution of bijuralism is headed in that direction. The Appellants' contention that Parliament did not intend section 118.1 of the Act to produce radically different results simply has no foundation in the law, notwithstanding it may be supportable by common sense. It is not an argument.

Common law could not be ignored in favour of civil law in Canada, or vice versa (at [17]–[18], [22]):

> The Appellant's argument is premised on a principle that when there is confusion in the common law one can look to civil law. I have been provided no authority to suggest that. In any event, this is based on the Appellants' perception that 'gift', while clearly defined in civil law, is ambiguous in common law. Again, with respect, I disagree with that notion. Simply because the common law system has no codified definition of gift, that does not mean the expression has not been clearly defined. There is a plethora of common law jurisprudence which has very clearly established what is required for a common law gift, most succinctly put in The Queen v Friedberg, 92 DTC 6031 (FCA), which was adopted in the more recent case of Maréchaux v R, 2010 FCA 287 (CanLII):
>
> > … a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor.
>
> There is no confusion. There is no ambiguity. There is no need to seek assistance from civil law jurisdictions, Québec or elsewhere, even if such a principle existed. Again, I see no argument to be made…I find no basis upon which the Appellants can mount any argument that would extend the civil law definition of gift to the advantage of taxpayers in common law jurisdictions for purposes of the Charitable Donation Tax Credit. Their position with respect to this argument is hopeless.

Therefore, the motion was granted and the portions of the amended Notices of Appeal containing the bijural argument were struck out.

The case may be viewed at: http://www.canlii.org/en/ca/tcc/doc/2015/2015tcc35/2015tcc35.html

Implications of this case

His Honour noted that there were further taxation appeals pending with bijural arguments, which he referred to as 'regrettable' (at [28]). His Honour said that there was nothing in the Canadian Interpretation Act or Harmonization Act which supported the bijural argument made in this case. Nor did any argument concerning horizontal or vertical equity in the law of taxation in Canada support the appellants in this case. To add this latter argument to the above case (which was attempted) was to inappropriately conflate two different principles (at [21]). It was appropriate that Canadians in different parts of the country should pay equal taxes, but there were simply two differing legal systems in Canada, and they applied in Quebec and the rest of Canada accordingly.

2.7.4 GRAIN GROWERS LIMITED V CHIEF COMMISSIONER OF STATE REVENUE [2015] NSWSC 925 (SUPREME COURT OF NEW SOUTH WALES, BLACK J, 14 JULY 2015)

Payroll tax – whether acquisition of commercial businesses negated dominant charitable purpose – whether employees' work 'ordinarily performed' for organisation's charitable purposes

Grain Growers Limited (GG) is a company limited by guarantee. This case dealt with whether GG was entitled to an exemption from payroll tax under section 48 of the *Payroll Tax Act 2007* (NSW) (the Act). GG applied under section 48 of the Act to the Commissioner of State Revenue (the Commissioner) in New South Wales (NSW) for exemption from payroll tax, and repayment of payroll tax paid over the previous five years. The basis for this application on 14 August 2013 was that GG was a nonprofit organisation with charitable purposes for the public benefit. The application was refused on 22 January 2014. The Notice of Disallowance from the Commissioner accepted that GG was a nonprofit organisation, but expressed the view that its purposes:

> [were] primarily for the benefit of its members, and as such it cannot be said to have charitable purposes under the fourth head [of charitable purposes in Pemsel's case].

GG objected on 19 March 2014 and the objection was disallowed on 18 August 2014. This application followed.

GG was formed from amalgamation over recent years of various bodies to do with grain farming. In its current form it was established in 2000 by a merger between the original Premium Wheat Growers Association (PWA) and Victorian Grain Services. It then accepted new members in Queensland following a merger between GrainCorp and a Queensland bulk handler in 2003. GG then acquired what had originally been the Bread Research Institute (BRI) in 2008 and Agrecon Operations Pty Ltd (Agrecon) in 2009. The assets, liabilities and staff of BRI and Agrecon were transferred to GG in 2011.

With this history, was GG a nonprofit body? Section 48(1) of the Act refers to exempt wages as being those of a nonprofit organisation having a 'sole or dominant purpose' which is charitable. Prior to 30 June 2008 the requirement for exemption was that the organisation had a 'wholly' charitable purpose. An explanatory note recorded that the purpose of the amendment made from that date was that the exemption from payroll tax should apply:

> To wages paid by any non-profit organisation that has as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose. The amendment does not affect the existing requirement that the wages must be paid or payable for work of a kind ordinarily performed in connection with the religious, charitable, benevolent, philanthropic or patriotic purpose and to a person engaged exclusively in that kind of work.

There was no doubt that GG was a nonprofit organisation (at [15]):

> I am satisfied that Grain Growers is a non-profit organisation, in both a broader and a narrower sense. Grain Growers does not appear to conduct, or seek to conduct, its activities at a profit and relies on income from invested monies derived from its earlier sale of an interest in GrainCorp to fund those activities…It appears that one product provided by Grain Growers was sold with a mark-up or profit, but the evidence of its chief executive, Ms Garden, which was neither the subject of objection [n]or any substantial cross-examination, was that the profit derived was applied to investment in other loss making or uncommercial products or to fulfil 'industry good' functions…and to fund advocacy areas of Grain Growers' activities. … In the relevant period, Grain Growers' Constitution required that its income and property be applied solely towards the attainment of its objects and prohibited the distribution of its property to its members by way of dividend, bonus or otherwise or on a winding up or dissolution of Grain Growers. The annual and financial reports for Grain Growers from 2008 to 2014 are in evidence…and do not disclose any dividend paid to members of Grain Growers at any time. These matters support its characterisation as a non-profit organisation, and I find that it had that character.

The question then was whether GG had a charitable purpose as its sole or dominant purpose. As His Honour observed, in relation to the Act in question (at [16]–[17]):

> Any such purpose would be established by reference to the spirit and intendment of the preamble to the *Statute of Charitable Uses* 1601 (Imp) as falling, relevantly, within the fourth category in *Pemsel*, as a trust for other purposes beneficial to the community. The Chief Commissioner submits that, within the fourth category, public benefit is not presumed and must be proved, and that Grain Growers has the onus of establishing that its objects are beneficial to the community: *Incorporated Council of Law Reporting of Queensland v Federal Commissioner of Taxation* …. Grain Growers in turn contends that the general improvement of agriculture is a charitable purpose which falls within the fourth class in *Pemsel* and also submits that the provision of assistance to business and industry can provide benefits of a kind that are recognised as charitable. The case law makes clear that the term 'charitable purpose' used in s 48 of the *Payroll Tax Act* is to be interpreted by reference to the *Statute of Charitable Uses* and *Pemsel….*

Also of relevance was the decision of the High Court in *Commissioner of Taxation (Cth) v Word Investments Ltd* (at [18]):

> In *Commissioner of Taxation (Cth) v Word Investments Ltd* (2008) 236 CLR 204…, the majority emphasised at [24] that the existence of a goal of profit, as a relevant purpose, does not exclude a characterisation of an institution as charitable in that sense. In that case, the factor that established a charitable purpose was that the profit would be applied to support another organisation that was charitable in character. The majority also held (at [26]) that the activities of that organisation, in raising funds by commercial means, although not intrinsically charitable, became charitable in character where they were carried out in furtherance of a charitable purpose. The Chief Commissioner accepted in submissions that *Word Investments* is authority that, if commercial activity is directed to furthering objects that are predominantly charitable, then that will not deprive that activity of its charitable character.

The High Court's decision in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 had shown that: '[T]he law of charity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied' (at [18] of that decision). However, the advancement of agriculture had long been recognised as a charitable purpose within the fourth head of charity, and nothing had changed in that respect (at [27]). So the question was whether the predominant purposes of GG were charitable. The objects of Grain Growers are set out in clause 1.1 of its amended constitution as follows:

> The objects of Grain Growers are to promote the development of Australian agricultural resources by:
> (a) representing the national interests of grain growers in Australia;
> (b) developing and implementing policies aimed at cultivating a strong, innovative, profitable, globally competitive and environmentally sustainable grains industry. These policies will be constructive, balanced and well researched;
> (c) making representations to and working with governments consistently with its role of representing the Australian grain community;
> (d) working with all sectors of the Australian grains industry where matters of common interest are concerned; and
> (e) exercising good corporate governance in representing the interests of the Australian grain community, in any manner that Grain Growers thinks fit.

Had the acquisition of BRI and Agrecon been entirely commercial? Did these businesses deprive GG of any possibility of being charitable? His Honour held that they did not (at [73]–[75]):

> There seems to me to be no reason to doubt that Grain Growers had the intention that it claims to have had in acquiring the BRI and Agrecon businesses, and the evidence that it subsidises the products that they sell supports the view that it does so in order to advance the interests of at least the grain industry, where such products are available to grain growers generally and not only its members. It seems to me that the evidence to which I have referred establishes that Grain Growers' business services activities were conducted in order to advance its larger charitable purpose, and are not to be treated as non-charitable merely because they had a commercial character, or because an attempt to advance the level of information and technical services available to the grains industry generally also benefited individual growers. I recognise that the functions of BRI and Agrecon have something of a commercial character, and were carried out by commercial entities before those entities were acquired by Agrecon, and at least Agrecon's products also have commercial competitors. However, as the High Court emphasised in *Word Investments*, an activity does not cease to be charitable because it has a commercial character, if it is conducted for a charitable purpose. I should add, for completeness, that it does not seem to me that the conduct of the separate businesses of BRI and Agrecon, or the Kondinin Group, within separate legal entities, in the period to 1 July 2011 could deprive the conduct of Grain Growers' activities of the charitable purpose that I have otherwise held to be established…I am satisfied that the evidence to which I referred above establishes that Grain Growers' purpose in conducting its affairs, and the businesses of BRI and Agrecon in particular, is that of advancing at least the Australian grain industry, and the Australian agricultural industry so far as the grains industry forms a subset of that industry, and has a charitable character. The requirements of s 48(1) of the *Payroll Tax Act* are therefore satisfied in respect of Grain Growers' activities in the relevant years.

Did GG also satisfy the requirements of section 48(2) of the Act? This section provides that:

> (2)The wages must be paid or payable:
> (a) for work of a kind ordinarily performed in connection with the religious, charitable, benevolent, philanthropic or patriotic purposes of the institution or body, and
> (b) to a person engaged exclusively in that kind of work.

Was the work of employees of GG such that it was of a kind that would **ordinarily** be performed in connection with the relevant charitable purpose of the body, rather than work ordinarily performed by that particular body? There was no question relating to section 48(2) arising in the 2009 to 2011 tax years, where the Commissioner accepted that if GG had a dominant charitable purpose, and wages were paid for 'industry good' functions, then the wages paid by GG would be exempt. These conditions were met in those years. It

was common ground that BRI and Agrecon, which were then separate legal entities apart from GG, paid payroll tax in those years and did not seek a refund of that payroll tax.

The issue as to section 48(2) arose in respect of the 2012 and 2013 tax years, after employees who were previously employed in the separate businesses of BRI and Agrecon were transferred to GG in its information services, technical services and analytical services sections from 1 July 2011. Specifically, GG's information services division was previously Agrecon and its technical and analytical services together represented what was previously BRI.

His Honour held that wages paid or payable to GG's employees working in the successor functions to the BRI and Agrecon companies were not paid or payable for work of a kind 'ordinarily performed' in connection with the relevant charitable purposes of GG, whether characterised as the advancement of agriculture or the advancement of the grain growing industry. Therefore, the exemption from payroll tax was not available to GG's employees engaged in any part of those activities (at [90]):

> It follows that it could, in principle, have been established by evidence that work of the kind performed by BRI and Agrecon, despite its commercial character, is ordinarily performed by bodies with a charitable purpose of advancing agriculture and the requirements of s 48(2) of the *Payroll Tax Act* would then be satisfied. That was not established in this case, as a matter of evidence in respect of the activities of BRI and Agrecon, rather than because it could not be established as a matter of principle. It does not seem to me that, as a matter of inference and without a specific evidentiary basis, I could properly find that grains research or the provision of consulting services utilising satellite imaging are work of a kind 'ordinarily performed' in connection with a charitable purpose of the advancement of agriculture. As I noted above, the fact that Grain Growers itself conducts those activities does not establish that they are ordinarily performed for the purpose of the advancement of agriculture, since its interest in those fields may be idiosyncratic or a product of its particular circumstances. Grain Growers did not lead evidence of any substance that research into bread or grain or the provision of consulting services using satellite imaging are *ordinarily performed* by charitable bodies that have the purpose of promoting agriculture, by contrast with, for example, educational activities that may well be ordinarily performed by such bodies. Although there are scattered references in the evidence to activities undertaken by United States governmental and trade bodies, those references fall well short of establishing any 'ordinary' practice among bodies directed to the advancement of agriculture of undertaking the kind of activities undertaken by BRI or Agrecon. The business rationale for Grain Growers acquisition of those businesses, so far as it emerges from the affidavit evidence and the documents to which I have referred above, did not suggest that they were acquired because their services were 'ordinarily performed' by comparable bodies to Grain Growers, or other bodies directed to the advancement of agriculture, as distinct from being desirably performed by Grain Growers in its particular circumstances.

His Honour also accepted the distinction drawn by the Commissioner between the work performed by the administrative staff of GG and its executives. The former was exempt work to the extent that it involved the charitable purposes, but the latter was not (at [92]):

> The Chief Commissioner accepts that executive and administrative staff of Grain Growers would fall within the relevant exemption, to the extent that they were performing work that is necessary for charitable work. However, the Chief Commissioner submits that, to the extent that the Grain Growers' executive and administrative staff are performing services in respect of Grain Growers' commercial activities, and specifically the functions continuing BRI's and Agrecon's former businesses, that is not work of a kind ordinarily performed in connection with a charitable object, and does not satisfy the test under s 48(2) of the *Payroll Tax Act*. That submission must also be accepted where I have held that activities undertaken [in] respect of those businesses are not shown to be of a kind

> 'ordinarily performed' in connection with a charitable purpose of the advancement of agriculture. The exemption is not available for wages of executive and administrative staff of Grain Growers who are partly engaged with those activities and businesses, and not exclusively engaged in work of a kind ordinarily performed in connection with the Grain Growers' charitable purposes.

Therefore, Grain Growers established that it was entitled to the benefit of an exemption under section 48 of the Act in respect of the period prior to 1 July 2011 and as to some of its employees after that date. This meant that it was entitled to repayment of part of the payroll tax it had paid in the period 2012-2013.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/925.html

Implications of this case

The Commissioner contended that Grain Growers' acquisition of two 'commercial' businesses, BRI (a research body) and Agrecon (a survey and forecasting research company) which provided business services to individual businesses, had a public benefit that was too remote in the absence of evidence, and that the amount expended on achieving the object of providing such services was such as to affect the other activities of Grain Growers, which were otherwise charitable. His Honour agreed that the objects and activities of Grain Growers were charitable up to the point of its acquisition of the two businesses. After that point, when the activities of the two acquisitions were absorbed into Grain Growers' own activities, a distinction had to be made between the parts of Grain Growers' activities that were charitable, and those that were not.

2.7.5 QUEENSLAND CHAMBER OF COMMERCE AND INDUSTRY V COMMISSIONER OF STATE REVENUE [2015] QSC 77 (SUPREME COURT OF QUEENSLAND, JACKSON J, 15 APRIL 2015)

Payroll tax – whether entity is a 'charitable institution'

This was an application concerning two sections of the *Tax Administration Act 2001* (Qld) (TAA) as they related to the payment of payroll tax (a State tax) under the *Payroll Tax Act 1971* (Qld) (PTA). Under section 9(1) of the PTA, wages paid or payable by an employer for services performed or rendered by an employee may be liable to payroll tax. However, section 14(2) of the PTA provides that the wages liable to payroll tax do not include wages paid or payable by a 'charitable institution' to a person where the person is working exclusively for particular relevant purposes. Section 14(9) defines 'charitable institution' to mean an institution registered under the TAA Pt 11A, other than a university or university college.

The appellant company is a company limited by guarantee, incorporated in 1934. On 30 November 2012, the appellant made a two-part application to the Commissioner. First, it applied for registration as an institution under Pt 11A of the TAA from an effective date of registration of 1 December 2007. Secondly, it applied for a refund of payroll tax paid for the period from 1 December 2007 to 30 November 2012, on the basis of the registration sought. This amounted to an application for reassessment of the appellant's assessments for payroll tax during that period. The application was refused by the Commissioner, with the relevant reason being that the appellant's constitution did not satisfy sections 149C(5)(a) and (b) of the TAA Pt 11A as to registration as an institution. The appellant objected to the Commissioner's refusal, and the objection was disallowed. This was the appeal from the disallowance by the Commissioner.

Section 149C(5)(a) and (b) of the TAA Pt 11A provide:

> However, an institution, other than an institution or trustee of an institution mentioned in subsection (2)(a) or (c), must not be registered unless, under its constitution, however described—
>
> (a) its income and property are used solely for promoting its objects; and

(b) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and

At the time of its application to the Commissioner, the appellant had two operative constitutions, one pre- and one post-27 November 2012. Each of the constitutions had a different objects clause in clause 3.1. Clause 6 contained its asset and distribution requirements. The court said there were two issues arising in the appeal:

1. First, under its constitution, were the appellant's income and property used solely for promoting its objects and was no part of its income or property to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members?
2. Secondly, when the respondent registered an institution as a charitable institution, could he or she state a date of registration in the notice of registration that is before the date when Pt 11A came into operation?

On the first issue, it was common ground that the appellant was an institution under section 149C(3) of the TAA Pt 11A. Such an institution may be registered under Pt 11A, unless it must not be registered under section 149C(5) of the TAA. It was agreed that section 149C(5)(c) was satisfied, but were sections 149C(5)(a) and (b) satisfied? The Commissioner contended that there were no express provisions to the effect of sections 149C(5)(a) and (b) in the appellant's constitutions. The appellant submitted that express provisions were not necessary.

Both parties raised the *Corporations Act 2001* (Cth) (CA) as applicable. Under that Act, a company limited by guarantee is no longer required to have a constitution in order to be registered as a company (sections 112, 117). The appellant had been incorporated under the old *Companies Act 1931* (Qld), which required a company to have a memorandum and articles of association (which together make up its constitution). The various iterations of corporations law which followed through the years to 2001 did not affect this position, since there were transitional provisions included. However, (at [42]–[43]):

> There is thus no legal requirement that a company limited by guarantee have a constitution…. In summary, there are no specific provisions of the CA that income or property of a company limited by guarantee are to be used solely for promoting its purposes or objects or that no part of the income and property of a company limited by guarantee is to be distributed, paid or transferred to members, except for the effect of the sections mentioned [which were not directly relevant].

The Commissioner raised the effect of section 124 CA, submitting that because section 124(1)(d) of the CA provides that a company may distribute any of the company's property among its members, in kind or otherwise, and section 124(2) of the CA provides that the company's power to do so is not affected by the fact that it is not in the company's interests, the appellant had the power to distribute any of its property among the members in kind or otherwise. His Honour did not agree that this was relevant (at [47]):

> Whether or not a company has an express provision in its constitution positively requiring that the company's income and property be applied for a particular purpose or negatively prohibiting the use of its income and property for other purposes, the effect of s 124 of the CA is that a contravention of the provision does not make a contravening transaction void. Once that point is reached, it is difficult to accept that the operation of the requirements under s 149C(5)(a) or (b) of the TAA is necessarily informed by the extent of the corporate capacity conferred under s 124 of the CA.

There were no other relevant issues under the CA. His Honour concluded that (at [59]):

> For the purposes of these proceedings, the relevant finding, as a matter of mixed fact and law, is that the appellant was required to use its income and property solely for promoting its objects. The

> question remains whether that is under its constitution within the meaning of s 149C(5) of the TAA where there is no provision of the constitution that expressly says so.

His Honour held that there was not only no need for an express provision as to the use of the appellant's property and income in itself (at [63]), but that the ordinary meaning of 'unless under the constitution…' did not require an express provision either. It included a case where the effect of the constitution in the framework of the relevant statutory and common law was that those conditions were satisfied (at [64]). Further (at [67]):

> Thus, the appellant's constitution has the effect that its income and property are to be used solely for promoting its objects. To the extent that it might be relevant, as a matter of fact, the appellant has used its income and property solely for promoting its objects.

Section 149C(5)(b) was also met since clause 6 of the appellant's constitution dealt with the matter of distribution of profits, though not expressly with the distribution of income or property. This was not required (at [68]–[69]):

> The purpose of s 149C(5)(b) of the TAA is that no part of the appellant's income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members. Clause 6.1 of the appellant's constitution prohibits the distribution of profits. It does not expressly deal with income or property as such, although profits will be derived from cash-flow, including income, and a payment is a transfer of property…. Although a payment may be made to a person who is a member of the appellant as provided for in cl 6.2 of the constitution, none of those payments is one made to the payee as a member or by reason of membership. The payments may be made for remuneration for goods or services supplied, rent, interest or reimbursement of expenses made with authority and in furtherance of the objects of the appellant. In each case the appellant's obligation to make the payment is based in consideration moving from the payee. Such a payment does not constitute a distribution, payment or transfer by way of bonus, dividend or other similar payment to a member.

As to the second issue of date of registration, Pt 11A of the TAA was introduced into the Act on 30 June 2010. His Honour took the view that the changes made in the Act as from that date were significant, having the effect that the Commissioner did not have the power to register the appellant as an institution under Pt 11A before 30 June 2010 (at [77]–[79]):

> Despite the apparent similarity between the two regimes, there are differences between the requirements to qualify as an 'exempt charitable institution' in the period before 30 June 2010 and the requirements to be registered anew as an institution under Pt 11A after 30 June 2010. That point alone is an answer to the question whether registration under Pt 11A of the TAA can antedate 30 June 2011. The effect of registration under Pt 11A is that an institution is a 'charitable institution', not that it is an 'exempt charitable institution'. Until 30 June 2010, it was only the wages of an 'exempt charitable institution' that could be exempted from the liability to payroll tax under the PTA. There is no provision that if an institution is registered under Pt 11A it is to be taken to be an 'exempt charitable institution' for the purposes of the PTA as it operated prior to 30 June 2010. In my view, even if the date of registration under Pt 11A were able to be a date before 30 June 2010, that would not avail the appellant. The back-dating would still only have the effect of making the appellant a 'charitable institution' as that defined expression operates in s 14(2) of the PTA, commencing on 30 June 2010. That might affect whether relevant wages are not liable to payroll tax under s 14(2) of the PTA after that date. But it will not make the appellant an 'exempt charitable institution' under s 14(2) of the PTA as it operated before 30 June 2010.

Therefore, the appeal was allowed in part. The appellant was successful in claiming that it could be registered as an institution under the TAA, but was unsuccessful in claiming that its registration could be backdated to 2007. It could only be back-dated to 30 June 2010 (at [97]):

> In the present case, the appellant should have been registered from the date that would have been the date of notice of registration, or the date of the application for registration, or a date before either of those dates, but not before 30 June 2010.

The case was remitted to the Commissioner for decision in accordance with the reasons of the court.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2015/77.html

Implications of this case

This case referred to the provisions of the *Corporations Act 2001* (Cth), but as the court noted (at [38]):

> …it is relevant to note that the *Corporations Act* 2001 (Cth) is not the only relevant legislative context for the constitutional power of a body corporate that may be registered as an institution under Pt 11A. For example, the *Associations Incorporation Act* 1981 (Qld) provides for the incorporation of an association which might qualify under Pt 11A of the TAA.

2.7.6 STUDY AND PREVENTION OF PSYCHOLOGICAL DISEASES FOUNDATION V COMMISSIONER OF TAXATION [2015] FCA 1117 (FEDERAL COURT OF AUSTRALIA, GREENWOOD J, 21 OCTOBER 2015)

Appeal against revocation of tax-exempt status for alleged charitable institution – whether 'research' into 17 members being alive was charitable purpose – whether procedural fairness

This was an appeal from a decision of the Administrative Appeals Tribunal (the Tribunal) made on 20 December 2013. In that decision, the Tribunal considered the tax-exempt status of The Study and Prevention of Psychological Diseases Foundation Incorporated (SPED). SPED had received the following endorsements from the Australian Taxation Office on 1 January 2005:

- An entity exempt from income tax as a charitable institution under section 50-110 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) in accordance with section 50-5 item 1.1;
- A deductible gift recipient in accordance with section 30-125 of the ITAA 1997 on the basis that it was a health promotion charity under section 30-20 of the ITAA 1997, item 1.1.6.

SPED also obtained the following endorsements from 1 July 2005:

- A charitable institution under section 176-1(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act); and
- A health promotion charity under section 123D(2) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA).

A review of SPED's endorsement as an income tax exempt charity under Subdivision 50-B of the ITAA 1997 was commenced in August 2009. By letter dated 6 April 2011 the Commissioner advised SPED that it had not satisfied the requirements for the above endorsements, and that they would be revoked with effect from 1 January 2005. Upon an appeal by SPED, the Tribunal concluded that SPED was not entitled to any of the endorsements granted to it in 2005, and that the relevant date for revocation of those endorsements was 1 January 2005.

On appeal, SPED contended that there were three questions for review arising from the Tribunal's decision. These were:

1. Did the Tribunal misconstrue the phrase 'charitable institution' as it appears in Item 1.1 of the table in s 50-5 of the 1997 Act and its application to the integers of s 50-105 and s 50-110 of the 1997 Act?
2. Did the Tribunal deny the applicant procedural fairness or constructively fail to exercise its statutory review function because either the Tribunal made a finding of fact that the activities of the applicant did not amount to 'research' when that question was not in issue, or alternatively, the Tribunal failed to address evidence, said to be cogent and substantial evidence, relating to the activities of the applicant as 'research' and, in particular, failed to address a document described as 'Methodology Overview of the SPED Research'?
3. Did the Tribunal deny the applicant procedural fairness or fail to take into account relevant considerations by failing to consider submissions made by the applicant going to six identified propositions (and other matters) concerning the exercise of the discretion conferred by s 426-55 of Sch 1 of the *Taxation Administration Act 1953* and, in particular, the issue of the date upon which revocation under s 426-55(2) would take effect?

The Tribunal's decision as to SPED's status as a charitable institution

The word 'charitable' has a technical legal meaning that can be traced to the law of trusts and, ultimately, to the preamble to the Statute of Elizabeth: *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55. The meaning of 'charitable purpose' has long been derived in Australia from the decision in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, where Lord Macnaghten 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.

SPED claimed to be a charitable institution having charitable purposes within two of the classes described in *Pemsel*: the advancement of education and other purposes beneficial to the community. However, an institution is charitable if its only purpose, or its main or dominant purpose, is charitable in the technical legal meaning, and it is established and maintained for that charitable purpose: *Federal Commissioner of Taxation v Word Investments Limited* [2008] HCA 55; (2008) 236 CLR 204 at 216–217. If an institution's objects in its constituent documents indicate a purpose that is charitable, but its actual activities and other relevant factors indicate the substance and the reality are to the contrary, the institution will not be charitable.

Taking all the evidence into account, the Tribunal did not accept that SPED's activities were at all charitable, or in accordance with its objects (see at paras [70]–[71], [74]–[75]). Its taxation endorsements were revoked as from 1 January 2005. A summary of the case before the Tribunal, *Study and Prevention of Psychological Diseases Foundation Incorporated and Commissioner of Taxation* [2013] AATA 919 is available at: https://wiki.qut.edu.au/display/CPNS/Study+and+Prevention+of+Psychological+Diseases+Foundation+Incorporated+and+Commissioner+of+Taxation

The questions on appeal

In relation to the first question of the appeal, His Honour did not accept that the Tribunal had failed to correctly understand the analytical approach to be adopted as required by the authorities or had simply failed to apply the correct approach to the task of determining whether SPED was a 'charitable institution'. This was because the reasons of the Tribunal had to be read as a whole in an integrated way to understand how the task was approached by the decision-maker, and how that decision was reached. His Honour reviewed the Tribunal's reasoning in detail and could find no error.

On the second ground of appeal, His Honour said that the critical findings of the Tribunal concerned the nature of the underlying activities of SPED as well as the nature, scope and focus of those activities. This addressed the question of whether SPED was engaged in the furtherance of any charitable purposes (at [194]):

> The critical findings on the underlying question of the nature, scope and focus of the activities were that the activities were predominantly the ordinary activities of life; they were carried out for the personal benefit of the members themselves; the expenditure was expenditure on the living expenses and personal expenditure of the members or SPED's commercial investments; expenditure in any way beneficial to the community is insignificant when compared with expenditure on private purposes; SPED's actual activities do not coincide with the stated objects in the Constitution; SPED does not fulfil the charitable purposes it asserts; and SPED exists and existed during the relevant years, for the benefit of its small number of members.

Whilst these findings may well have led the Tribunal to conclude that the activities were not 'research', a finding to which SPED objected, they could also support the 'critical' finding that (at [195]):

> …the private nonpublic nature of the activities…reflected no benefit to the community or at least benefits which were regarded as 'insignificant' when compared with expenditure, for example, on private purposes. The critical matter is the private domestic furtherance of the interests of the members rather than the furtherance of any purpose focused upon benefits to the community.

This reasoning revealed no error in law. Therefore, SPED failed on the first two grounds of appeal.

On the third ground, relating to the date of revocation of the tax endorsements, His Honour held that the Tribunal had not properly considered all the submissions made by SPED, and remitted the matter to the Tribunal for consideration of the applicant's submissions on the question of the effective date of revocation only. What was required in this context was a clarification of the Tribunal's decision based on each submission made by SPED. Two of SPED's submissions had not been considered originally. The other matters decided by the Tribunal in 2013, including the finding of the propriety of revocation, were to be regarded as final and closed.

This appeal decision may be viewed at: http://www.austlii.edu.au/au/cases/cth/FCA/2015/1117.html

The case in the Tribunal may be viewed at: http://www.austlii.edu.au/au/cases/cth/aat/2013/919.html

2.8 TRUSTS AND WILLS

2.8.1 ATTORNEY GENERAL OF NEW SOUTH WALES V HOMELAND COMMUNITY LTD [2015] NSWCA 15 (NEW SOUTH WALES COURT OF APPEAL, MACFARLANE, MEAGHER JJA, SACKVILLE AJA, 15 FEBRUARY 2015)

Whether land held on charitable trust – whether breach of trust

This was an appeal from *Attorney General in and for the State of New South Wales v Homeland Community Ltd* [2013] NSWSC 1748 (the 2013 decision). In that case, the question for decision was whether the Homeland Community Limited (Homeland), held land at Thora, near Bellingen in New South Wales, of which it is registered proprietor, together with its other assets, upon certain charitable trusts.

Homeland was the purported trustee of a trust known as the Homeland Foundation Centre of Light (the Trust). Homeland's principal asset is a property situated in the Thora Valley (the property), on which are located 20 homes and five cabins. The property is the permanent home for approximately 27 adults and 13 children. The occupants make contributions to Homeland for their right to occupy the property.

The property was purchased in 1977. A community was established there, modelled on the Findhorn community in Scotland. It was set up under a charitable trust. The relevant trust deed in this case was drawn up in 1978. It described the community as 'charitable Trust known as The Homeland Foundation Centre of Light', and listed various religious and educational objectives in clause 3 of the document. In 1987, the trustees agreed to transfer the assets of the Trust to a company to be formed by the residents, which became Homeland.

The Attorney General alleged that Homeland was not using the property for the charitable purposes for which the trust was established. Rather, the property was being used for the benefit of the members of Homeland to establish and operate a residential community that subscribes to the objects set out in its memorandum of association. For that reason the Attorney General contended that Homeland should be removed as trustee of the trust.

The 2013 decision

This original action proceeded on the basis that:

- if the deed of 2 March 1978 took effect, it created a valid charitable trust for the advancement of religion and the advancement of education;
- if Homeland held the land on trust then it held it on charitable trust;
- if it did hold the land on the charitable trust alleged, then there was a breach of that trust.

The purchase of the land and the subsequent Deeds

Terrance Plowright had travelled to Scotland in 1974 to work in a community called the Findhorn Foundation. This was a body which was an educational community with a religious basis directed towards the survival of humanity in light of the coming effects of climate change, environmental degradation, greed and other human failings. Although its philosophy involved a consideration of God as a universal concept, the community did not support any particular religion.

When he returned to Sydney, Plowright founded the Awareness Centre in Chatswood which ran workshops and lectures on 'scientific, philosophical, psychological, religious and spiritual understandings and the potential of the human spirit'. This activity brought Plowright into contact with Bruce Davis and Michael Roads who were conducting a community living project in Mildura at that time. Davis and Roads were looking for land for a larger community. They found the property at Thora which was for sale for $65,000. Plowright raised

$23,000 through his centre towards the purchase price, with the difference being contributed by several other persons.

The land was subsequently purchased in the names of Plowright and Davis on 17 May 1977. On 8 December 1977 Plowright and Davis executed a Declaration of Trust in favour of seven persons (the 1977 Deed). The Deed constituted only Plowright and Davis as trustees. Seven persons including Plowright and Davis were named as the beneficiaries. However, the Deed described the seven beneficiaries as 'the Trustees of the Homeland Centre of Light'.

Pursuant to that Deed, Plowright and Davis declared that they held the Thora property and all bank accounts held for the Homeland Centre of Light and certain business names on trust for the seven beneficiaries who had provided the funds for the purchase of the land and other property. The 1977 Deed created no power in any person to revoke or terminate the trust. Nor did it vest in any person a power to change the terms of the trust deed.

By Deed dated 2 March 1978 six of the seven beneficiaries under the 1977 Deed purported to constitute a charitable trust known as the Homeland Foundation Centre of Light (the Foundation). It was clearly expected that the seventh beneficiary, Bruce Hosken, would be a party to this Deed as the deed before execution showed him as a party but his name is crossed out and he did not execute it. This was held to be immaterial in an earlier hearing, and also that there was no question that this was a valid charitable trust.

Therefore, the parties to the 1978 Deed (apart from Hosken) were the trustees of the trust. Various retirements and appointments were made after that date. After some dissension in the group, a further document was agreed to in 1987 (the 1987 Agreement). This led to the establishment of Homeland (the company).

The new company

Homeland Community Limited, the first defendant in the 2013 action, was incorporated and registered as a company limited by guarantee on 18 November 1988. The principal objects of the company on incorporation included clauses 2(a) of the Memorandum of Association as follows:

> The objects for which the Company is established are:
> - To take over the present unincorporated association known as the Homeland Foundation including its activities, real property, funds and other assets and liabilities.

By Deed of Appointment of new trustee dated 30 December 1988 the existing trustees appointed Homeland Community Limited as a trustee of the Homeland Foundation Centre of Light. This document was not executed by that company as a new trustee and therefore did not establish its acceptance of the Trust. There is no evidence that any director of Homeland saw this document at the time. Letters of resignation of the five trustees apart from Homeland were apparently received on 30 December 1988, as a minute of meeting of the trustees of that date includes a resolution to accept those resignations. The letters are undated.

Was the property actually transferred to Homeland? The date of any possible transfer seemed to be in doubt. The then trustees had signed a Statutory Declaration on 23 December 1988 which referred to a 'transfer' which was not identified. However, Windeyer J held that the only document to which this could refer was a transfer of the Thora land from the then five trustees to Homeland Community Limited dated 20 November 1989 (though there was doubt as to the witnessing of the five signatures). The transfer was executed by Homeland Community Limited as transferee under its common seal. The consideration was expressed to be $1. However, the document did not state that it was pursuant to the appointment of Homeland as new Trustee. The transfer was registered on 1 February 1990.

Did Homeland ever accept appointment as trustee?

After a consideration of the history of the property, His Honour found that (at [64] of the 2013 decision):

> The 1978 Deed appears to be a resettlement of, among other things, the whole of the Thora land. The Trustees had no power to resettle under the 1977 Deed. Nor did they have a power to revoke or extinguish the trust. Thus it cannot be effective to create a charitable trust or the charitable trust which the Attorney General seeks to enforce.... The deed is void or a nullity. There is no completely constituted trust.... Therefore, it is not a deed.

The new trustees who were purported to be appointed in 1978 could not take any better title than their predecessors. When in 1988 the then trustees purported to appoint Homeland as the new trustee, Homeland's position did not differ from that of the former trustees. His Honour held that Homeland did not accept the appointment as trustee (at [67]–[68]).

Therefore, did the deed of trust dated 2 March 1978, titled 'The Homeland Foundation Centre of Light Incorporating Rules of Committee of Management' and executed by Terrance Kippax Plowright, Bruce Davis, Michael Joseph Roads, Yvonne Siems, Roger Dunston and Anatole Kononewsky, bring into existence a valid charitable trust and, if so, was the first defendant the current trustee of that charitable trust? Windeyer J's answer was 'no'. Therefore, as there was no trust, there could be no breach of trust, and the Attorney-General's case was dismissed. The Attorney-General appealed that decision.

The decision on appeal

The Attorney-General's appeal was dismissed. Macfarlan JA who delivered the judgement (the other judges concurring) found that the Attorney General's claim that Homeland held the property on trust was founded on the assumption that the 1978 Deed created a charitable trust. However, there was no such trust. Homeland had not taken the property subject to a charitable trust under the 1987 Agreement or otherwise (at [94]–[96]):

> …the Company was not put on notice by the 1987 Agreement of an appointment of it as trustee of the putative charitable trust, it follows a fortiori that, contrary to the Attorney General's submission, that Agreement did not itself constitute the Company such trustee. It also follows that it is unnecessary to consider the Attorney General's challenge to the primary judge's finding that if the Company was appointed such trustee, it disclaimed the appointment. That challenge was based upon the proposition, which I have rejected, that by taking a transfer of the property pursuant to the 1987 Agreement, the Company accepted its appointment as trustee. It further follows that the Attorney General's claim that, when the property was transferred to it, the Company held it on a constructive charitable trust must be rejected. The Company's lack of any relevant notice and its registration as proprietor of the property under the Real Property Act require that conclusion.

The 2013 case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/1748.html

This appeal decision may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCA/2015/15.html

2.8.2 BADDELEY AND ORS (TRUSTEES OF THE BATH RECREATION GROUND TRUST) V SPARROW AND ORS [2015] UKUT 420 (TCC) (UNITED KINGDOM UPPER TRIBUNAL, TAX AND CHANCERY CHAMBER, 30 JULY 2015)

Whether breach of trust – grounds held on charitable trust – whether requirement not to use land otherwise than as an open space was a separate charitable purpose

This is an appeal against the decision of the First Tier Tribunal (General Regulatory Chamber–Charity) (FTT) released on 27 March 2014. The appeal to the FTT concerned the Charity Commission's (the Commission) Scheme of 12 June 2013 (the Scheme), made pursuant to section 69 of the Charities Act 2011, in respect of the charity previously known as The Recreation Ground Bath, and now known as The Bath Recreation Ground Trust (the Charity).

The Charity owns and manages a recreation ground in the centre of Bath (the Recreation Ground). On 1 February 1956 the Recreation Ground was acquired by the Mayor, Aldermen and Citizens of the City of Bath from the Bath and County Recreation Ground Company Ltd and was held by them on trust under the terms on which the Recreation Ground was conveyed (the 1956 Conveyance). There was confusion over time as to the status of the Recreation Ground, particularly when the control of the Recreation Ground passed to Bath and North East Somerset Council (BANES), as successors to the Mayor, Aldermen and Citizens of the City of Bath. On 31 July 2002 the England and Wales High Court determined that the Recreation Ground was and had been held on charitable trust (the Trust) and that the trustee, now BANES, was charged with maintaining the Recreation Ground as a recreational facility available for the benefit of the public at large: see *Northeast Somerset Council v HM Attorney General* [2002] EWCA 1623 (CH). The trust was entered on the register of charities in November 2002.

In the period between 1956 and 2002, two developments had occurred at the Recreation Ground:

- In about 1974, an indoor sports and leisure centre and car park (the Leisure Centre) was built by BANES on the Recreation Ground in its capacity as the local authority. This amounted to around 11,120 square metres in total area. The construction took place despite the terms of the trust created by the 1956 Conveyance requiring BANES to 'not use the Recreation Ground otherwise than as an open space'.
- A 75 year lease, dated 23 May 1995, of about 14,907 square metres of the Recreation Ground was granted to The Trustees of the Bath Football Club (the 1995 Lease). The 1995 Lease replaced an earlier lease and permitted part of the Recreation Ground to be used and occupied by the Bath Football Club as a rugby stadium and pitch. The terms of the trust created by the 1956 Conveyance not only required the land to be used for recreation purposes and preserved as an open space but also required that one sport should not be preferred over another. As the 1995 Lease only granted Bath Football Club the right to provide seating accommodation on three sides of the rugby pitch included in the lease, the Charity has made additional land available each year for the temporary provision of seating on the fourth side of the stadium. This effectively closed off the area from the public.

Clearly, there had been confusion as to the nature of the charitable trust which applied to the Recreation Ground. Was there any way in which the apparent breaches of trust could be resolved? After the 2002 decision, the Commission commenced an enquiry into the Charity, which continued until March 2007. On 26 June 2003 the Commission appointed receivers and managers in respect of all affairs of the Charity. Negotiations took place between the receivers and managers and BANES, who continued to act as trustee of the Charity, regarding the future of the Leisure Centre. No resolution had been achieved by the time that the Commission closed the statutory inquiry in 2007 and the receivers and managers handed responsibility for the

management of the Charity back to BANES as trustee. The legal title to the land until recently held by BANES has now been vested in the Official Custodian for Charities.

In November 2012 the Commission published a draft scheme in respect of the Charity. The Commission proposed to use its powers under the Charities Act 2011 to amend the governance, powers and purposes of the Charity, where appropriate, in order to permit a resolution to be found to the problem of the occupation of the Recreation Ground by the Leisure Centre and by Bath Rugby under the 1995 Lease (the apparent breaches of trust). There was a large response to the draft scheme, particularly from members of the public. After the period of consultation closed, the scheme was formally made on 12 June 2013.

The 2014 decision

In the 2014 case, the appellants were residents who lived near to the Recreation Ground, and were therefore beneficiaries of the Charity. The appellants questioned whether the scheme was properly made under section 69 of the Charities Act 2011, and whether it was justified. They were also concerned as to whether the new trustees appointed under the Scheme were appropriately constituted as a body. In addition, they challenged the validity of the 1995 lease and the status of the Leisure Centre.

The Tribunal held that the Commission did have the power to make a Scheme under section 69 of the Charities Act 2011. New governance and powers for the Charity were clearly needed, and the Scheme was the best way to achieve this outcome. The Leisure Centre, a major installation, could not be removed without substantial cost to the Charity, in both monetary and legal terms. The Scheme had presented a solution to this issue by providing that the land on which the Leisure Centre stood was to be the subject of a separate charitable trust to be administered solely by BANES. The Tribunal agreed that the erection of the Leisure Centre represented a 'cy près occasion' (since the facilities of an indoor sports Leisure Centre could be approximated to the objects of the Charity), and that the Leisure Centre should only be in place for its useful life, and then should be removed so that the area could be returned to open space.

However, the Tribunal did not agree with the Scheme provisions that there should be a separate trust under the control of BANES. They amended the Scheme so that the trustees should be the same ones as for the rest of the Charity and independent from BANES per se. The Tribunal's reason was that BANES had mismanaged the Charity in the past. The Tribunal further amended the Scheme to permit only one BANES representative on the Board of the Charity, with that person not to be chair or vice-chair (as had been the case under the Scheme to date), and the other trustees to be independent of BANES.

The most contentious part of the Scheme related to the 1995 lease. The Tribunal said that this could be resolved by the Commission through a revamped scheme, with better conditions attached to the lease, but no real resolution to the problem of the football club lease was advanced. Thus, the appeal was allowed in part, with an order that the Commission's Scheme be amended as outlined by the Tribunal.

The 2015 appeal

The appellants in this appeal were trustees of the Charity, and the respondents were residents of Bath who live near the Recreation Ground. The 2014 Tribunal decision had determined that the Tribunal was bound to follow the 2002 decision of the High Court with regard to the charitable status of the Charity. The Tribunal came to the conclusion that the objects of the Charity prior to the making of the Scheme were as set out in the 1956 Conveyance with the addition of the wording, '*to maintain the same as a recreational facility available for the benefit of the public at large*', which was added in the 2002 judgement. The Tribunal then went on to construe the objects they had nominated as those of the Charity (i.e. those in the 1956 conveyance). These included that the Recreation Ground should not be used as other than an open space. A second requirement was that the Recreation Ground, although to be used for the playing of sports amongst other open air

activities, was not to be used to favour any one particular sport, or to favour any one particular club or sporting body.

On appeal, the Upper Tribunal held that it was **not** a purpose of the trusts of the 1956 Conveyance to preserve the Recreation Ground ***in specie*** as an open space (at [66]). There was no doubt that the 1956 conveyance was for a recreational use. The Recreation Ground was conveyed 'for the purposes of or in connection with games and sports etc.' and 'for no other purpose'. However, the preservation of the land as an open space was not expressed to be one of the **purposes** for which it was conveyed. Rather, the conveyance was subject to a proviso that 'the Corporation shall not use the property hereby conveyed otherwise than as an open space...'. This proviso was crucial (at [67]):

> Were it not for that proviso, it would be clear…that the Recreation Ground could be alienated without a cy-près scheme notwithstanding the opening words of the habendum of the conveyance requiring that the Corporation 'for ever hereafter shall manage etc'. In our view, the inclusion of that proviso, worded as a restriction and not as additional purpose, does not lead to a different conclusion. Rather, the proviso is to be operated according to its tenor, that is to say as a restriction: and being no more than a restriction, it can apply only so long as the person on whom the restriction is placed – the Corporation (or its successors in title as trustee) – retain the land. The restriction is not to be treated as introducing a restriction on alienation that would not otherwise be there. Support for that conclusion can be found when the placing of the proviso in the clause as a whole is noted. The structure is this: a trust for recreational purposes and no other purposes, followed by four matters not expressed to be purposes, namely: (i) an obligation to maintain, equip or lay out the land for those purposes (ii) not to use the land otherwise than as an open space (iii) to exercise the power at (i) in a way which will secure use principally for games and sports of all kinds (iv) not to show any undue preference for any game or sport or particular body of persons. Clearly (i), (iii) and (iv) are concerned with ways in which the primary trust is to be implemented. We consider that (ii) should also be approached in the same way and not as giving rise to a separate trust purpose.

There was no charitable purpose in maintaining the Recreation Ground as entirely open space (at [61]):

> …it is our view that, in order to establish a valid charitable trust to preserve the Recreation Ground as an open space, it would need to be shown (i) that the qualities of the Recreation Ground were such that the purpose of preserving it as an open space was capable of being a charitable purpose and (ii) that the 1956 Conveyance, as a matter of construction, in fact created such a trust.

There was no such charitable purpose and no trust to maintain the Recreation Ground as open space. The open space requirement was not part of the original purposes of the Trust (at [71]):

> …it cannot successfully be argued that, although there is no independent purpose of preserving the Recreation Ground in specie as open space, the requirement not to use it other than as open space is part of the recreational purpose and therefore part of the 'original purpose' for the purposes of section 62 Charities Act 2011. The reasoning by which we have reached our conclusion on construction applies equally to the question whether the restriction on use other than as an open space is part of the 'original purpose'…the intention or purpose that the Recreation Ground should be used as open space was not a condition qualifying the use of that land for recreational purposes.

Thus, the appeal was successful. There was no trust to maintain the Recreation Ground as open space as such. Therefore, the uses to which it had been put were not breaches of trust.

This decision may be viewed at: http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Bath-Recreation-Ground-v-Charity-Commision.pdf

The 2014 decision may be viewed at:
http://www.charity.tribunals.gov.uk/documents/decisions/decision27mar14-recreation-ground.pdf

Implications of this case

The residents in this appeal had referred to the beauty of the area, and implied that the uses to which the Recreation Ground had been put did not enhance the area. This appeal found that the uses of the Recreation Ground were within the purposes of the original trust. They were recreational purposes. There was no purpose purely relating to open space (at [65]):

> The fact that the Recreation Ground is an area of green open space in the heart of an historic and culturally important city is not, in our view, a sufficient basis for a conclusion that a trust for its preservation as open space is a charitable public purpose.

2.8.3 BENNETT V THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS AND ORS [2015] QSC 85 (SUPREME COURT OF QUEENSLAND, MULLINS J, 15 APRIL 2015)

Gift in will for establishment of scholarship – disclaimer of gift by donee – application cy près

This case concerned a gift in a will. The will of Phillip Yeats Bisset, a well-known Queensland architect, gave his estate to the applicants as the trustees of his will to give effect to the gifts and directions in the will. Mr Bisset's will divided the residuary estate into thirteen equal parts and by clause 4.4(2) Mr Bisset gave five of those parts (estimated at between $1.2m and $1.3m) to the Royal Australian Institute of Architects (the respondent) for the establishment of a scholarship for a final year architecture student at a Queensland University to study overseas, with a particular emphasis on the study of planning. The scholarship was to be known as the Phillip Y Bisset Planning Scholarship.

After correspondence with the respondent, the applicants concluded that the respondent had disclaimed the gift on the basis that it could not be practically administered on the terms delineated in the will. The applicants' solicitors then wrote to Queensland University of Technology (QUT), the University of Queensland (UQ), Griffith University and Bond University advising that the respondent had disclaimed the gift and asking each university to submit *cy pres* proposals. Each university responded in November 2013 with a proposal. The applicants submitted the proposals of the universities to the Attorney-General together with two letters from the respondent to the applicants, which constituted the disclaimer in the applicants' view.

On 26 June 2014, the Crown Solicitor, on behalf of the Attorney-General, requested the applicants' solicitors to consult with the universities and the respondent to see if there could be another proposal they could submit that more closely approached the original intent of the gift under clause 4.4(2) and schedule 3 to the will. Each university responded in October 2014 with a further proposal. The respondent did not submit a proposal, but the evidence showed that the applicants did not appear to have consulted with the respondent in respect of any of the proposals by the universities or in respect of the Crown Solicitor's letter of 26 June 2014.

The Crown Solicitor advised the applicants' solicitors on 12 December 2014 that the Attorney-General had considered the *cy pres* proposals for the administration of the Philip Y Bisset Planning Scholarship advanced by QUT, UQ, Griffith and Bond and considered that the Griffith proposal, the UQ proposal and QUT's proposed first option were close to the original purposes of the will. The applicants' view was that the property which was the subject of the gift be applied *cy pres* by paying it to QUT on trust to invest, and from the capital and income to pay scholarships to be known as the "Philip Y Bisset Planning Scholarship" to students who had completed a Master of Architecture degree or equivalent degree at a Queensland University for the purpose of studying architecture overseas with particular emphasis on the planning of buildings.

The applicants favoured the option proposed by QUT because it was the most detailed and, in their view, very close to the original purposes of the will and, of the four universities, Mr Bisset had the closest connection with QUT, having studied at its predecessor institution in central Brisbane. He was also a regular supporter of the QUT Learning Potential Fund which supports low income and disadvantaged students to complete their degrees. The applicants therefore sought a declaration that in making the gift in clause 4.4(2) of his will, Mr Bisset had a general charitable intention, and an order pursuant to section 105(1)(a)(iii) and/or section 105(1)(e)(iii) of the *Trusts Act 1973* (Qld) (the Act) that the gift be paid to QUT was appropriate.

There were three issues for determination:

1. Had the respondent disclaimed the gift?
2. Did Mr Bissett have a general charitable intention when making the gift in his will?
3. Should the gift be applied *cy pres*?

Disclaimer

On the issue of disclaimer, Her Honour held that the disclaimer was effective and could not be retracted. The respondent had written its first disclaimer on legal advice, nominating two issues of difficulty – the fact that the scholarship involved an emphasis on planning, and the fact that it was limited to Queensland. Its first disclaimer was 'almost cavalier' (at [33]):

> Mr Bisset was extremely generous in making the gift under clause 4.4(2) for the purpose of establishing a scholarship in his profession of architecture, even if his express wish is for the focus of the scholarship to be on planning of buildings and their inter-relationship. As a Queenslander, his focus was on providing the scholarship for the benefit of students studying architecture in Queensland. It is surprising that a national professional body such as the first respondent questioned the appropriateness of administering a gift for scholarships to benefit students studying in the State in which Mr Bisset had studied, lived and worked. The first respondent's attitude expressed in both its letters of July and December about the limitation of the gift to benefit Queensland students was almost cavalier. Using that aspect of the gift as a reason to raise difficulties about the gift is even more surprising when it was disclosed by the chief executive officer of the first respondent for the purpose of the hearing that the first respondent administers at least four awards for architecture restricted to the Queensland Chapter.

However, the first letter of disclaimer was marked 'without prejudice', so that it was possible to say that it was not completely clear that the disclaimer was final. Her Honour characterised the second letter of disclaimer as 'peremptory' (at [47]) and totally effective. The effect of disclaimer was that the gift on the terms of clause 4.4(2) of the will to the respondent failed and it was then a matter of considering the *cy pres* application on the basis of section 105(1)(a)(iii) of the Act.

General charitable intention

The condition that must be satisfied to enable a charitable gift under a will that would otherwise fail to be applied *cy près* is the existence of a general charitable intention on the part of the testator which goes beyond the making of a specific charitable gift. Her Honour had no difficulty in discerning a general charitable intention in the will (at [51]):

> I find the nature and structure of the gifts under Mr Bisset's will, even apart from clause 4.4(2), easily justify the conclusion that Mr Bisset had a general charitable intention that went beyond the specific gift to the first respondent for the purposes set out in clause 4.4(2)…

Application cy pres

The respondent made a *cy pres* proposal after this proceeding commenced. Her Honour took the view that (at [56]):

> The first respondent was Mr Bisset's preferred choice for implementing the scholarship for architecture students. The revised proposal of the first respondent made after this proceeding commenced best achieves the purpose and intention of Mr Bisset in making the gift under clause 4.4(2) of the will and should therefore be the basis for the application of the gift *cy pres*.

Therefore, the gift was applied *cy pres* with the respondent remaining as trustee. Her Honour ordered that pursuant to section 105 of the Act the property which was the subject of the gift in clause 4.4(2) of the will be applied *cy pres*, as if clause 4.4(2) provided (alterations made by Her Honour underlined):

> Clause 4.4(2) five parts to THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS to hold the capital moneys as it sees fit and apply the income or any such part of the capital and income therefrom as the National Executive Committee of The Royal Australian Institute of Architects ACN 000 023 012 in its capacity as trustee shall from year to year determine for a scholarship to be granted to one or more students in their final year of the architecture course at a prescribed school of architecture in Queensland to study architecture overseas with particular emphasis on the planning and design of buildings. The scholarship is to be known as: 'The Philip Y Bisset Planning (Architecture) Scholarship' and the rules for the granting of such scholarship shall be determined by the National Executive Committee of The Royal Australian Institute of Architects (or its delegate) but nevertheless I express the wish that the guidelines contained in the Third Schedule to this my Will be taken into account wherever possible by the National Executive Committee (or its delegate) when determining such rules and I declare that the receipt of the Chief Executive officer or other appropriate officer of The Royal Australian Institute of Architects shall be a sufficient discharge to my Trustee.

The case may be viewed at: http://www.austlii.edu.au/au/cases/qld/QSC/2015/85.html

Implications of this case

Any gift in a will must be assented to or disclaimed on the donor's terms. In this case, although the possibility of disclaimer was at first equivocal, it then became definite. Having then disclaimed the gift the respondent was asked to provide a cy pres application of the gift. It did so during this proceeding. Ultimately, Her Honour was able to apply the gift cy pres in favour of the respondent because the clause constituting the gift in the will could be reworded to reflect the respondent's concerns, and make it possible to carry out the gift.

2.8.4 **CHANDLER V COULSON** [2015] NSWSC 172 (SUPREME COURT OF NEW SOUTH WALES, PEMBROKE J, 9 MARCH 2015)

BLAKE V GRIFFITHS [2015] VCC 258 (COUNTY COURT OF VICTORIA, MISSO J, 16 MARCH 2015)

Wills – family provision claims

These two (unrelated) cases concerned family provision from wills. In both cases, charities lost bequests made to them.

In *Blake*, a disabled son who was originally left 50% of his mother's estate, was awarded the remainder, which had been left to three charities, the Cancer Council of Victoria, the Epilepsy Foundation of Victoria, and

Diabetes (Victoria) Inc. The remainder had been depleted by another family provision claim by the deceased's two nieces which was settled for $16,000. Costs were also awarded from the estate.

The deceased had made bequests to the charities she chose because her other son had died of brain cancer, and her disabled son suffered from both epilepsy and diabetes. However, the court was of the view that her disabled son, whose care needs were very high, was entitled to the whole of the estate minus the settlement to the two nieces.

In *Chandler*, a de facto partner claimed provision from the deceased's will. He had not been left anything in the will, which provided for a number of unrelated beneficiaries, and for three charities, the RSPCA, Guide Dogs Victoria, and the Anti-Cancer Council of Victoria. The plaintiff was unemployed and on a disability pension. He had been residing for some years rent-free in the deceased's New South Wales home.

His Honour held that under section 60(2) of the Succession Act 2006 (NSW), which lists a large number of factors to be taken into account by the court in awarding family provision, the plaintiff was entitled to proper and adequate provision due to the moral duty to provide, placed upon the deceased by the weight of previous case law.

It was held that the plaintiff should be awarded $400,000 from an estate of $837,000 with the amount to be taken in equal shares from eight beneficiaries, including the three charities.

The *Chandler v Coulsen* case may be viewed at:
http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/172.html

The *Blake v Griffiths* case may be viewed at: http://www.austlii.edu.au/au/cases/vic/VCC/2015/258.html

2.8.5 CHURCH PROPERTY TRUSTEES V THE ATTORNEY-GENERAL AND THE GREAT CHRISTCHURCH BUILDINGS TRUST [2015] NZHC 1843 (HIGH COURT OF NEW ZEALAND, DUNNINGHAM J, 5 AUGUST 2015)

Trustees' relief from liability – restitution of trust funds – failure to insure

This case follows on from previous decisions relating to the severe earthquake damage done to Christchurch Cathedral in 2011. This case decided that:

1. The restitution to the Cathedral Trust of the funds expended (plus interest) on the Transitional Cathedral meant there was no requirement for Church Property Trustees (CPT) to seek relief from liability under section 73 of the Trustee Act 1956.
2. If an application for relief under section 73 had been relevant, there was insufficient information to conclude that relief should be granted.
3. CPT was not in breach of trust for failing to insure the Cathedral for its full replacement value.
4. The insurance moneys received in respect of the claim under the insurance policy that insured the Cathedral contents were not held on the Cathedral trust, but were the property of the Cathedral Chapter.

The parties

1. The CPT has the form of a corporate trustee, recognised by statute: see the Anglican (Diocese of Christchurch) Church Property Trust Act 2003. The CPT owns much of the church property in the Anglican diocese of Canterbury, New Zealand. They hold the land, and the now damaged Cathedral, upon the terms of the Cathedral Trust.

2. The GCBT was formed in August 2012 as an incorporated charitable trust. A group of prominent Christchurch citizens established the GCBT with the principal objective of promoting the preservation of heritage buildings damaged in the earthquakes. Their particular concern has been the restoration of the gothic Cathedral to its original state.
3. The issues were between the CPT and the GCBT. However, the Attorney-General was named as a defendant and appeared at the hearing as *parens patriae* to ensure the due administration of established charities and the proper application of funds devoted to charitable purposes.

Previous litigation between CPT and GCBT

In 2012 GCBT initiated judicial review proceedings challenging the legitimacy of CPT's decision to deconstruct Christchurch Cathedral as being in breach of the central purpose of the trust on which the Cathedral was held. In a decision issued on 15 November 2012 Chisholm J declared that CPT was trustee of the Cathedral Trust which required there to be a Cathedral on the Cathedral Square site in central Christchurch, but that any Cathedral built did not have to replicate the Cathedral as it had stood before the 2011 earthquakes. His Honour also signalled, but did not determine, that the insurance proceeds for the material damage to the Cathedral were held for the same site-specific purpose.

In a decision dated 8 April 2013, Panckhurst J held that the proceeds of the material damage insurance policy were subject to the terms of trust applicable to the Cathedral Trust and it followed that it was in breach of that Trust to use approximately $4,500,000 of those funds to construct the Transitional Cathedral at an alternative site (Latimer Square in Christchurch). This led to CPT restoring the insurance funds used to the Trust. However, Panckhurst J declined to determine the application of section 73 of the Trustee Act 1956 in this decision.

In 2014, CPT sought to amend its statement of claim to abandon its claim for relief under section 73 of the Trustee Act, and instead advanced a new application under section 66 for directions about the appropriate treatment and use of the insurance proceeds for the Cathedral contents. The directions were sought because, at that stage, CPT proposed using some of these proceeds to reimburse the expenditure on the Transitional Cathedral. In his judgment dated 30 May 2014, Panckhurst J declined leave to amend the statement of claim to abandon the application for relief from personal liability, but allowed the addition, by consent, of the application for directions in relation to the use of the Cathedral contents insurance.

The issues in this case

The issues in this case were:

(a) Should the application for relief be addressed under section 73 of the Trustee Act 1956 or section 11 of the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 (the CPT Act)?
(b) Did repayment of the monies spent in breach of trust eliminate any issue of liability?
(c) If not, should CPT be relieved of liability in any event, taking into account the following issues:

    (i) Whether CPT was put on notice that it was using funds in breach of trust and continued to take steps in breach of that trust without first seeking the Court's guidance or approval?
    (ii) CPT's decision to gift to St John's parish (in Latimer Square) the Transitional Cathedral and not to seek restitution from the insurance proceeds for St John's?
    (iii) The fact that CPT did not insure the Cathedral for full replacement value.

(d) Were the proceeds of the Cathedral contents insurance claim held on trust for the Cathedral community, as represented by the Chapter, or were they held on the Cathedral Trust?
(e) If they were held on trust for the Cathedral community, is it appropriate to declare that CPT can apply those funds to be used as directed by the Chapter? In this context, the term 'Chapter'

> describes the administrative unit that represents in terms of canon law the Cathedral congregation. The day to day running of the Cathedral is in the hands of the Dean and the Chapter.

Issue (a)

There had been uncertainty in previous litigation as to whether section 73 of the Trusts Act or section 11 of the CPT Act applied to relieve liability of the CPT. Section 11 of the CPT Act provides:

> No member of the Church Property Trustees is personally liable for any act or omission of the Church Property Trustees, or of any officer or employee of the Church Property Trustees, done or omitted in good faith in the course of the operations of the Church Property Trustees.

It was held that section 73 was the correct pleading (at [18]). Section 11 of the CPT was designed to operate as a defence for individual members of the corporate trustee, and not as a power for the Court to grant relief from liability, so was not relevant to the case.

Issue (b)

The restoration of the funds used for the Transitional Cathedral to the Trust (plus interest) was held to fully discharge any liability owed by the CPT (at [25]).

Issue (c)

Given that it was held that there was no residual issue of liability arising for the CPT, there was, strictly speaking, no need to consider issue (c). However, if there had been an issue of liability, would section 73 have applied to relieve that liability? Her Honour considered this issue in the light of the sub-issues listed above:

(i) Was CPT put on notice that it was using funds in breach of trust and continued to take steps in breach of that trust without first seeking the Court's guidance or approval?

Her Honour held that it was not initially put on notice (at [52]). The real question was what happened subsequently. Her Honour said in this respect (at [57]):

> I am not satisfied that when CPT was put on notice it was too late to change tack and proceed without using the insurance funds until it had directions from the Court confirming that was appropriate. That leaves in doubt whether CPT would have been found to have acted reasonably if I was in the position of determining relief from liability.

(ii) Should CPT's decision not to insure the Cathedral for full replacement value tell against relief?

The CPT did not insure the Cathedral for its full replacement value. The CPT had relied on a 2008 insurance valuation of $40,133,110. In fact, the full rebuild cost is now estimated at between $104,000,000 and $220,000,000. Her Honour held that it was not unreasonable to rely on the valuation received in 2008. The valuation had been done by a specialist valuer from the UK engaged by the CPT's insurers. The premium paid by the CPT was based on 70% of the valuation, with an annual premium of $40,713. The reason for this underinsurance was that the Chapter could not afford the premium for the full replacement value (as valued).

Case law on the extent of a trustee's duty to insure indicates that there is no presumption that trust property should be insured for full replacement value and that the ability to pay the premium is relevant to the question of what insurance a prudent trustee should hold. Her Honour therefore held that the CPT's decision as to the level of insurance was proper (at [74]). Thus, this was not a factor which would tell against the trustee acting reasonably for the purpose of relief under section 73.

(iii) Was it reasonable to decide to gift to St John's church the Transitional Cathedral and not seek restitution from the St John's insurance proceeds?

St John's church in Latimer Square was destroyed in the earthquakes. The CPT decided to enter a memorandum of understanding (MOU) with the parish of Christchurch St John's, which allowed the Transitional Cathedral to be constructed on the Latimer Square site where the St John's church had stood, and to vest in St John's after the exclusive use period of 10 years from the date of practical completion. The MOU required no financial contribution from St John's, either at the time of construction, or at the point when the church reverted to St John's for St John's own purposes. Was this a reasonable use of the insurance monies received? Her Honour found that this aspect was unexplained (at [77]):

> What that does not address is why CPT entered the MOU at the outset on terms which seemed to disproportionately benefit St Johns at the expense of the Cathedral Trust. While I accept it was not recognised by CPT at that point that a Cathedral Trust on the terms subsequently identified was in existence, it nevertheless had a duty to act reasonably. It remains unexplained why, at the very least, some contribution was not sought from St Johns for an asset that would vest in St Johns after just 10 years, or why the proceeds of the St Johns' insurance policies were not used for this building. I am unable, therefore, to make any finding on the appropriateness of this decision.

Therefore, in respect of issue (c) as a whole, Her Honour held that, although she had held that relief under section 73 was not required for the CPT, there were still some unexplained issues which had been raised by the GCBT.

Issues (d) and (e)

Were the proceeds of the Cathedral contents insurance claim held on trust for the Cathedral community, as represented by the Chapter, or were they held on the Cathedral Trust? Her Honour said that whilst CPT had received the insurance proceeds, its obligations differed depending on whether it, or the Chapter, owned the contents. If CPT owned the contents as trustee then, by virtue of section 25(3) of the Trustee Act, it was obliged to hold the proceeds on equivalent trusts (being to replace the contents of a Cathedral on Cathedral Square). If it did not hold the contents as trustee, then it held the proceeds as bare trustee for the actual owner of the insured items, and section 25 of the Trustee Act did not govern their use (at [92]).

The evidence was somewhat scant, and perhaps equivocal in relation to donated items. However, it was held that the latter position described above was the correct position (at [103]-[104]):

> …the position is that the proceeds of the contents insurance policy which have been paid to CPT are simply held on a bare trust for the legal and beneficial owner of the contents, the Cathedral congregation as represented by Chapter. Because the contents were not owned by CPT, the obligations under s 25 of the Trustee Act do not apply to constrain CPT in how those funds are applied. Accordingly, CPT is obliged to do no more than pay over the insurance monies received in respect of the insurance claim for the Cathedral contents to the Chapter, or to apply them as directed by Chapter.

Declarations were made accordingly.

This case may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2015/1843.html

The 2012 decision of Chisholm J may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2012/3045.html

The 2013 decision of Panckhurst J may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2013/678.html

The 2014 decision of Panckhurst J may be viewed at: http://www.nzlii.org/nz/cases/NZHC/2014/1182.html

2.8.6 REVEREND FATHER SIMON CKUJ AS TRUSTEE OF THE JAROSLAW ANDREW ORYSZKIEWYCZ HALYCKYJ PERMANENT CHARITABLE FUND V THE ATTORNEY-GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES [2015] NSWSC 35 (SUPREME COURT OF NEW SOUTH WALES, DARKE J, 6 FEBRUARY 2015)

Administrative scheme for charitable trust

The plaintiffs in this case were the trustees of a charitable trust established by Jaroslaw Halyckyj in 1995. The trust was established by a Declaration of Trust instrument dated 23 July 1995 (the trust deed). In the trust deed, Jaroslaw Halyckyj provided that he '[desired] to establish a charity to provide for the religious purposes [specified]… of St Andrews Ukrainian Catholic Church presently situated at Lidcombe, Sydney'. The property of the trust consisted of moneys held in various bank deposits, which totalled in excess of $600,000.

The plaintiffs sought an order for the settlement of an administrative scheme in respect of the trust. Commencement of the proceedings, which were charitable trust proceedings within the meaning of the *Charitable Trusts Act 1993* (NSW) (the Act), had been authorised by the Attorney-General (through his delegate the Solicitor-General) as required by section 6 of the Act. Subject to one qualification, the Attorney-General regarded the scheme proposed by the plaintiffs as appropriate.

Clause 3 of the trust deed provided, subject to certain provisos, that the trustees were to hold the trust fund and the income thereof 'upon trust to pay the net income of the trust fund to the resident head priest for the time being of St Andrews in quarterly instalments for such of the following objects set out in clause 4 of this deed as shall be exclusively charitable'. Clause 4 then provided:

> The objects of the Charity are the benefit, upkeep and maintenance of St Andrews, including the keep of any priest or priests resident at St Andrews.

The scheme proposed by the plaintiffs provided for the trust deed to be treated as varied in a number of respects. These variations fell into five categories:

1. provisions designed to satisfy the requirements of the Australian Taxation Office concerning taxation concessions available to charities, thus enabling the trust to maintain its tax concession charity status;
2. provisions designed to provide a mechanism for the trust to receive gifts;
3. a provision designed to clarify that the trustees were bound to comply with the trust deed even if there was a conflict between the trust deed and relevant church statutes;
4. provisions designed to clarify that only priests duly appointed by the church Eparch were to be capable of benefiting from the trust through the provision of their keep; and
5. provisions designed to clarify that any money, whether capital or income, paid out of the trust funds had to be applied towards the objects set out in clause 4, and that the trustees had to keep the trust funds in bank accounts that were separate from other bank accounts held by the trustees.

The Attorney-General regarded the proposed scheme as appropriate, subject to one qualification. His Honour agreed, stating that the provisions in 1–3 and 5 above were appropriate. The only qualification concerned 4 above. In particular, the concern expressed by the Attorney-General was that the insertion of the words 'or in the Parish of' might be a change that went beyond the permissible scope of an administrative scheme and might alter the objects of the trust such that a cy-près scheme might arise.

However, His Honour held that this proposed change was within the scope of an administrative scheme (at [13]–[14]):

> It seems to me, particularly bearing in mind recital A to the trust deed, which refers to St Andrews Ukrainian Catholic Church presently situated at Lidcombe, Sydney ('St Andrews'), that the objects clause would not be construed as being restricted to the provision of keep to priests physically resident at Lidcombe. Further, the proposed alteration, which makes it clear that provision may be made for the keep of priests resident anywhere within the Parish (a term that is now to be defined) may be seen as a clarification that would be of assistance to the trustees, in circumstances where the relevant provisions of the church statutes… contemplate that priests appointed to St Andrews might not necessarily be housed in the presbytery at Lidcombe…. The proposed amendments to clause 4 also involve use of the term 'Priest', which is to be a defined term. After discussion with counsel, it was agreed that it would be desirable to change the proposed definition to make it clear that a Priest had to be duly appointed to St Andrews by the Eparch.

Therefore, an administrative scheme was ordered by the court.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/35.html

Implications of this case

An administrative scheme is not the same thing as a cy-près scheme, which is ordered when it is impossible or impracticable to carry out the objects of a trust in the manner the settlor stipulated. The circumstances in which the Court may settle an administrative scheme in respect of a charitable trust include a case where the stipulated means for the achievement or pursuit of the charitable objects are not sufficient for the practical application of the trust property for those purposes and it is necessary to provide further and more detailed machinery. Thus, an administrative scheme supplements and/or clarifies any provisions the settlor has stipulated concerning the manner in which the objects of the trust are to be pursued when practical circumstances show that the settlor's stipulation of the means is inadequate or impractical.

2.8.7 EQUITY TRUSTEES LTD V JEWISH CARE (VICTORIA) INC [2015] VSC 73 (SUPREME COURT OF VICTORIA, HARGRAVE J, 10 MARCH 2015)

Testamentary trust – application of funds – whether within original purpose of trust

This case was one which commonly arises where a charitable bequest establishes a trust in favour of a particular charity, which then changes its name or ceases to exist. In this case, the trust was established under the will of Albert Splatt who died in 1975. The plaintiff is the trustee of the trust.

The original beneficiary of the trust was the Melbourne Hebrew Memorial Hospital at Ashwood in Melbourne, which was established in 1979 under the auspices of Jewish Care (Victoria) Inc. In 1991, the name of the hospital was changed, in line with legislative requirements, to the Melbourne Hebrew Memorial Nursing Home, which reflected its actual purpose. Eventually, a different facility was established in 2009 at Caulfield in Melbourne with funds mostly provided by the Smorgon family. As this facility was a hospital, the plaintiff trustee applied the income from the trust to it.

However, the trustee became concerned that the Caulfield hospital was not within the purpose of the trust because it was known as Gary Smorgon House (incorporating the Melbourne Hebrew Memorial Hospital). Jewish Care (Victoria) Inc contended that the facility was known by these two names interchangeably. Considering the evidence, His Honour did not agree. He found that the Caulfield facility was known, listed in directories, and named on its website, its signage and otherwise (including on government listings) as Gary Smorgon House. To apply the income of the trust to this facility would become a breach of trust.

Therefore, His Honour held that the trust funds should not be applied to Gary Smorgon House, but rather be applied cy-près to other purposes of a similar nature. The cy-près hearing, at which the Attorney-General of Victoria has asked to be heard, was yet to occur at the date of writing.

The case may be viewed at: http://www.austlii.edu.au/au/cases/vic/VSC/2015/73.html

2.8.8 BISHOP IRINEJ DOBRIJEVIC V FREE SERBIAN ORTHODOX CHURCH, DIOCESE FOR AUSTRALIA & NEW ZEALAND PROPERTY TRUST [2015] NSWSC 637 (SUPREME COURT OF NEW SOUTH WALES, WHITE J, 29 MAY 2015)

Church property held on trust – discord within church – original trust purpose – alteration of trust purpose

The underlying dispute in this case was a property dispute, with two religious factions pursuing very valuable property for their own use. In 1963, the Serbian Orthodox Church split into two groups, one known as the Free Serbian Orthodox Church and the other as the Serbian Orthodox Church. This split occurred in the Serbian Orthodox Church because of perceived concerns amongst expatriate Serbians about the influence which the then communist government in Yugoslavia might have had upon the affairs of the church.

The Free Serbian Orthodox Church Diocese of the United States and Canada was established in 1963. On 31 October 1964 the Free Serbian Orthodox Church Diocese for Australia and New Zealand was established at an assembly in Melbourne. There were 14 congregations which affiliated with the Free Serbian Orthodox Church Diocese for Australia and New Zealand. That community, however, was slow to accept newer arrivals from the now former Yugoslavia into its membership. It seems that from about 1964 there were two parallel, but separate and distinct, dioceses in Australia. One was known as the Serbian Orthodox Church Diocese of Australia and New Zealand under the jurisdiction of the Serbian Orthodox Church in the former Yugoslavia. The other was the Free Serbian Orthodox Church Diocese of Australia and New Zealand which was affiliated with the Free Serbian Orthodox Diocese for the United States of America and Canada.

Discussions aimed at removing the divisions between the congregations began in 1991, at about the time that the former Yugoslavia began to disintegrate politically. In April 1991 a document was prepared setting out recommendations for reconciliation between the Serbian Orthodox Patriarchy and the Serbian Orthodox New Gracanica Archdiocese (which included the Free Serbian Orthodox Church Diocese for Australia and New Zealand). However, there are still deep divisions evident within the church in Australia.

The first plaintiff in this case, Bishop Irinej (Dobrijevic), is a bishop of the Serbian Orthodox Church and head of the Metropolitanate of Australia and New Zealand of that church (the SOC-ANZ Metropolitanate). The second plaintiff is a company that was established in 2008 to hold newly acquired property for the Serbian Orthodox Church in Australia. The first defendant (the Property Trust Company) is the registered proprietor of the land on which the monastery of St Sava stands. It was common ground that the Property Trust Company holds the monastery on a charitable trust. The second to fifth defendants are current directors of the Property Trust Company. The Attorney-General was the sixth defendant in the case. The Attorney-General submitted that the property was held on trust for the purpose of propagating the Holy Scripture and Holy Tradition according to the teaching of the Holy Orthodox Church through the Free Serbian Orthodox Church ANZ Diocese.

After an exhaustive survey of the relevant underlying history of the split and attempted reconciliation within the Church, His Honour held that (at [82]):

> In my view, the property was acquired by the Free ANZ Diocese and is now held by the Property Trust Company upon a trust for the purpose of building and conducting a monastery, a monastery church, and related facilities for the purposes of the Free ANZ Diocese. It was not acquired for the purposes of the Free ANZ Diocese generally, but for the more specific purpose of building the monastery

> buildings, including the church, conducting a monastery on the site and conducting church services in the church that was to be built. The monastery as a whole, including the church, was to be used for the purposes of the Free ANZ Diocese.

This meant that the monastery property, and in particular the church constructed on it, could be used only in a way consistent with the fundamental or essential doctrines and principles of the Free ANZ Diocese.

His Honour did not accept that there had been full reconciliation between the two factions. The Free ANZ church had remained separate from the Orthodox Church itself (at [321]–[322]):

> The first to fifth defendants submitted that the FSOC-ANZ Diocese was a separate church with its own doctrines, ordinances and tribunals. It was a separate and distinct Orthodox Church in Australia. They submitted that separation from the Serbian Orthodox Church was a core tenet of the Free Serbian Orthodox Diocese and went to the core of the trust. They submitted that the 'theology of communion' in the sense in which that phrase is understood in the Eastern Orthodox Church did not apply to the Free Serbian Orthodox Church Diocese at the time of its establishment because it was then not part of the Eastern Orthodox Church, but was an independent Orthodox Church. At the time of its establishment it was not in communion with any of the other 14 (or 15) autocephalous churches. Prior to the reconciliation, it was recognised (for a time) by only one of those churches, namely the Patriarchate of Alexandria. It had an independent status and was an autonomous church. The reconciliation and concelebration of the liturgy brought it into spiritual communion with the Serbian Orthodox Church, but spiritual communion did not connote a surrender of its status as an independent and autonomous church. I do not accept the plaintiffs' submission that the Free ANZ Diocese had become part of the Serbian Orthodox Church whether or not the resolution to adopt a new constitution to establish the SOC-ANZ Metropolitanate on 4 September 2010 was validly passed.

The Free ANZ Diocese was an unincorporated association. Its 1976 constitution contained no provision dealing with a proposed dissolution or amalgamation of the unincorporated association that is (or was) the Free ANZ Diocese. Had the Free ANZ Diocese amalgamated with the SOC-ANZ? In His Honour's view it had not (at [344]):

> …the existing trust of the monastery in favour of the Free ANZ Diocese will enure in favour of the new united Metropolitanate only if the basis on which the members of the Free ANZ Diocese were associated contained a power to enter into a union with the Serbian Orthodox Church. At least without prior amendment to its constitution, I do not consider that there was such a power, except by unanimous assent of all its members.

There was no evidence of unanimous assent when the relevant resolution was purportedly taken.

Was the monastery held on trust for the purposes of the SOC-ANZ?

The monastery was not presently held on trust for the purposes of the SOC-ANZ Metropolitanate. His Honour concluded that (at 521):

1. The monastery was and is held by the Property Trust Company (the first defendant) upon a trust for the purposes of building and conducting a monastery, a monastery church and related facilities for the purposes of the Free ANZ Diocese as constituted from time to time;
2. There had been no merger of the Free ANZ church with the SOC-ANZ Diocese, despite considerable attempts since 1991;
3. Nevertheless, Bishop Irinej was entitled to exercise the authority of Bishop of the Free ANZ Diocese as provided for in the 1976 constitution. This included authority to supervise the monastery;
4. Thus, the rejection by the Property Trust Company of Bishop Irinej's authority to supervise the monastery, the exclusion of Bishop Irinej and of persons authorised by him to attend the monastery

and to conduct services in the monastery church, and the allowing of Father Saracevic (a not properly authorised priest) to conduct services in the monastery church between 2008 and 2010, were breaches of the trust on which the monastery was held;

5. Those breaches of trust should not be excused.

Had the Free ANZ Diocese voted itself out of existence?

Having regard to the matters put in issue, His Honour said that it could not be concluded that the Free ANZ Diocese had ceased to exist (at 521). The resolution of the Church National Assembly of the Free ANZ Diocese on 4 September 2010 to adopt a new constitution whereby the Free ANZ Diocese purportedly ceased to exist as a separate association was invalid on the grounds that:

- the constitution of the Free ANZ Diocese did not permit its dissolution or its amalgamation with the SOC-ANZ Diocese into the ANZ Metropolitanate; and
- four church-school congregations were not invited to and did not attend the meetings of 3 and 4 September 2010 by duly appointed delegates, and it is not open to the plaintiffs, or to the Attorney-General, to contend that those church-school congregations were not entitled to attend because they had already left the Free ANZ Diocese.

Had the trust purpose changed?

Despite, the finding that the Free ANZ Diocese still existed, His Honour held that the original trust purpose has ceased to provide a suitable and effective method of using the trust property having regard to the spirit of the trust. Thus, the trust purpose was ordered to be altered pursuant to section 9 of the *Charitable Trusts Act 1993* (NSW) to allow for the monastery to be used for the purposes of the SOC-ANZ Metropolitanate. It was ordered that the property should be transferred to the SOC-ANZ Metropolitanate, but also be available for use by any members of the Free ANZ unincorporated association where this could be done without conflict.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/637.html

Implications of this case

His Honour had no difficulty with the argument that, as an unincorporated association, the affairs of the Free ANZ Diocese were not justiciable (at [347]–[348]):

> The plaintiffs' initial response was to say that these matters were not justiciable because the court should not concern itself with alleged irregularities in the internal management of the association…. I do not agree. As Burbury CJ explained in *Green v Page* the basis upon which a court will refuse to interfere at the instance of individual members of an unincorporated association who complain about irregularities in procedure laid down by its rules for convening and conducting meetings is the application of the principle in *Foss v Harbottle* [1843] EngR 478;(1843) 2 Hare 461;67 ER 189. The rationale of that principle as explained by Romer J in *Cotter v National Union of Seamen* [1929] 2 Ch 58 (at 68) (in the passage quoted in *Green v Page* at 77) is that:
>
> > In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

2.8.9 BISHOP IRINEJ DOBRIJEVIC & ANOR V FREE SERBIAN ORTHODOX CHURCH, DIOCESE FOR AUSTRALIA & NEW ZEALAND PROPERTY TRUST & ORS (NO. 2) [2015] NSWSC 1976 (SUPREME COURT OF NEW SOUTH WALES, WHITE J, 24 DECEMBER 2015)

Stay of orders pending appeal – new evidence – trust property subject to dispute

This case follows on from the court's findings in *Bishop Irinej Dobrijevic & Anor v Free Serbian Orthodox Church, Diocese for Australia & New Zealand Property Trust & Ors* [2015] NSWSC 637 (the May 2015 decision). In this hearing, the court reopened its judgement because of the introduction of new evidence after the May 2015 decision was made. Amended orders were made and then stayed pending appeal.

This was a property dispute, with two religious factions pursuing valuable property for their own use. In 1963, the Serbian Orthodox Church worldwide split into two groups, one known as the Free Serbian Orthodox Church and the other as the Serbian Orthodox Church. This affected the church's structure in Australia, with the Australian congregations also splitting into two groups. One was known as the Serbian Orthodox Church Diocese of Australia and New Zealand under the jurisdiction of the Serbian Orthodox Church in the (then) Yugoslavia. The other was the Free Serbian Orthodox Church Diocese of Australia and New Zealand which was affiliated with the Free Serbian Orthodox Diocese for the United States of America and Canada. The latter group opposed the communist regime in the then Yugoslavia.

Attempts at reconciliation between the Australian groups began in 1991, when the regime in the former Yugoslavia began to disintegrate. In April 1991 a document was prepared setting out recommendations for reconciliation between the Serbian Orthodox Patriarchy and the Serbian Orthodox New Gracanica Archdiocese (which included the Free Serbian Orthodox Church Diocese for Australia and New Zealand). However, there were (and are) still deep divisions between the parties, and ultimately no resolution was reached.

The first plaintiff in this case, Bishop Irinej (Dobrijevic), is a bishop of the Serbian Orthodox Church and head of the Metropolitanate of Australia and New Zealand of that church (the SOC-ANZ Metropolitanate). The second plaintiff is a company that was established in 2008 to hold newly acquired property for the Serbian Orthodox Church in Australia. The first defendant (the Property Trust Company) is the registered proprietor of land on which the monastery of St Sava stands. It was common ground that the Property Trust Company holds the monastery on a charitable trust. The second to fifth defendants are current directors of the Property Trust Company. The Attorney-General was the sixth defendant in the case.

His Honour originally held, inter alia, that (at [521] of the May 2015 decision):

6. The monastery was and is held by the Property Trust Company (the first defendant) upon a trust for the purposes of building and conducting a monastery, a monastery church and related facilities for the purposes of the Free ANZ Diocese as constituted from time to time;

7. There had been no merger of the Free ANZ church (an unincorporated association) with the SOC-ANZ Diocese, despite considerable attempts since 1991.

Despite the finding that the Free ANZ Diocese still existed as a separate unincorporated group, His Honour held that the original trust purpose had ceased to provide a suitable and effective method of using the trust property having regard to the spirit of the trust. Thus, the trust purpose was ordered to be altered pursuant to section 9 of the *Charitable Trusts Act 1993* (NSW) to allow for the monastery to be used for the purposes of the SOC-ANZ Metropolitanate. It was ordered that the property should be transferred to the SOC-ANZ Metropolitanate, but also be available for use by any members of the Free ANZ unincorporated association where this could be done without conflict.

Subsequently, further issues arose. These were:

1. His Honour ordered that a representative order be made so that the defendants, as an unincorporated association, were bound by the decision (at [3]):

    > A representative order should have been sought by the plaintiffs to ensure that the members of the Free ANZ Diocese were bound by the orders the plaintiffs sought. The litigation was run by the first to fifth defendants on behalf of the members of the Free ANZ Diocese.

2. His Honour had also ordered the preparation of a scheme in the May 2015 decision. The plaintiffs and the Attorney-General jointly proposed one scheme and the defendants another. The hearing on the scheme was scheduled for 1 September 2015. The defendants' scheme was that the monastery should be shared for worship even though the two congregations were not in communion with each other. This was vehemently opposed by the plaintiffs. As Hs Honour explained it (at [6]):

    > [Bishop Irinej] deposed, amongst other things, that use of any part of the monastery by a cleric who was not in communion with the Serbian Orthodox Church would be a desecration of the monastery and each time that occurred he, or a delegate priest in his name, would need to conduct a service to re-consecrate or re-bless a building or land that had been used by clergy of the Free ANZ Diocese who were not in communion with the Serbian Orthodox Church. This would mean, for example, that the Free ANZ Diocese could not use the grounds of the monastery for a children's camp which was attended by a priest of the Free ANZ Diocese who opened the proceedings with a prayer, without the monastery having to be re-blessed. Bishop Irinej said that a burial service provided by clergy of the Free ANZ Diocese at the monastery would desecrate the cemetery as a whole. He said that if an individual or an individual's family required a burial service by clergy of the Free ANZ Diocese, then the funeral service and the burial service would have to be performed at a Free ANZ Diocese church, rather than at the monastery cemetery itself, and the casket would need to be transported to the cemetery for burial.

3. Bishop Irinej also introduced new evidence which cast doubt on whether the SOC-ANZ Metropolitanate would use the monastery within the spirit of the trust. This evidence involved making the monastery a women's monastery, a matter which had not been raised at the May 2015 hearing, and that the monastery should not be used for secular events.

The hearing on a scheme had to be adjourned, and the judgement reopened. His Honour considered whether his conclusions would be different in light of the new evidence. He held that they would not be different, and ordered that the scheme proposed by the plaintiffs and the Attorney-General be adopted subject to several changes which he outlined. His order that the property should be transferred to the SOC-ANZ Metropolitanate, but also be available for use by any members of the Free ANZ unincorporated association where this could be done without conflict, remained. This did not encompass the use of the monastery for Free ANZ services, but allowed Free ANZ members to enter the monastery for private prayer, attend the monastery for public events, and use the cemetery. His Honour did not agree with the desecration argument (which was not pressed by the plaintiffs), nor with the proposition that the presence of Free ANZ clergy would cause confusion. However, the latter could not conduct services in the monastery.

At [109], His Honour made, inter alia, the following declarations and orders:

> 1. He declared that the property in question (the monastery) was held by the first defendant upon a charitable trust for the purpose of conducting a monastery, a monastery church and related facilities for the purposes of the unincorporated association known as the Free Serbian Orthodox Church – Diocese of Australia and New Zealand (the Free ANZ Diocese).

2. He declared that the trust purpose on which the first defendant held the monastery had ceased to provide a suitable and effective method of using the trust property having regard to the spirit of the trust.
3. He ordered that the first defendant be removed as trustee of the trust and that the second plaintiff be appointed as trustee in its place.
4. He ordered that the monastery vest in the second plaintiff.
5. He ordered that the first to fifth defendants do all that is required on their part to transfer title to the monastery to the second plaintiff.
6. He ordered, pursuant to section 9 of the *Charitable Trusts Act 1993* (NSW), that the terms of the trust on which the monastery is held by the first defendant, and is to be held by the second plaintiff, be altered to provide that the trustee hold and use the monastery for charitable purposes of the Metropolitanate of Australia and New Zealand of the Serbian Orthodox Church provided that:
    a) to do so is not inconsistent with the said purpose; and
    b) to do so is practicable having regard to the need to avoid conflict.

The monastery had to be available for use not only for the purposes of the Metropolitanate of Australia and New Zealand of the Serbian Orthodox Church, but also for use by those individuals and organisations that comprise or form part of the Free ANZ Diocese.
7. He ordered that a scheme be established for the administration of the trust as set out in the annexure 'A' to the orders given.

Orders 3–7 (and three others) were stayed pending an appeal against them.

This decision may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/1976.html

The decision of 29 May 2015 may be viewed at:
http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/637.html

Implications of this case

His Honour ordered a stay against his own orders pending an appeal by the defendants. He accepted the defendants' contention that a stay was appropriate. There were at least arguable grounds for appeal, and the balance of convenience argument for a stay was 'strong' (at [95]):

> I accept that the foreshadowed appeal raises serious issues for the determination of the Court of Appeal. As Mr Blake SC submitted, the question of the proper approach to s 9 of the *Charitable Trusts Act* has not yet been considered by the Court of Appeal. Mr Blake submitted that this is the first case where orders have been made under s 9 of the *Charitable Trusts Act* in New South Wales to apply the property of an existing and continuing religious body to benefit a different religious body. Previous applications under s 9 were not truly *inter partes* hostile litigation.

2.8.10 **KING V THE CHILTERN DOG RESCUE** [2015] EWCA CIV 581 (COURT OF APPEAL. (CIVIL DIVISION), JACKSON, PATTEN, SALES LJJ, 9 JUNE 2015)

Donatio mortis causa – whether person contemplated impending death when handing over title deeds

This was an appeal from *King v Dubrey* [2014] EWHC 2083 (Ch). In that English case, seven charities were the residuary beneficiaries of the will of the deceased, June Fairbrother, who died in April 2011. The claimant in the case was her nephew. The nephew claimed that the deceased had made a *donatio mortis causa* (a gift in contemplation of death) of her property (a home valued at £350,000 in Hertfordshire) to him between four and six months before her death by handing him the deeds of the property, and saying words to the effect: 'This will be yours when I go'.

When made, a *donatio mortis causa* is a present gift which remains conditional until the donor dies. It can be revoked until that time. Until death, the gift is inchoate, and gives rise to a constructive trust. If the donor effectively transfers title to the donee, the gift will become unconditional on the donor's death. This had been the apparent situation in this case, since the deceased handed over the deeds to her house.

The defendant charities (Blue Cross, the Peoples' Dispensary for Sick Animals, the International Fund for Animal Welfare, the Donkey Sanctuary, World Animal Protection, Redwings and the Chilterns Dog Rescue Society) contended that the deceased had not had the mental capacity to make such a gift at the time she was alleged to have made it. However, His Honour at first instance allowed the claim, saying that the evidence did not come 'anywhere near' justifying the conclusion that the deceased had not, when she acted in a manner relied on by her nephew, had the mental capacity to make the gift. The facts were such that there was a valid donatio mortis causa made by the deceased at a time when she was increasingly concerned about her impending death. Thus, there had been a valid gift in contemplation of death. This being so, the provisions of her will did not apply, and the charities were not beneficiaries under her will.

The charities in the case were particularly concerned about the outcome, and appealed to the Court of appeal. The appeal was allowed. Jackson LJ (with whom Patten LJ and Sales LJ agreed), reviewed the available authorities. The legal doctrine of donatio mortis causa (DMC) has its origins in Roman law and is little used in English law today. Jackson LJ referred to DMC as 'an anomaly' (at [51]), and a principle of Roman Law which (at [37]):

> Even Roman jurists found…perplexing, since it had some of the characteristics of a legacy and some of the characteristics of a gift *inter vivos*. In those circumstances it was a legal principle which, one might have thought, was unlikely to survive the fall of the Roman Empire.

In that light, His Lordship found that (at [53]):

> Indeed I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all. The doctrine obviously served a useful purpose in the social conditions prevailing under the later Roman Empire. But it serves little useful purpose today, save possibly as a means of validating death bed gifts. Even then considerable caution is required.

The 'considerable caution' referred to arises from the fact that gifts made under DMC can be easily open to abuse since they are subject to neither the formalities of section 9 of the Wills Act 1837 (requiring written wills, with signatures and witnesses) nor of section 52 of the Law of Property Act 1925 (which requires some form of writing for the transfer of property). They are also immune from the Statute of Frauds 1677.

Such gifts needed to be kept within 'proper bounds' (at [54]). Jackson LJ listed the proper bounds at [50]:

> i) [donor] D contemplates his impending death;
> ii) D makes a gift which will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift;
> iii) D delivers dominion over the subject matter of the gift to R[ecipient].

He concluded that (at [60]):

> The doctrine of DMC is only applicable if the three requirements set out above are met. Because the doctrine is open to abuse, courts should require strict proof of compliance with those requirements. The courts should not permit any further expansion of the doctrine.

Had there been a valid DMC in this case? The Court of Appeal concluded that:

1. At the time of the relevant conversation with her nephew, the deceased was not contemplating her **impending** death. She was aged 81, but not otherwise in bad health.
2. Her alleged words to her nephew were more a testamentary statement than one which constituted a revocable gift.
3. The deceased handed the title deeds of her house to her nephew. This was 'delivering dominion' on the authority of past cases, so the third requirement was met.

The Court of Appeal said that the failure on the first requirement was enough to decide the case. Although the deceased had had the capacity to make a valid DMC, she had not done so, and there was no gift made to her nephew. The will therefore stood, and the charities succeeded in obtaining their shares of the residuary under the will.

The case may be viewed at: http://www.bailii.org/ew/cases/EWCA/Civ/2015/581.html

Implications of this case

Although the claimant nephew in this case did not succeed in his claim for a donatio mortis causa on appeal, he was awarded £75,000 in provision under the Inheritance (Provision for Family and Dependants) Act 1975 by the judge at first instance in the alternative, and this claim was not disturbed on appeal. This was a claim under what is referred to as a family provision in Australia, where a valid claimant makes application for provision under a will which did not provide, or did not provide adequately, for him/her.

2.8.11 **KRNJULAC V LINCU** [2015] NSWCA 367 (COURT OF APPEAL OF NEW SOUTH WALES, BATHURST CJ, LEEMING JA, EMMETT AJA, 2 DECEMBER 2015)

Land impressed with charitable trust for religious purposes – trustee acquiring trust property by fraud or trickery

This was an appeal from *Lincu v Krnjulac* [2014] NSWSC 532. Chief Justice Bathurst (with whom the other judges agreed) held that part of the original judgement findings against two of the appellants should be set aside and the appeal allowed.

The case at first instance

This case at first instance concerned the affairs of The Apostolic Christian Church Nazarene – Sydney. The plaintiffs had sought to recover land for the charitable purposes of a small congregation of Christians. The land was the site of a church building, which had been purchased in 1978 in the names of five original trustees (including the two original plaintiffs). In 2004, it was transferred in 2004 into the names of one of the original trustees (the first original defendant), and his two adult sons (the second and third original defendants, and the appellants in this appeal), for their own purposes.

The Apostolic Christian Church Nazarene – Sydney (the Church) is an unincorporated voluntary association in New South Wales which apparently had always operated without a formal written constitution. However, there was a common understanding that business undertaken by members of the association in pursuit of their common purpose was ordinarily decided by a process which, in a secular context, would be recognised as a form of democracy, bound by conventions grounded in custom, and informed by shared beliefs. Thus, the Church was of a congregational nature, rather than hierarchical.

The trust deed upon which the plaintiffs founded their claim could not be located. However, His Honour accepted secondary evidence of its existence because it was used as part of the documentation for a mortgage from the then Bank of New South Wales in 1978. The mortgage was discharged in 1982, having been paid for by gifts and donations from members of the Church.

The first defendant was one of five original trustees. Two of these original trustees had died in the interim, and one (who was the second plaintiff in the case below) had moved to a like-minded congregation in Melbourne. In May 2004, after the deaths of the two trustees, the first defendant procured (by trickery or fraud) the transfer of the property to himself and his two adult sons as joint tenants. In his banking arrangements from that date, he claimed that the property was his own asset, and mortgaged the property. He had also paid the expenses related to the land and building after that time. There was evidence that he was now having financial difficulties. If that were so, it was possible that the mortgagee would take possession of the land and building, so that its purpose as a church would be lost.

The defendants contended that the fact that the government of the Church took a democratic, congregational form meant that the terms of a trust upon which property was held for the Church could be varied, or the identity of the trustees could be changed, by a popular vote of the members of the Church in its guise as a voluntary association. However, His Honour held that unless the terms of the trust were proven to include a power of amendment, or a power to appoint and remove trustees, it was not open to the members of the Church to change the trust for the charitable, religious purposes of the Church. The land, having been acquired in 1978, remained impressed with a trust for the charitable, religious purposes of the Church.

The land was purchased, and the mortgage paid off, for the purpose of public worship according to the system of belief of this particular Christian church community. Even though membership of the unincorporated voluntary association connected with that community might have had special meaning, and the nature of an attendant's participation in a worship service might have varied according to a variety of considerations, including membership of the association, services had always been open to the public.

His Honour concluded (at [18]–[19] of the judgement below):

> I am satisfied that the land was purchased on trust for the advancement of religion, not for the benefit of particular individuals, and that its purchase was directed to the benefit of the public. In short, I am satisfied that the land was purchased on trust for, and dedicated to, charitable purposes.... A trust for the advancement of religion falls squarely within the meaning of the word 'charity' under the general law: *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] UKHL 1....

There was nothing in the facts that changed this outcome. In particular, the fact that the congregation was very small did not affect its charitable character.

His Honour held that the three defendants were obliged in equity to restore to the Church the property they had taken from it, and to repay the monies fraudulently raised by mortgage.

The appeal decision

The two adult sons of the original defendant appealed the findings against them in respect of making up the shortfall in the mortgage owing. The sons did not appeal the order to transfer the land to the respondents. The appeal was allowed because of technicalities in the way the case was handled. The appeal court held that the primary judge was not entitled to decide the case against the two sons on the basis that he did. Therefore, some of the orders made by him against the appellants had to be set aside (at [18], [24]).

This appeal decision may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWCA/2015/367.html

The case at first instance may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2014/532.html

2.8.12 ESTATE OF GEORGE AENEAS MCDONALD; HOWARD V THE SYDNEY CHILDREN'S HOSPITAL NETWORK (RANDWICK & WESTMEAD) AND ORS [2015] NSWSC 1610 (SUPREME COURT OF NEW SOUTH WALES, WHITE J, 30 OCTOBER 2015)

Validity of will – suspicious circumstances surrounding execution – charitable beneficiaries in prior wills not included in last will – whether testator considered implications

This case concerned the will of George Aeneas McDonald (the testator) who died on 14 November 2013, aged 93. The testator, who was unmarried and had no children, made early wills in 1975 and 1990 with solicitors who looked after his affairs for a total of 60 years. An updated will was made in 1999, and again in 2011 with the same solicitors. All these wills left most of the testator's estate (apart from some specific legacies of property) to charity, especially to the New Children's Hospital at Westmead, of which the testator was a long-time supporter.

However, in June 2013, without the knowledge of his long-time solicitor, a new will was prepared by the testator's neighbour leaving the whole of the testator's estate (worth about $2 million) to the neighbour's wife. The legacies to charity were reduced to a non-binding request for the wife to give $20,000 to the defendant Children's Hospital, and $5000 to the testator's church. The will was prepared using a will kit, and was witnessed by the neighbour's son and the manager of his farm property. The terms of the 2013 will (omitting witnessing and signatures) were:

> *This is the last Will and Testament of myself, George A McDonald of* [xxx] *Greenwich in the State of NSW*
> *I revoke all Wills and other Documents of Testamentary intent previously made by me; this is my last Will and Testament.*
> *I appoint David Howard of* [yyy] *Greenwich to be the Executor and Trustee of my Will*
> *I give the whole of my Estate to Lisa Howard of* [yyy] *Greenwich NSW after my just debts, funeral and Testamentary expenses are paid. I would request that Lisa donate $5000 to the John Taylor Memorial Presbyterian Church Greenwich and $20000 to the Childrens Hospital Westmead.*

It was common ground in this case that the testator had testamentary capacity. It was also common ground that there were suspicious circumstances attending the execution of the claimed will made on 7 June 2013.

Where a capable testator makes a will that is duly executed and attested there is a presumption that the testator knows and approves of the contents of the will, but that presumption does not arise where the making of the will is attended by suspicious circumstances. Therefore, in a case such as this one, the onus is upon the person propounding the will to prove not only its due execution but that the testator knew and approved of its contents.

His Honour was clear that the change of intention in the new will was not in itself suspicious. The suspicion arose only when considering the issue of whether the testator had properly weighed the claims of the charities involved, on his testamentary bounty (at [42]):

> There is no evidence that he weighed the fact that under his existing will he had left the Children's Hospital half of the residue of his estate. There is no evidence that he considered afresh whether World Vision Australia had any claim on his testamentary bounty or whether he considered that the Salvation Army should be given his household effects as had been a consistent provision in three previous testamentary dispositions. The possibility that [the testator] did not consider or weigh those claims is enhanced by the fact that he was not given a copy of the will to read and consider before he signed it. Nor was he provided with one of the two documents that was signed, or a photocopy of either of them, which is itself a suspicious circumstance.

Whatever the possible suspicious circumstances might have been, they were not enough to overturn the 2013 will as such. It was entirely possible that the testator had changed his mind about the disposition of his estate. However, His Honour was of the view that the testator had not properly considered the claims of the charities (at [65]):

> In the present case, I am satisfied that [the testator] understood that subject to gifts to be made to the two charities, all of his estate would be given to Mrs Howard. I am not satisfied that in deciding that he should leave the bulk of his estate to Mrs Howard he considered his prior wills, or that he weighed the claims of the Children's Hospital and World Vision, for which he had previously made generous provision, or the Salvation Army to whom he had previously given his household effects. But I do not think it necessary that he should have done so in order to have made a valid will.

Thus, the will was ruled valid. However, the non-binding clause relating to the possible gifts to charity was rectified under section 27(1) of the *Succession Act 2006* (NSW) to make the gifts specific legacies to the two charities mentioned. All costs were ordered to be paid from the estate.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/1610.html

Implications of this case

For the will to be admitted to probate, it is not enough for the plaintiff to show that the deceased had testamentary capacity and the will was duly executed. The court must also be satisfied that the testator 'knew and approved' of the contents of the will. This means that the court must be satisfied that the will expresses the real intention of the testator. In this case, the two charities which remained in the newest version of the deceased's will were successful in ensuring that the gifts that the deceased had intended to be theirs were paid. Without the Court's order, the testator's request that his beneficiary donate sums to the charities named was completely unenforceable.

2.8.13 ESTATE OF LESLIE WALTER MORGAN; THE SALVATION ARMY (NSW) PROPERTY TRUST V KENNETH MERVYN PATTESON [2015] NSWSC 194 (SUPREME COURT OF NEW SOUTH WALES, YOUNG AJA, 6 MARCH 2015)

Gift in will – specific charitable intention – gift fails for impracticability

This case dealt with the construction of the will of Leslie Walter Morgan, who died on 12 July 2013. The will was dated 24 August 1999. After making specific legacies, the testator provided in clause 7 of his will:

> 7. I GIVE DEVISE AND BEQUEATH the property known as ... Ryde to the Salvation Army PROVIDED THAT the said Salvation Army shall demolish the house standing on the property and in its place build a church.

Clause 8 gave the rest and residue of the estate to the Salvation Army.

There were two issues with the will which illustrate the problems which often arise in this sort of case:

1. An entity known as the 'Salvation Army' does not exist.
2. The condition attached to the gift was unable to be carried out. The land was unsuitable for a church. The cost of demolishing the house and building a church was not a viable option for the Salvation Army which already had a place of worship in the area. Moreover, the Salvation Army just did not wish to demolish the house or build a church on the land.

Could the will be rectified in some way? His Honour held that it was unnecessary to do so in relation to the recipient of the gift in clause 7. He took the view that there was no need to substitute the words 'the Salvation Army (NSW) Property Trust' (the correct entity for the gift) for the words 'Salvation Army', since it would be readily understood that this was the intended recipient.

On the second issue, His Honour said that there were several possibilities:

1. The simplest approach was to say that there was no way that the proviso to the gift in clause 7 could take effect. Therefore, the gift failed and fell into the residue.
2. Alternatively, there was a charitable gift to the Salvation Army and that the words 'PROVIDED THAT' were not a condition at all, but merely precatory words, which indicated the testator's desire as to what the Salvation Army should do with the property. If that was the proper construction of the will then the Salvation Army should take the property and was not bound to comply with the testator's wishes. His Honour felt that this was 'an unlikely meaning of the clause' (at [7]).
3. Or, there was a general charitable intention and, since the proviso to the gift had become impracticable, there should be a cy-pres scheme, almost certainly in favour of the Salvation Army, to carry out a charitable purpose.
4. Or, the gift was a specific charitable gift, which failed for impracticability.

The testator in this case was a lifelong member of the Salvation Army, and had raised a large sum of money for the Salvation Army despite being physically disabled. He was devoted to the cause of the Salvation Army. In the circumstances, His Honour held that there was a charitable gift for specific charitable purposes. Therefore, the gift in clause 7 failed and the Salvation Army (NSW) Property Trust took the property absolutely, as residuary beneficiary.

The case may be viewed at: http://www.austlii.edu.au/au/cases/nsw/NSWSC/2015/194.html

2.8.14 THE PUBLIC TRUSTEE AS EXECUTOR OF THE WILL OF CECILY PATRICIA LINDSAY (DEC'D) V AUSTRALIAN CONSERVATION FOUNDATION INC [2015] WASC 29 (SUPREME COURT OF WESTERN AUSTRALIA, MCKECHNIE J, 2 FEBRUARY 2015)

Will – estate including gifts to organisations no longer existing – no residue clause – presumption against intestacy and to give effect to intentions

This was a case illustrating the need to keep wills up to date. The deceased was a supporter of conservation causes, and made her will in 1985. When she died 23 years later, some of the organisations, and many of the investments and named bank accounts she mentioned in her will had ceased to exist. Her will included the following bequests of financial assets to charities:

- Australian Conservation Foundation, 672B Glenferrie Road, Hawthorn Victoria, 3122 – seven thirty-sixths (7/36) share,
- Western Australian Campaign to Save Native Forests, 794 Hay Street, Perth, W.A. – five thirtysixths (5/36) share,
- Western Australian Conservation Council, 794 Hay Street, Perth, WA – five thirtysixths (5/36) share,
- Western Australian Environment Centre, 794 Hay Street, Perth, W.A. – five thirtysixths (5/36) share,
- Western Australian Naturalists' Club, P.O. Box 156, Nedlands, W.A. – five thirtysixths (5/36) share,
- Tuberculosis & Chest Association of W.A. Inc., 75 Carrington Street, Nedlands, W.A. – one thirtysixth (1/36) share,

Other bequests were to named persons or dealt with the deceased's house and car. There was no residue clause in the will. Thus, if any of the named charitable gifts failed, that part of the estate would fall into intestacy.

The principle of construction used to interpret wills is to construe the will in order to give effect to the deceased's apparent intentions. There is a definite presumption against intestacy. Therefore, the court held that the investments and bank balances were generic in nature, and could be used as gifts even though the specific investments and bank accounts may have been superseded. The intention of the deceased was to give her money to named beneficiaries (mostly charities) and this should be upheld.

As to the charities which no longer operated as such, the court held that the gifts were for charitable purposes, whether or not the organisation still existed. The bequests were ordered to be dealt with by an appropriate scheme.

The case may be viewed at: http://www.austlii.edu.au/au/cases/wa/WASC/2015/29.html

2.8.15 SECRETARY FOR JUSTICE [HONG KONG] V CHINACHEM CHARITABLE FOUNDATION (COURT OF FINAL APPEAL, HONG KONG SPECIAL ADMINISTRATIVE REGION, MA CJ, RIBEIRO PJ, FOK PJ, CHAN PJ, LORD WALKER OF GESTINGTHORPE NPJ, 18 MAY 2015)

Charitable gifts in will – uncertainty as to terms – gifts to: charitable foundation; funding for 'Chinese prize of worldwide significance'; support for family members

This was the final appeal in the case of a foundation set up in Hong Kong by the owner of the Chinachem group of companies, Nina Wang (referred to as Nina in the judgement). The judgement was given by Lord Walker of Gestingthorpe with whom the other judges of appeal agreed. Nina made a home-made will in the Chinese language which made the Chinachem Foundation Limited (the Foundation, a company limited by guarantee) the principal beneficiary of her HK$82 billion fortune. However, family contention, lost wills issues and legal technicalities arose. In this final part of the litigation, the Secretary for Justice was involved as the protector of charities in Hong Kong.

The contentious home-made will was made by hand in 2002. After litigation, it was declared to be the valid will of the deceased in 2011. The will contained only four clauses. Clause 1 contained a gift of Nina's property to the Foundation. Clause 2 contained provisions about the appointment of a managing organisation to supervise the Foundation, and about the funding of 'a Chinese prize of worldwide significance similar to that of the Nobel Prize'. Clause 3 related to the Foundation's management of the Chinachem Group. Clause 4 contained provisions about the Foundation providing support for members of the family of Nina's late husband Teddy Wang, and for staff of the Chinachem Group and their children.

The principal issue in these proceedings was whether Nina's net residuary estate was held by her administrators in trust for:

> (a) the Foundation absolutely, or
> (b) the Foundation on terms that the Foundation held the same in trust to give effect to all (or some) of the directions in clauses 2, 3 and 4 of the Will; or
> (c) some other person or persons.

It was common ground on appeal that the Foundation was charitable (at [12]):

> It is common ground that the Foundation is a company with exclusively charitable objects, recognised since its incorporation in 1988 as exempt from tax under section 88 of the Inland Revenue Ordinance,

> Cap 112. Its charitable objects are not narrowly restricted, but are expressed in wide terms. The whole of its capital and income, after expenses, must be used for its charitable objects, and in the event of winding-up its surplus assets would be devoted to charity.

In 2013, Poon J had held that the Foundation held as a trustee and was obliged to give effect to clauses 2, 3 and 4 of the will so far as was possible. The Foundation appealed to the Court of Appeal (Lam VP, Cheung and Kwan JJA), and the Court handed down judgment on 11 April 2014 dismissing the appeal. The Foundation appealed again in this case.

The Court of Final Appeal dismissed the appeal, agreeing with the courts below that the Foundation held its assets as a trustee (option (b) above). This meant that the Foundation had to give effect, as trustee, to the other clauses in the will (as far as that was possible). All the net proceeds of the will were to be administered by the Foundation, under supervision of both its board of governors and of a supervisory body as set out in the will. The proceeds were to be used for both the prize outlined in the will and in a limited way for the family and company employees. As His Lordship remarked, the words used in the will about the prize were vague (at [61]–[62]):

> The Court of Appeal was correct in its view that the Chinese prize need not resemble the Nobel Prize in all respects. But that leaves the intended content of the expression in a good deal of uncertainty. The Chinese prize is no doubt intended to bring further renown to the People's Republic of China, in the same way as the Nobel Prize focuses international attention on Sweden at the time of the Nobel awards. But Nina cannot have intended that the prize should be limited to excellence in Chinese literature, or Chinese music, or any specifically Chinese cultural activity, since that would be inconsistent with her clear intention that the prize should be international in character – "of worldwide significance". Probably Nina had in mind that the prize would be administered, and its award ceremonies held, in Beijing (or possibly Hong Kong). These are all matters which the board of governors of the Foundation will need to consider very carefully, with appropriate guidance…. What is essential is that the Chinese prize should be a proper charitable purpose. A prize of this sort is charitable only if it is for the public good, in encouraging the general public to strive for excellence in scientific, social and cultural activities which are beneficial to mankind. The public good which such a prize achieves is reflected, not so much in the conferment of a large financial benefit on a celebrity who may already be well provided for, as in the incentive that it gives to hundreds of thousands of people who do not win the prize, but are encouraged to strive for excellence. So the subject matter for which the prize is awarded is highly material.

Clause 4 of the will concerned the formation of some kind of supervisory body for the trust. The will contained words that were not capable of being put into effect (the supervisors being named as the President of China, the Chief Executive of Hong Kong, and the Secretary General of the United Nations), but the court was clear that some kind of supervisory body had been intended (at [73]–[74]):

> The Court of Appeal was no doubt correct, both as a matter of the ordinary probabilities and on the strength of [the] evidence, to hold that the whole of Nina's testamentary dispositions was not to be made conditional on the acceptance of office by the President of the People's Republic of China, the Chief Executive of Hong Kong and the Secretary-General of the United Nations. But it does not follow from that that it was not an essential part of Nina's intentions to have some supervisory board, composed of individuals of real distinction, to guide the Foundation in the prudent management of her business empire and in the wise application for charitable purposes of the much greater distributed corporate profits that would be available after her death…. The language suggests that she saw the Foundation itself as being within her gift, and that she wished… to commit it to the care of a new body which was outside the Foundation, and over the Foundation, rather than being simply an

> organ of the Foundation itself. That is a matter that comes well within the court's scheme-making power, as is the detailed working-out of Nina's intention to establish the Chinese prize.

The Court of Final Appeal held that a scheme should be established to give effect to Nina's wishes (at [76]–[78]):

> In the circumstances it is right for this Court to express the clear view that there should be a scheme for the administration of the charitable trusts of Nina's will. There is a strong public interest in this important benefaction having a clear and sounder legal basis than the language of Nina's home-made will. A scheme should be prepared and submitted to the High Court for approval after consultation (which will, it is to be hoped, be full and cooperative) between the Foundation's board of governors and the Secretary for Justice as the guardian of the public interest. The scheme should have two principal objectives: the establishment of a supervising body, including its terms of reference and its membership; and the detailed working-out of arrangements for the Chinese prize. The members of the new body should be individuals of unquestionable integrity, experience and judgment. They will no doubt bringing [sic] a variety of skills to their task, but between them they should be skilled in corporate governance and investment, and have deep knowledge of the fields in which the charity is likely to be active (such as medical and scientific research, education at all levels, disaster relief, social progress, and music, literature and fine arts). The new supervising body will also have a part to play in the detailed provisions for the Chinese prize, although one or more specialised prize committees may be thought appropriate once the subject-matter of the prize (or prizes) has been settled. The statutes of the Nobel Foundation… provide one possible template, but there is no requirement for them to be followed closely.

The scheme was also to provide for other matters under the will. These included a possible appropriation in respect of the clause 4(2) beneficiaries (the remaining family members) and the possibility of the court approving provision at the corporate level for the clause 4(3) beneficiaries (the employees and children of employees). The Court also suggested a review of the Foundation's Articles to ensure that they were still appropriate.

The case may be viewed at: http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=98447

Implications of this decision

This is an example of the complexity that can arise when wills are home-made, though on a very large scale because of the immense sum involved. The Foundation was charitable, but there was one aspect – the limited provision for family – which might have affected that outcome. However, the court was untroubled by this aspect (at [71]):

> The needs of the clause 4(2) beneficiaries [the family members], even if met on the most ample and generous scale, cannot possibly call for more than a tiny part of the resources of the residuary estate. If there is any danger of this tiny non-charitable disposition having adverse tax consequences for the estate as a whole, consideration should be given to the appropriation of a separate (and in relative terms very small) fund which will be amply sufficient to provide (by its income and capital) for the needs of the clause 4(2) beneficiaries.

2.8.16 TASMANIAN PERPETUAL TRUSTEES LIMITED V ATTORNEY-GENERAL [2015] TASSC 1 (SUPREME COURT OF TASMANIA, WOOD J, 29 JANUARY 2015)

Testamentary trust for charitable purposes – application for cy pres scheme – proposed scheme not in keeping with original purpose of gift

This was a variation of trust case made under section 6 of the *Variation of Trusts Act 1994* (Tas) (the Act). In her will made on 28 July 1908, Sarah Louisa Noake, the testatrix, directed the trustees and executors to hold land owned by her in the township of Longford for the purposes of the trust, and to expend the residue of her estate building residences on that land. The residences were to be rented to 'spinsters in poor circumstances', and the rent was to be the sum necessary to keep the residences in repair. If spinsters in poor circumstances were not to avail themselves of any or all of the residences, the residences were to be let generally, and the rental income was to benefit the Queen Victoria Hospital for Women in Launceston.

In 1925, seven heritage style cottages were built on the land. For decades, they were rented by spinsters. Over time, the numbers of spinsters in poor circumstances seeking to rent the cottages diminished and in recent times there had been no such demand. The cottages were currently rented generally and the leases have been taken up primarily by elderly tenants in receipt of welfare payments. In addition, in the decades after the will was made, the Queen Victoria Hospital in Launceston went through various changes in name and funding and finally closed in 1995. The staff and services were incorporated into the Launceston General Hospital as the Queen Victoria Maternity Unit.

The applicant, Tasmanian Perpetual Trustees Limited (TPTL) contended that the original purposes of the trust had become impracticable and impossible to carry out. The application in this case was for orders varying the purposes of the trust, known as a cy-près scheme. Such a scheme involves an application for funds to be applied as near (cy-près) as possible to the original intention of the testatrix. The applicant applied for orders that the cottages be sold, and the funds invested in a share portfolio, with the income from the portfolio to benefit the maternity unit at the Launceston General Hospital. The Attorney-General was represented and did not oppose the application or seek to bring any additional matters to the court's attention in evidence or submissions.

The applicant identified several problems with the trust as it stood. There was only about $104,000 remaining in the testatrix's account, the cottages required significant repair, and spinster tenants were difficult to find. Moreover, the closure of the nominated hospital meant that payments to a beneficiary had not been able to be made. In the applicant's view, the proposed scheme meant that more money would be available to the substituted beneficiary than could be extracted from the rental payments from the cottages.

Section 6 of the Act enacts a 'statutory cy-près' regime. If the court is satisfied that circumstances exist justifying variation of the purposes under a charitable trust, the court may approve a scheme varying those purposes. Before the court's jurisdiction may be exercised approving a variation of the purposes of a trust, it is necessary for the application to satisfy the requirements of the Act in sections 5 and 6. Under section 6, the purpose of the trust must be charitable, a term that is not defined in the Act. It has a legal meaning, with the general law concept applying: *Commissioners of Income Tax v Pemsel* [1891] AC 531 at 580. The Preamble of the Elizabethan *Statute of Charitable Uses 1601* sets out a list of charitable purposes. The relevant purpose in this case is the 'relief of aged, impotent and poor people'.

Her Honour had no doubt that the provision of 'residences or homes for spinsters in poor circumstances' was a charitable purpose. In addition, the provision of funds to the named hospital fell within the fourth head of charity in Pemsel's case. In light of the charitable nature of the trust, Her Honour approved the scheme in so far as it applied an income stream to the Queen Victoria Maternity Unit at the Launceston Hospital. However, Her Honour did not approve the scheme as to the replacement of the cottages with a share portfolio. Her view

was that the income streams would be comparable, and that the provision of an income stream from a share portfolio was not without risk (at [52]–[53]):

> The spirit of the gift was not merely to result in benefit to the hospital or to maximise that benefit. The spirit of the original gift seems to have been to preserve the possibility of providing accommodation for spinsters in poor circumstances, even if none of the houses could be rented to spinsters, and even if there was, at the time in question, no tangible prospect of any being let to spinsters. A share portfolio with an income stream severs any possibility of any assistance to spinsters in the future. I conclude that the proposed scheme does not accord with the spirit of the gift. I add that, in another respect, the proposal does not accord with the real intention behind the original purposes. It appears from the terms of the will that the deceased had a family connection to the township of Longford. The Noake family had a vault tomb and enclosure in the Longford Church yard; the terms of the will provided for the expenditure of a sum on repairing and renovating the tomb and enclosure during and within 21 years of the testatrix's death. The construction of houses in the township for a charitable purpose provided an enduring and substantial legacy to the deceased and her family name in the township. The proposed scheme would spell an end to that legacy.

Therefore, the scheme was approved only in part.

The case may be viewed at: http://www.austlii.edu.au/au/cases/tas/TASSC/2015/1.html

Implications of this case

This was a case of the passage of time presenting difficulties for trustees of a charitable trust. The management of a proposed share portfolio would have been much easier for the trustees, but did not, in the court's view, fall within the spirit of the charitable gift as it was originally made.

2.8.17 IN THE ESTATE OF DOROTHY WHELEN (DECEASED) [2015] EWHC 3301 (CH) (HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEHRENS J, 18 NOVEMBER 2015)

Second will – whether validly executed – original of first will missing – whether lost or destroyed

This was a case involving four charities which were the residuary beneficiaries of the will of Dorothy Whelen (the deceased). The will was made in 1982, and the deceased died in 2012, aged 92. The estate was valued at approximately £1.8 million. The four claimant registered charities were the Royal National Institute for Deaf People, the Royal National Institute for Blind People, the Marie Curie Memorial Foundation, and the Institute for Cancer Research: the Royal Cancer Hospital.

The defendant, Alan Turner, was a beneficiary under a homemade will which was alleged to have been executed on 1 November 1999 (the 1999 will). The principal beneficiary under the 1999 will was Hazel Turner, who is Alan Turner's mother. Other beneficiaries included two of Alan Turner's brothers, Philip and Glen Turner, and Robin Summers (a financial advisor and close personal friend of the deceased). The claimant charities challenged the validity of the 1999 will and sought probate in solemn form of the 1982 will.

The following facts were relevant:

1. The deceased had no close relatives, and she and Mrs Turner had been life-long friends.
2. The original of the 1982 will could not be found, although a copy of it was found in the deceased's house after her death.
3. If the 1999 will was validly executed, there was no question that it would revoke the 1982 will.

4. The two witnesses to the 1999 will stated that the deceased had not been present when the 1999 will was made. Rather, only Mrs Turner had been present and the witnesses stated they thought they were witnessing Mrs Turner's will, not the deceased's will.
5. The latter point would mean that the 1999 will was not executed in accordance with section 9 of the Wills Act 1837.
6. It the 1999 will was not validly executed, and the 1982 will had been destroyed (and therefore revoked by the deceased), there was an issue as between the claimants and the deceased's next of kin as to claims under an intestacy.

The latter issue had been settled as between the charities and the next of kin in a separate agreement in 2013. Therefore this case only dealt with the validity of the 1999 will.

The claimant charities contended that not only was the 1999 will not validly executed, but that the deceased did not know and approve the contents of the 1999 will. The facts revealed that the deceased had not deliberately destroyed the 1982 will. However, it had been lost. Moreover, her latest instructions to solicitors and her financial advisor Mr Summers indicated that she still intended to benefit charities for the deaf and blind. She had attended a solicitor with Mrs Turner in early 2000, and neither had mentioned the 1999 will. Ultimately, she had not proceeded with instructions for a new will in 2000. Later in 2000, she lost capacity, and could no longer make a valid will.

There were three homemade wills (using a will kit) of relevance. These were the 1999 wills of Mr Turner, Mrs Turner and of the deceased. Mr Turner's will was dated 11 August 1999, and witnessed by a Ms Williams (who could not be traced) and by a Ms Tomalin (who had, by her account, met Mr Turner on a bus). Mr Turner died in 2011 and left everything to Mrs Turner. Mrs Turner's will was improperly dated as '28 day of (month) 1999' and witnessed by Ms Tomalin and by Mrs Turner's employer, Mr Hallam. Mrs Whelen's will was dated 1 November 1999 and apparently witnessed by Ms Tomalin and Mr Hallam. Mrs Whelen appointed Mrs Turner as her sole executrix, and left her home to Mrs Turner. There were pecuniary legacies of £10,000 to Philip Turner, and £5,000 to each of Alan Turner, Glenn Turner and Elizabeth Shaw. The rest of the estate was to be divided equally between Mr Summers and Mrs Turner. Finally there was clause which provided (sic):

> IN THE EVENT OF HAZEL TURNER'S DEATH THE ESTATE GOES TO HER ISSUE.

Forensic examination of the three homemade wills found that the wills of Mrs Whelen and Mrs Turner had been placed exactly on top of each other. Ms Tomalin's signature as witness had been made on Mrs Whelen's will and its impression had gone through to Mrs Turner's will. In Mrs Whelen's will there were four different inks used, and three different hands. None of the handwriting in the body of the will was Mrs Whelen's, although evidence was given by Mr Summers that the handwriting at the top (name) and bottom (signature) sections of the will was Mrs Whelen's.

It was certainly possible that Mrs Whelen had intended to leave her home to her friend Mrs Turner, and legacies to the persons named in the 1999 will. There were perfectly good reasons for these dispositions. However, after consideration of all the evidence, His Honour said that he was satisfied that Mrs Whelen's will was not executed in accordance with section 9 of the Wills Act 1837 and thus should not be admitted to probate. In light of this finding, it was not necessary to consider whether the 1999 will had been made with the knowledge and approval of Mrs Whelen. Nevertheless, His Honour said that he would have concluded that Mrs Whelen did know and approve the contents of the will she signed, despite the possibility of suspicious circumstances (at [42]):

> I agree…that there are features of the 1999 Will that excite suspicion. It is a homemade will prepared or at least obtained by the principal beneficiary. It is by no means clear when the bequests were inserted or who they were written by. There is no evidence that it was read over to Mrs Whelen. It

> was not properly attested. As against that there is no doubt that Mrs Whelen signed the will. Mrs Whelen had on a number of occasions expressed an intention to leave [her home] to Mrs Turner. Mrs Turner was a lifelong and close friend of Mrs Whelen. Mrs Whelen had no close relatives and did not wish to benefit her distant relatives. The terms of the will are relatively straightforward and easy to understand. Furthermore, as stated above the legacies and residuary gift are readily explicable.

Since the 1999 will could not be admitted to probate, the question then became whether the 1982 will should be admitted to probate. Had it been destroyed and so revoked by Mrs Whelen? His Honour said that the evidence suggested rather that the 1982 will had been lost and not destroyed. That being so, the 1982 will was admitted to probate. The charities were therefore successful in their claim.

The case may be viewed at: http://www.bailii.org/ew/cases/EWHC/Ch/2015/3301.html

Implications of this case

This was a case of the four beneficiary charities fighting for their rights under the deceased's original will. The original will had been lost, raising the rebuttable presumption that it had been destroyed with the intention of revocation. This was able to be overcome in this case by the available evidence. Many of the deceased's documents were missing from her house, including the original 1982 will. There was evidence from a letter in 1998 that Mrs Whelen was unable to locate it at that time, when she was considering a new will, which suggested it had not been destroyed deliberately. There was also evidence that an extensive search had been undertaken in the deceased's house after her death, and before the official search by her lawyers. Thus, the Court ruled the original 1982 will was valid, and the four charities could obtain the benefit of it.

2.9 MISCELLANEOUS

2.9.1 **ENGLISH BRIDGE UNION LIMITED V THE ENGLISH SPORTS COUNCIL** [2015] EWHC 2875 (ADMIN) (HIGH COURT OF JUSTICE, QUEENS BENCH DIVISION, ADMINISTRATIVE DIVISION, DOVE J, 15 OCTOBER 2015)

Whether bridge is a sport – definition of 'sport' as physical activity and physical recreation

The English Bridge Union Limited (the Union) is the governing body for the game of competitive bridge in England. The defendant is the governing body for sport in England. The other defendants were the governing bodies for sport in Scotland, Wales, Northern Ireland and the UK as a whole. The question raised by the Union in this case was whether bridge is a sport. The Union's position was that bridge was a so-called 'mind sport'. However, the definition of a sport used by the defendant is derived from the European Sports Charter, Article 2(1) of which provides:

> 'Sport' means all forms of **physical activity** which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels. [emphasis added]

This definition is a version of the United Nations definition of sport which states that sport consists of:

> All forms of **physical activity** that contribute to physical fitness, mental wellbeing and social interaction, such as play, recreation, organised or competitive sport, and indigenous sports and games. [emphasis added]

In contrast, section 3(2)(d) of the Charities Act 2011 defines sport as:

> …sports or games which promote health by involving physical **or mental skill** or exertion. [emphasis added]

The parties agreed that it was possible to construct a definition of sport that would include 'mind sports' like bridge. In addition, the International Olympic Committee and other international organisations recognise bridge as a sport.

The court said that the legal question to be determined was whether the defendant had been legally correct to adopt a definition of sport which excluded mind sports. This involved an investigation of both the Royal Charter which created the defendant in 1971 (and the Charter's amendment in 1996), and section 3 of the Physical Recreation Act 1937 (the Act). There had been a convoluted history of the definition of sport in England from 1935 (when the predecessor to the defendant was first mooted) onwards.

The Act referred to 'physical training and recreation', which, despite subsequent amendments, had remained the core terminology. A draft bill in 2000 had proposed adding chess and other mind sports to the definition of sport, but the proposal was not proceeded with.

In 2006, the defendants agreed to adopt the definition of sport in the 1993 European Sports Charter (above) for the UK. This limits sport to physical activity. The Royal Charter of 1971, setting up the Sports Council of England, also uses the term 'sport and physical recreation'. This was later replaced by a 1996 version. In the light of these usages, the court held that the interpretation of both the Act and Royal Charter was limited to physical types of sport (at [40]–[41]):

> Since it is central to both of the Grounds advanced on behalf of the claimant in my view it is convenient to start the consideration of the issues with the correct interpretation of s 3 of the 1937 Act and, in particular, the words 'physical training and recreation'. Does an understanding of that

> phrase, and the will of Parliament in enacting it, require it to include physical activity? As set out above in order to understand the intention of Parliament at the time when the Act was passed it is entirely permissible to have regard to the 1937 Memorandum. In the passage set out above directly bearing on the scope of the phrase 'physical training and recreation' it is perfectly clear that that phrase is focused upon physical activity and was intended to encompass physical recreation, rather than any other kind of recreation. Thus in my view the 1937 Memorandum is strongly supportive of the defendant and the intervener's construction of s 3 which is limited to pursuits involving physical activity.

There was therefore 'a compelling case in support of the contention that the phrase "physical training and recreation" within s 3(1)(a) is to be interpreted as meaning physical training and physical recreation' (at [43]).

As to the interpretation of the Royal Charter, the court said that the phrase 'sport and physical recreation' had to be looked at in context. There was a continuous broken history from 1937 to the present day which supported the contention that sport was a physical activity (at [47]):

> The history and context of the 1996 Royal Charter is therefore all of a piece and strongly supportive of the approach taken by the defendant and the intervener namely that the phrase 'sport and physical recreation' is confined to physical activity.

Thus there was no legal error in adopting the definition of sport which the defendants had adopted. This was despite the facts the other jurisdictions had included bridge as a sport, and that other activities such as darts and model aircraft flying had been defined as sports by the defendants (at [51]):

> The centrality of the correct interpretation of the 1937 Act and also the 1996 Royal Charter also disposes, in my view, of the arguments raised by the claimant in relation to why other activities such as darts or model aircraft flying have been recognised. Whatever the rights or wrongs of those decisions, they cannot impinge upon the correct determination in law of the meaning of the 1937 Act and the Royal Charter. Similarly the fact that other international organisations, applying their own distinctive approaches and definitions, have recognised bridge as a sport, has a very limited relevance in determining the legal questions which arise in this case and does nothing to deter me from the conclusion that the defendant's approach to the 1937 Act and the Royal Charter was legally correct.

Therefore, bridge was not a sport for the purposes of the English Sports Council. The Union's claim for judicial review was dismissed.

The case may be viewed at: http://www.bailii.org/ew/cases/EWHC/Admin/2015/2875.html

2.9.2 **ESCARPMENT BIOSPHERE FOUNDATION V WORLD HEALTH INITIATIVES**, 2015 ONSC 205 (CANLII) (ONTARIO SUPERIOR COURT OF JUSTICE, PENNY J, 12 JANUARY 2015)

Promissory note – competing claims

Escarpment Biosphere Foundation (EBF) was a registered charity. Its objects included the conservation of land in Ontario and the alleviation of suffering due to neglected tropical diseases. World Health Initiatives Inc (WHI) developed and then marketed a donation program tax shelter (the Program) from 2003 to 2008. EBF participated in the Program from 2004 to 2008. There were two phases to the Program:

1. Under phase one of the Program, taxpayers who participated in it became beneficiaries of a trust. The trust was endowed with pharmaceuticals which were distributed to the participants, who then sold

them to a US NGO for cash proceeds. Those cash proceeds, together with further funds provided by the participants, were donated to registered charities;

2. Under phase two, the registered charities distributed the funds to EBF. EBF also received some funds directly from taxpayer participants in 2008. EBF used approximately 85% of the funds it received from these sources to purchase pharmaceuticals from the US NGO for distribution through international humanitarian aid relief programs to combat neglected tropical diseases. EBF retained 1% of the funds as a fee, and used these funds to pay professional and other expenses and to conserve land in Ontario. EBF had no paid staff and was run entirely by volunteers. Under a Services Agreement with WHI, EBF agreed to pay WHI a fee equal to 13.5%, plus applicable taxes, of the total funds EBF received under the 2008 Program.

In 2007, the Canada Revenue Agency (CRA) initiated an audit of the Program, including EBF's involvement. The CRA disallowed tax credits claimed by thousands of participants (donors) in the Program. As a result, WHI stopped actively marketing the Program but continued to administer it in 2008 for existing participants. In 2009, WHI decided to suspend the Program entirely pending resolution of CRA's objections. Ultimately, in February 2012, CRA revoked EBF's charitable status on the basis that EBF's involvement in the Program was not in compliance with the Income Tax Act. EBF had to divest its assets. One of these was a promissory note dated 1 April 2008 (the Note) made by the respondent WHI for the face value of $5 million. EBF claimed $4,840,608.22 was owing on the Note, which had been assigned to the Biosphere Preservation Society (BPS), another registered charity.

This trial was to determine two issues:

1. the right of BPS, as assignee of EBF, to be paid under the terms of the Note and, if so, in what amount;
2. WHI's right to claim set-off under the terms of a Services Agreement which had existed between EBF and WHI, or otherwise, and, if so, in what amount.

The Services Agreement concerned fundraising and consulting services provided to EBF by WHI. His Honour held that the services had been provided by WHI and there was a genuine set-off involved (at [45]–[46]):

> In my view, the obligations represented by the two competing claims in this case (the debt represented by the Note and the claim to advanced commissions which were earned but unbilled) are 'mutual cross obligations' in the classic sense of the term. EBF paid advanced commissions to WHI of $4.84 million. EBF's advance was secured by the Note, until the commissions were earned. Once earned, the commissions were due and owing. Accordingly, the 'loan' represented by the Note is a mutual cross obligation to the 'advanced commission', once earned. I do not think the Limitations Act prohibits WHI from advancing the defence of set off in this case. WHI had already received the money ($4.84 million) as an advance in 2008. It had no 'claim' for the $4.84 million-worth of commissions because it had already been 'paid' those commissions. WHI is not now making a 'claim' for those monies. It is merely, by way of defence, resisting EBF's claim for repayment of the Note on the basis that the debt represented by the Note was satisfied in 2008 when the advanced commissions were earned through WHI's fee on the volume of total funds raised for EBF of some $14 million. On EBF's own accounting records, it is clear that WHI more than earned the $4.84 million advance. Accordingly, EBF's claim (including the claim of the assignee, BPS) for repayment of the Note is dismissed.

Therefore, the claim by EBF, and by its assignee BPS, for payment on the Note was dismissed.

The case may be viewed at: http://www.canlii.org/en/on/onsc/doc/2015/2015onsc205/2015onsc205.html

2.9.3 **ROBINSON V LEPAGE,** 2015 ONSC 3128 (CANLII) (ONTARIO SUPERIOR COURT OF JUSTICE, DIVISIONAL COURT, SMITH J, 15 MAY 2015)

Apprehension of judicial bias – judge receiving support for charity appeal from respondent's legal representative

This was an appeal by Robinson (the appellant) from the decision of Small Claims Court Deputy Judge Lyon Gilbert dated 8 May 2014 awarding damages for breach of contract to the respondent, plus costs. The ground of appeal dealt with in this case was that the Deputy Judge acted unethically by personally soliciting and receiving charitable donations from the paralegal representing the respondent, and in failing to disclose this fact to the appellant prior to the commencement of the trial. The issue was whether this gave rise to a reasonable apprehension of bias.

The Deputy Judge entered a charity cycling event in April 2014, advertising his participation on the event's website and soliciting donations thereby. Nine days before the commencement of the trial in question the Deputy Judge received a financial donation of an undisclosed amount from Phoenix Paralegal & Advocacy Services. The donation was posted on his website.

Phoenix Paralegal & Advocacy Services is the employer of the paralegal who represented the respondent in this case at trial. The paralegal also posted a comment on the website, stating: 'A great effort for a great cause. Enjoy the ride Mr. Gilbert!' The Deputy Judge did not disclose receipt of the financial donation received from Phoenix Paralegal & Advocacy Services or the message received from the paralegal involved before trial. The appellant only became aware of this information after the Deputy Judge's decision.

Did this situation give rise to a reasonable apprehension of bias? Was there an ethical breach? The Canadian Judicial Council (CJC) has published 'Ethical Principles for Judges', which apply to judges at all levels in Canada. These include the following guideline, under the heading Civic and Charitable Activity:

> Judges are free to participate in civic, charitable and religious activities subject to the following considerations:
> (a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.
> (b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.

One of the rationales behind the establishment of ethical guidelines for the judiciary is to ensure that judges avoid any perceived apprehension of bias. Actual bias will always disqualify a judge. A reasonable apprehension of bias means that a judge must disqualify himself/herself to safeguard confidence in the administration of justice.

The test for ascertaining whether there is a reasonable apprehension of bias in Canada was set out by the Supreme Court of Canada in *Committee for Justice v The National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369]:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…. That test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not the Decision maker, whether consciously or unconsciously, would not decide fairly.

His Honour is this case said that (at [21]):

> When the Appellant learned of Deputy Judge Gilbert's relationship with Phoenix Paralegal & Advocacy and the Respondent's representative… after receiving the decision of the court, he could not but think

that he did not receive a fair trial and that the judge was biased in favour of the Respondent (Plaintiff). Any informed person, viewing the matter realistically and practically would arrive at the same conclusion.

In all the circumstances of this case, it was held that the Deputy Judge should have disclosed the donation and comment made on the website, and then recused himself from the case. The appeal was allowed, and the decision made by the Deputy Judge in the original hearing was set aside.

The case may be viewed at: http://www.canlii.org/en/on/onsc/doc/2015/2015onsc3128/2015onsc3128.html

2.9.4 **SEA SHEPHERD (UK) V FISH & FISH LTD** [2015] UKSC 10 (SUPREME COURT OF THE UNITED KINGDOM, LORDS NEUBERGER, MANCE, KERR, SUMPTION, TOULSON, 4 MARCH 2015)

Tort – whether common design by joint tortfeasors – de minimis rule

In this case, the issue on appeal to the UK Supreme Court concerned accessory liability in tort. The appellant, Sea Shepherd UK (SSUK), was an English charity formed as a company limited by guarantee. SSUK was the first defendant in the proceedings at first instance. The second and third defendants (service of process for both being outside the jurisdiction) were the Sea Shepherd Conservation Society (SSCS) and Paul Watson, the founder of SSCS, and a director of SSUK. The claim was for loss and damage allegedly suffered by the respondent (the original claimant), Fish and Fish Limited (FF), in an incident in the Mediterranean Sea on 17 June 2010 when conservationists mounted an operation designed to disrupt the bluefin tuna fishing activities of FF. The appeal arose from the determination of a preliminary issue as to whether the incident was directed and/or authorised and/or carried out by the appellant, its servants or agents, and whether SSUK was liable, directly or vicariously, for any damage sustained by the claimant.

FF operates a fish farm off the coast of Malta which is authorised by the International Conference for the Conservation of Atlantic Tuna (ICCAT). ICCAT and European Council Regulation (EC) No. 302/2009 regulate the fishing of Atlantic blue fin tuna. Fishing is only permitted during a limited period each year and a quota system restricts catches. FF was not operating outside any official guidelines.

On 17 June 2010, two of FF's vessels were towing cages containing live blue fin tuna from Libya to its fish farm, when, as part of 'Operation Blue Rage', a campaign by SSCS, one of them was rammed by another vessel, the 'Steve Irwin'. A cage was damaged and some 33 tonnes of the total catch of 64 tonnes of fish were released into the sea by divers from the 'Steve Irwin'. The appellant claimed €760,148 in damages for trespass to and/or conversion of its property. SSUK is the registered owner of the 'Steve Irwin', which it purchased in 2006 with funds provided by SSCS. The ship is registered in The Netherlands.

SSCS is a conservation charity based in the United States of America. It was founded in 1977 following a split from Greenpeace. It is an Oregon corporation, and is now based in Washington State. In 2010 it launched 'Operation Blue Rage', a campaign aimed at preventing fishing of Atlantic blue fin tuna contrary to the ICCAT's Regulations and EC Regulation No. 302/2009. A posting on SSCS's website dated 23 January 2010 stated that 'the objective will be to intercept and oppose the illegal operations of blue fin tuna poachers' and that 'Sea Shepherd intends to confront the poachers and will not back down to threats and violence from the fishermen'. Watson is the founder and organisational head of SSCS. He is a director, but not an employee, of SSUK. On 17 June 2010, Watson was the Master of the 'Steve Irwin'.

Were the Sea Shepherd parties all **joint** tortfeasors? Was there a common design underlying their actions? The judge at first instance said no. The judge rejected the appellant's case that Watson was the controlling mind behind all the Sea Shepherd entities and acted on behalf of them all. The judge also held that although the

'Steve Irwin' was legally owned by SSUK, it was, at all material times, beneficially owned by SSCS. The ship was being used in an SSCS campaign, for SSCS purposes. In addition, Watson's title as a director of SSUK was merely honorary, and had no real substance. SSUK did not facilitate the campaign on the evidence, although the facts showed that it made the ship available to SSCS, and was involved in fundraising and other activities attached to the campaign. However, it was held that SSUK was not part of the tort.

The case in the Court of Appeal (see at [2013] EWCA (Civ) 544)

On appeal to the Court of Appeal, only the common design issue was in contention. The requirement of a common design in tort law is one that provides protection against indeterminate and uncertain liability. The current legal position on common design in tort is that there are two requirements:

1. there must be a common design that the acts relied on as tortious should be done by one or more of the alleged joint tortfeasors, who are the actual perpetrator or perpetrators;
2. the other alleged joint tortfeasor, the alleged participator, itself did acts in furtherance of the common design. There is, however, no need for the participator to commit an independent tort.

Thus, once a common design has been established, the question becomes whether the defendant who is said to be a joint tortfeasor has done something that has furthered that common design. In modern terms, providing that the act furthering an undoubted common design is more than *de minimis* (minimal), it will be sufficient for determining joint liability. There is no longer any need for the act to have been an essential part of, or of real significance to the commission of the tort.

Was the trial judge correct to say that there was no common design in this case? Did the judge err in finding that SSUK's participation was 'of minimal importance and played no effective part in the commission of the tort'? Beatson LJ (in the leading judgement of the Court of Appeal) said on this point (at [71]) that there was a common design, such that:

1. SSCS and Watson were the perpetrators of the plan of action; and
2. SSUK was the participator who assisted the plan to come to fruition.

McCombe and Mummery LLJ agreed on the common design point, with McCombe going further and saying that the appeal should have been allowed on the other point in contention, that of capacity (at [75]–[76]). Therefore, although the actual perpetrators of the tort were SSCS and Watson, SSUK was held to have participated by doing actual acts which furthered the common design. The appeal was allowed, and all three respondents were held to be joint tortfeasors, and jointly liable in damages yet to be determined.

The Supreme Court appeal

This appeal in the Supreme Court turned on the factual issue of how minimal (or not) the contribution of SSUK was to the commission of the alleged tort in question. The judges were not in disagreement as to the applicable legal principles. In a 3/2 decision, the Supreme Court held that the contribution of SSUK to the overall tort was minimal, and therefore SSUK was not a joint tortfeasor with the other original defendants.

The majority identified two acts done by SSUK which might have suggested involvement. One was to have two volunteers locate and work on the 'Steve Irwin' for a day, and the other was to have a 'mailshot' used to raise Sterling contributions for Operation 'Blue Rage'. The amount raised was £1,730, which SSUK transferred to SSCS. The majority (Lords Toulson, Neuberger, Kerr) held that these activities were minimal. Thus, the de minimus rule applied, and SSUK was not liable for the alleged tort.

The only point of disagreement among the bench concerned the importance of the money raised through SSUK to the overall alleged tort, which Lord Sumption described as a point of difference 'of little moment' (at [29]). Lord Sumption, dissenting, held (at [52]) that the mailshot contribution 'was not so small as to be legally

equivalent to nothing', and that even relatively small contributions by each associated entity were 'not indispensable' to 'the efficient mobilisation of financial and logistical support internationally through campaigns managed by the associated national organisations'. Also in dissent, Lord Mance at [99]–[100], considered £1,730 was 'a not insignificant sum' which combined with collections from other national branches, so that there was no 'incongruity in a conclusion that SSUK lent material assistance to SSCS … and [was] potentially liable accordingly'.

Therefore, the judgement at first instance that SSUK was not liable as a joint tortfeasor with SSCS and Watson was restored by the Supreme Court.

This appeal decision may be viewed at: http://www.bailii.org/uk/cases/UKSC/2015/10.html

The case in the Court of Appeal may be viewed at: http://www.bailii.org/ew/cases/EWCA/Civ/2013/544.html

Implications of this case

This decision did not interfere with the law relating to joint tortfeasors in the UK (and Australia). The factual issue of how minimal was the assistance given to SSCS by SSUK was the only point at issue. Since the majority held that the assistance was minimal, then SSUK could not be a joint tortfeasor under the current law.

3.0 LEGISLATION

3.1 COMMONWEALTH

The relevant Acts and Regulations in the Commonwealth (federal) jurisdiction include:

- *Corporations Act 2001*
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- *Charities Act 2013*
- *Australian Charities And Not-for-profits Commission Act 2012*
- *Personal Liability for Corporate Fault Reform Act 2012*
- *Not-for-profit Sector Freedom to Advocate Act 2013*

In addition, many other federal laws apply to nonprofit organisations, such as those governing taxation, employment of staff, anti-discrimination, using digital communication, sending funds overseas and being in receipt of government agency funding.

The *Tax and Superannuation Laws Amendment (2014 Measures No. 5) Act 2015* received assent and commenced on 19 March 2015. This Act introduced a new education charity called Australian Schools Plus as a tax-deductible charity with DGR status. This will now allow donors to receive a DGR receipt for donations for general educational purposes to particular schools. Previously, donors were only able to obtain tax deductions for donations to endorsed school building funds, school libraries and scholarship funds. Now any school can apply for funding for a project by making an application to be a potential recipient through Australian Schools Plus: see at http://www.schoolsplus.org.au/for-schools/. Schools particularly targeted by this initiative are those with an Index of Community Socio-Educational Advantage (ICSEA) below 1000 (which implies some disadvantage) on the My School listing (see at: https://www.myschool.edu.au/).

The *Tax and Superannuation Laws Amendment (2015 Measures No.5) Act 2015* received assent on 30 November 2015 and relevant provisions commenced on the date of assent. Some charities' FBT concessions on salary-packaged entertainment benefits could be adversely affected by these amendments.

Salary-packaged entertainment benefits are affected as follows:

- A separate single grossed-up cap of $5,000 for salary-packaged entertainment benefits for employees of public benevolent institutions, health promotion charities, public and not-for-profit hospitals, and public ambulance services. This represents a change to the existing FBT law under which employees can salary-package entertainment benefits with no FBT payable by the employer, no reporting of benefits and no caps.
- Salary-packaged meal entertainment benefits will become reportable fringe benefits. This means that salary-packaged meal entertainment benefits will be taken into account in assessing an employee's eligibility for certain tax concessions and an employee's liability for certain levies and surcharges.
- Removal of access to elective valuation rules when valuing salary-packaged entertainment benefits to prevent unintended and excessively concessional values being applied to those benefits.

Two measures were announced by the Prime Minister's Community Business Partnership on 28 May 2015 (http://www.communitybusinesspartnership.gov.au/second-meeting/). These were:

1. To remove the need for donors to obtain a valuation from the Australian Taxation Office (ATO) for donations of listed shares or managed funds greater than $5,000. Reduced compliance costs will ensue, since donors will no longer need to pay a $241 fee to the ATO for these valuations (Scott Morrison and Josh Frydenburg, joint media release, 28 May 2015, http://jaf.ministers.treasury.gov.au/media-release/026-2015/).
2. To provide consistent treatment for private ancillary funds (PAFs) and public ancillary funds in the winding up phase. This means PAFs, which are private funds set up to provide money or property to deductible gift recipients, will have the flexibility to transfer their net assets to other ancillary funds, an option already available to public ancillary funds in the winding up phase.

All Acts and Regulations for the Commonwealth jurisdiction can be found at http://www.comlaw.gov.au/

3.2 NEW SOUTH WALES

The relevant Acts and Regulations in New South Wales are:

- *Associations Incorporation Act 2009*
- *Association Incorporation Regulation 2010*
- *Charitable Fundraising Act 1991*
- *Charitable Fundraising Regulation 2015*
- *Charitable Trusts Act 1993*
- *Co-operatives (Adoption of National Law) Act 2012*
- *Co-operatives (New South Wales) Regulation 2014*
- *Lotteries and Art Unions Act 1901*
- *Lotteries and Art Unions Regulation 2014*

The responsibility for regulation of NSW charity laws was moved to the Minister for Innovation and Better Regulation on 1 July 2015. In addition, NSW Fair Trading assumed authority for administering the *Charitable Fundraising Act 1991* from 1 July 2015. For details, see at: http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising.page.

A new Charitable Fundraising Regulation 2015 commenced on 1 September 2015, replacing the previous Regulation of 2008. The new Regulation reproduces the 2008 Regulation, except that it omits previous Schedule 1, and alters thresholds:

- Schedule 1 of the 2008 Regulation prescribed the standard set of conditions attached to a fundraising authority deemed under section 16(6) of the Act. Section 16(6) of the *Charitable Fundraising Act 1991* provides that where an application for a fundraising authority is not dealt with within 60 days (or if further information is sought within 60 days) the authority is taken to have been granted, subject to conditions prescribed by regulation. Clause 17 of the 2015 Regulation provides that persons or organisations that are deemed to hold an authority under section 16(6) of the Act are taken to comply with the conditions set out in a document prepared and published by the Office of Liquor, Gaming and Racing (OLGR). These are the 'Charitable Fundraising Authority Conditions' of 31 July 2015: see at http://www.olgr.nsw.gov.au/pdfs/charitable-fundraising-authority-conditions-2015.pdf
- The annual income threshold applying to charities that are exempt from obtaining a fundraising authority was increased from $10,000 to $15,000 to align with a similar exemption that applies in the Australian Capital Territory. The annual income threshold applying to charities exempt from the annual auditing requirements was increased from $100,000 to $250,000 to align with similar requirements for charities registered with the ACNC, and requirements under the *Associations Incorporation Act 2009*.

All Acts and Regulations for New South Wales can be found at http://www.legislation.nsw.gov.au/

3.3 VICTORIA

The relevant Acts and Regulations in Victoria are:

- *Associations Incorporation Reform Act 2012*
- *Associations Incorporation Reform Regulations 2012*
- *Charities Act 1978*
- *Charities Regulations 2015* (replacing *Charities Regulations 2005*)
- *Co-operatives National Law Application Act 2013* – see below
- *Fundraising Act 1998* – no substantive updates
- *Fundraising Regulations 2009* – no substantive updates
- *Gambling Regulation Act 2003* – no substantive updates
- *Gambling Regulation Regulations 2005* – no substantive updates

There were no substantive updates to most of this legislation. Outlined below are amendments to the *Associations Incorporation Reform Act* and the *Co-operatives National Law Application Act*, and new *Charities Regulations*.

Associations Incorporation Reform Act 2012

In April 2015, the *Veterans and Other Acts Amendment Act 2015* came into effect, amending the *Veterans Act 2005*, aiding the administration of patriotic funds in Victoria. In relation to the *Associations Incorporation Reform Act 2012*, the amendments allow the secretary of an association to apply for an exemption from the requirement to permit members of the association to inspect the association's register of members, under section 57 of the *Associations Incorporation Reform Act 2012.* Applications must be made in writing to the Registrar of Incorporated Associations and must state the special circumstances that apply to the association that justify not permitting members of the association to inspect the register of members.

Co-operatives National Law Application Act 2013

In 2013, the *Co-operatives National Law Application Act 2013* was passed by Victorian Parliament, providing for application of a national law relating to formation, registration and operation of co-operatives.

In 2015, the *Co-operatives National Law Application Act 2013* was amended slightly by the introduction of the *Veterans and Other Acts Amendment Act 2015*. The amendments changed the definition of 'designated tribunal' in section 11(a) from the Supreme Court of Victoria to the Magistrates' Court (now section 11(1)(a)); and inserted sub-sections 11(2) and (3), providing that in any proceeding under the Act in relation to which the Magistrates' Court is the designated tribunal, it may transfer proceedings to the Supreme Court on its own initiative or on application.

Charities Regulations 2015

The *Charities Regulations 2015* came into operation in November 2015, replacing the previous *Charities Regulations 2005.* The objectives of the Regulations remain the same, to prescribe fees for the purposes of the *Charities Act 1978.*

All Acts and Regulations for Victoria can be found at: http://www.legislation.vic.gov.au/

3.4 QUEENSLAND

The relevant Acts and Regulations in Queensland are:

- *Associations Incorporation Act 1981*
- *Associations Incorporation Regulation 1999*
- *Collections Act 1966*
- *Collections Regulation 2008*
- *Cooperatives Act 1997*
- *Charitable Funds Act 1958*
- *Charitable and Non-Profit Gaming Act 1999*
- *Charitable and Non-Profit Gaming Regulation 1999*

There were no material changes to the relevant Acts and Regulations in Queensland during 2015.

All Queensland Acts and Regulations can be found at:

https://www.legislation.qld.gov.au/OQPChome.htm

3.5 WESTERN AUSTRALIA

The relevant Acts and Regulations in Western Australia are:

- *Associations Incorporation Act 1987*
- *Associations Incorporation Regulations 1988*
- *Charitable Collections Act 1946*
- *Charitable Collections Regulations 1947*
- *Charitable Trusts Act 1962*
- *Co-operatives Act 2009*
- *Co-operatives Regulations 2010*
- *Gaming and Wagering Commission Act 1987*
- *Gaming And Wagering Commission Regulations1988*
- *Street Collections (Regulation) Act 1940*
- *Street Collections Regulations 1999*

The new *Associations Incorporation Act 2015* was passed and assented to on 2 November 2015, but at time of writing was yet to commence by proclamation (section 2(b)). When proclaimed, section 185 of the new Act will repeal the *Associations Incorporation Act 1987*. In preparation for passage of the new Act in 2015, the *Associations Incorporation Regulations 1998* were amended: *Associations Incorporation Amendment Regulations 2015*, gazetted on 14 April 2015, inserted a new regulation (reg 5), to define a 'prescribed body' for the purposes of the Act; and from 1 July 2015, the fee schedule to the Act was updated, with the publication of the *Associations Incorporation Amendment Regulations (No. 2) 2015* on 23 June 2015.

The *Charitable Trusts Act 1962* was untouched by the legislature in 2015, however, on 9 June 2015 the *Charitable Trusts Regulations 2015* were published, doubling the previous economic thresholds applicable for the treatment of schemes relating to the distribution of trust assets. This affects how section 10A of the principal Act should be read. It should be noted that this outcome goes unmentioned in the Compilation Table for the Act, as published by State Law Publishers.

Amendments were made to section 476(5) of the *Co-operatives Act 2009* to reflect changes to the *Corruption and Crime Commission Act 2003* in 2014, recasting it as the *Corruption, Crime and Misconduct Act 2003*.

Besides changing the name of the Commission, the amendment transferred 'misconduct' investigation functions from the Corruption, Crime and Misconduct Commission to the Public Sector Commissioner. The relevant provisions of the amending Act were proclaimed to commence on 1 July 2015. Section 476 of the *Co-operatives Act 2009* relates to the secrecy obligations (and exceptions) placed on the Registrar.

From 1 July 2015, the fees set out in Schedule 10 of the *Co-operatives Regulations 2010* were updated, following gazettal of the *Co-operatives Amendment Regulations 2015*.

The *Gaming and Wagering Commission Act 1987* was amended with effect from 30 November 2015 to remove reference at section 12(11)(a) to a person having been scheduled under the *Mental Health Act*, as a basis for vacating the seat of a Gaming and Wagering Commission Member. This was achieved by means of section 62 of the *Mental Health Legislation Amendment Act 2014* (for relevant commencement dates, see: *Gazette* of 13 November 2015).

From 1 January 2015, the fees at Schedule 1 of the *Gaming and Wagering Commission Regulations 1988* were amended (see: *Gaming and Wagering Commission Amendment Regulations 2014*, published 14 November 2015).

There were no other material changes to Acts and Regulations in Western Australia during 2015.

All Acts and Regulations for Western Australia can be found at
http://www.slp.wa.gov.au/legislation/statutes.nsf/default.html

3.6 SOUTH AUSTRALIA

The relevant Acts and Regulations in South Australia are:

- *Associations Incorporation Act 1985*
- *Associations Incorporation Regulations 2008*
- *Collections for Charitable Purposes Act 1939*
- *Cooperatives National Law (South Australia) Act 2013*
- *Cooperatives (South Australia) Regulations 2015*
- *Gaming Machines Act 1992*
- *Health Services Charitable Gifts Act 2011*
- *Health Services Charitable Gifts Regulations 2011*
- *Lottery and Gaming Act 1936*
- *Lottery and Gaming Regulations 2008*
- *Not-for-Profit Sector Freedom to Advocate Act 2013*

The *Co-operatives National Law (South Australia) Act 2013* (reported in the 2013 and 2014 almanacs) commenced on 22 May 2015 (Gazette 7 May 2015 at 1678). The Act adopts the Co-operatives National Law in Schedule 1. The Gazette of 7 May 2015 also set out the *Cooperatives (South Australia) Regulations 2015* at page 1679. These also came into operation on 22 May 2015.

The *Statutes Amendment and Repeal (Budget 2015) Act 2015* amended section 71(5)(j) of the *Stamp Duties Act 1923* (SA). The amendment took effect on 26 November 2015 as follows:

> (j) a transfer of property to a body established wholly for charitable or religious purposes where the Commissioner is satisfied that the property will not be used (wholly or predominantly) for commercial or business purposes (including on the basis that this paragraph will not apply even if any revenue, income or other benefit arising from the use of the property for commercial or business purposes will be applied towards the charitable or religious purposes of the body);

This change means that transfers of property in South Australia to bodies that are established wholly for charitable or religious purposes may be exempt from stamp duty. The amended section will assist charities with obtaining exemption, as the transfer need not be a gift without consideration, as was previously required for the transfer to be exempt from stamp duty. However, there are restrictions on the use of the property, in that the transferee cannot use the property for commercial or business purposes.

All Acts and Regulations for South Australia can be found at http://www.legislation.sa.gov.au/index.aspx

3.7 TASMANIA

The relevant Acts and Regulations in Tasmania are:

- *Associations Incorporation Act 1964*
- *Associations Incorporation Regulations 2007*
- *Associations Incorporation (Model Rules) Regulations 2007*
- *Collections for Charities Act 2001*
- *Collections for Charities Regulations 2011*
- *Cooperatives National Law (Tasmania) Act 2015*
- *Gaming Control Act 1993*
- *Gaming Control Regulations 2014*

The *Co-operatives National Law (Tasmania) Act 2015* commenced on 1 September 2015. This Act introduced the national cooperatives scheme into Tasmanian law. Also enacted were the *Cooperatives National (Tasmania) Local Regulations 2015*.

All Acts and Regulations for Tasmania can be found at http://www.thelaw.tas.gov.au/index.w3p

3.8 AUSTRALIAN CAPITAL TERRITORY

The relevant Acts and Regulations in the ACT are:

- *Associations Incorporation Act 1991*
- *Associations Incorporation Regulation 1991*
- *Charitable Collections Act 2003*
- *Charitable Collections Regulation 2003*
- *Cooperatives Act 2002*
- *Gaming Machine Act 2004*
- *Gaming Machine Regulation 2004*
- *Lotteries Act 1964*
- *Unlawful Gambling Act 2009*
- *Unlawful Gambling Regulation 2010*

There were two significant legislative changes in the ACT during 2015. The *Lotteries Act 1964* was amended by the *Lotteries (Approvals) Amendment Act 2015*. The *Lotteries Act 1964* (the Act) regulates all ACT lotteries including common forms of gaming such as raffles, housie, bingo and trade promotions, as well as commercial interstate public lotteries and instant scratch lotteries. It is administered by the ACT Gambling and Racing Commission (the Commission). The purpose of the amending legislation was to reduce the overall regulatory burden by allowing low-risk lotteries to be conducted without requiring approval from the Commission.

This legislation exhibited a move to a risk-based approach to certain lottery activities. The amending legislation extended the categories of exempt lotteries considered low-risk for gambling harm, consumer protection and criminal activity. The amendments thus allowed for differentiation between large value, high-risk activities and

low-risk activities (such as infrequent small bingo sessions and raffles). The government's view was that this allowed the Commission to respond appropriately to changes in the market without compromising the integrity of the gaming industry.

The *Lotteries Act 1964* now contains the following alterations, operational since 6 November 2015:

- modified powers for the Commission to determine exemption thresholds for different lottery products (sub-sections 6(1)–(3));
- removal of the requirement for low-risk lotteries to apply to the Commission for approval to conduct the lottery (sub-sections 7(1), (2));
- conditions under which exempt lotteries are to be conducted (section 6A).

Various Acts were amended by the *Revenue (Charitable Organisations) Legislation Amendment Act 2015* as from 26 November 2015. These were the *Duties Act 1999*, *Payroll Tax Act 2011*, *Rates Act 2004* and *Taxation Administration Act 1999* (TAA). As in other jurisdictions, tax law in the ACT grants charitable organisations various concessions and exemptions. Whether an organisation is granted tax-exempt status depends on the technical legal meaning of 'charitable', a term which has been developed under the common law. However, the meaning of 'charitable organisation' has been broadened by court decisions such as those in *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 and *Chamber of Commerce and Industry of Western Australia Inc v Commissioner of State Revenue (WA)* [2012] WASAT 146. The view of the ACT government is that these legal developments have significantly affected the scope of what is considered charitable, and therefore which organisations are eligible for tax exemptions, in such a way as to be beyond both policy intent and community expectations about benevolent activities, presenting a revenue risk (Explanatory Statement to the Bill, at page 2). The government also took the view that the ACT was more at risk of revenue loss in this case because it is the seat of governance of many major organisations of the kind likely to be affected by changes in the definition of 'charitable organisations'.

The major amendment is to the TAA in new Part 3A. Section 18A defines an 'organisation' as an association, society, institution or body. Section 18B states that a 'charitable organisation' (for tax law purposes) does not include an 'excluded organisation'. Section 18C(1) defines an excluded organisation as:

a) a political party; or
b) an industrial organisation; or
c) a professional organisation; or
d) an organisation that promotes trade, industry or commerce; or
e) a class of organisation prescribed by regulation.

These excluded organisations cannot be exempted from tax. It should be noted that trade unions and political parties which would not normally be charitable in any event, but the explanatory statement to the legislation shows that both were stated to be excluded to guard against future developments (at page 3).

Section 18D sets out the manner of determining the purpose of an organisation as follows:

> For this part, the purpose or purposes of an organisation are to be determined having regard to all the relevant circumstances including the organisation's stated objects (if any) and its activities.

All Acts and Regulations for the ACT can be found at http://www.legislation.act.gov.au/

3.9 NORTHERN TERRITORY

The relevant Acts and Regulations in the Northern Territory are:

- *Associations Act*
- *Associations Regulations*
- *Associations (Model Constitution) Regulations*
- *Co-operatives (National Uniform Legislation) Act 2015*
- *Cooperatives National Regulations (NT) (yet to commence)*
- *Gaming Control Act*
- *Gaming Control (Community Gaming) Regulations*
- *Gaming Machine Act*
- *Gaming Control (Gaming Machines) Regulations*
- *Gaming Control (Internet Gaming) Regulations*
- *Gaming Machine Regulations*
- *Gaming Machine Rules*

The *Statute Law Amendment (Directors' Liability) Act 2015* commenced on 14 October 2015. Its provisions affect directors under the *Gaming Control Act* (at section 72) and the *Gaming Machine Act* (at sections 180, 180A) to impose criminal liability on executive officers of a body corporate in certain circumstances. If the body corporate is liable, criminal liability for directors can be deemed. The purpose of these amendments was to align Northern Territory legislation with the Council of Australian Governments (COAG) reforms for nationally consistent directors' (executive officers') liability provisions in legislation. The amendments also aim to achieve consistency in the wording of the provisions to create simplicity and clarity for corporations that operate across multiple jurisdictions.

A directors' liability provision under these reforms imposes personal criminal liability on directors for breaches of laws by corporations (bodies corporate). The COAG reforms aim to ensure that a director is not liable for corporate fault unless he or she has personally assisted in the commission of an offence, or has been negligent or reckless in relation to the corporation's offending.

The *Gaming Control Act* was amended by the *Revenue and Other Legislation Amendment Act 2015* The amendments, which commenced on 1 July 2015, were enacted to:

- create a head of power to impose annual licence fees and regulatory fees on casinos in the Northern Territory; and
- require casinos in the Northern Territory to pay a gaming machine community benefit levy to the Community Benefit Fund at the rate of 10 per cent of the casino's gross monthly profit from gaming machines (effective from 1 July 2015).

The *Gaming Machine Act* was amended by the *Gaming and Liquor Legislation Amendment Act 2015*, which commenced on 1 July 2015. This was an Act dealing with a technicality only, i.e. the ability for gaming machine licence holders to apply for a transfer of that licence to another business in instances where the related liquor licence is also being transferred.

The *Payroll Tax Act 2009* (NT) was amended in June 2015 by the *Revenue and Other Legislation Amendment Act 2015* (NT), to restrict payroll tax concessions for charities by replacing Part 4 Div 1. The new categories of 'excluded entities' (section 48A(3)) are predominantly based on purposes:

- A 'trade, industry or commerce entity' (section 48B), if 'a purpose of the entity is to promote trade, industry or commerce (whether generally or in respect of any particular kind of trade, industry or

commerce)', but not where the sole or predominant purpose of the entity is one or more of the first three limbs of charitable purposes.

- A 'political party', defined (section 48) as 'an entity that has as one of its purposes the promotion of the election' of a candidate endorsed by it.
- An 'industrial association', defined (section 48) by reference to the identity of the persons associating together (employers or employees) and in some instances also by reference to purpose.
- A 'professional association', defined (section 48) as 'an entity that has as one of its purposes the promotion of the interests of its members in any profession'.

The *Co-operatives (National Uniform Legislation) Act 2015* was assented to on 22 May 2015, and commenced on 1 July 2015. This adopts the Co-operatives National Law in line with other Australian jurisdictions. The *Co-operatives (National Uniform Legislation) Regulations* were gazetted on 2 December 2015, with a commencement date of 1 January 2017.

All Acts and Regulations for the Northern Territory can be found at http://dcm.nt.gov.au/strong_service_delivery/supporting_government/current_northern_territory_legislation_database

4.0 CONTRIBUTING ORGANISATIONS

THE AUSTRALIAN CENTRE FOR PHILANTHROPY AND NONPROFIT STUDIES

The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS) is part of the QUT Business School which is internationally recognised for its high quality teaching and research. ACPNS brings together academics and research students from a wide variety of disciplines, however all have expertise in philanthropy, nonprofit organisations, and the social economy. The Centre's research activities incorporate a wide range of issues of interest and concern to philanthropic and nonprofit organisations and government including:

Accounting and Finance
QUT Standard Chart of Accounts – now the National Standard Chart of Accounts (NSCOA)

Nonprofit Governance
Governance and management teaching and research
Nonprofit board assessments (the Developing Your Board nonprofit board evaluation)

Nonprofit Regulation
Law reform policy
Taxation
Liability
Human services contracts and partnerships

Philanthropy and Fundraising
High net worth giving
Professional adviser's role in philanthropy
Philanthropy for Indigenous and Torres Strait Islanders' causes
Planned giving

Social Enterprise
Mapping and scoping the sector
Strategic management of social enterprises
Social enterprise and public policy
Legal issues affecting social enterprise

Apart from the research activities of its members, staff associated with the Centre also teach programs designed for students interested in following careers in the management of philanthropic and nonprofit organisations or in public administration associated with nonprofit organisations. The Graduate Certificate in Business (Philanthropy and Nonprofit Studies) comprises eight core units which provide the basis for articulation into the Master of Business (Philanthropy and Nonprofit Studies). The Graduate Certificate is available to students based outside of Brisbane via flexible delivery mode.

The Centre has an active community service and continuing professional education program and has conducted public and specialist seminars for several years. The Centre also publishes working papers, manuals and monographs.

Mission
...to bring to the community the benefits of teaching, research, technology and service relevant to philanthropic and nonprofit communities.

History

Established in 2001, the Centre builds on the former Program on Nonprofit Corporations (PONC), which commenced in the School of Accountancy, Faculty of Business in 1991. PONS involved various staff within the Faculty of Business in research, consultancy and community service in the areas of law, tax, management, marketing, fundraising, ethics and nonprofits organisations.

The Program developed a strong reputation for research and community service in the legal, accounting, taxation and public policy aspects of philanthropic and nonprofit entities.

In 2001, generous support was received from The Myer Foundation and the Reid Family Charitable Trusts. This support was matched by QUT. In 2007, the Centre became a fully accredited member of the Nonprofit Academic Centers Council in the United States.

THE CHARITY LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND

The Charity Law Association of Australia and New Zealand (CLAANZ) was originally established as the Australian Charity Law Association in 2009 in response to the emerging need for accountable, charity-related legal services in Australia. The Association changed its name on 27 August 2015 to better reflect the engagement, since our establishment, of Australian and New Zealand colleagues in addressing legal issues in the charity and NFP sector in both countries. The Association is registered as a charity with the Australian Charities and Not-for-profits Commission (ACNC).

The Association's aim is to provide a forum for professionals, academics and charity and not-for-profit (NFP) employees or volunteers who have an interest in charity and NFP law to increase their knowledge in this area and, as a consequence, raise the standard of legal assistance provided to charities and NFP organisations. This education is provided through seminars and conferences involving both members and international and Australian guest speakers, our website is also designed to facilitate interaction between members. The many recent reforms in the regulation of charities and NFPs serve to highlight the importance of education to keep abreast of current legislative requirements, whether from a compliance or advisory perspective.

The 2015 Conference was held in Brisbane in August over two days and covered topics such as Religion and Charity; issues of education in Charity Law; Trusts and Charity; and drafting constitutions. In addition two concurrent streams were provided, one focusing on issues encountered by in-house counsel and the other on governance and regulation. The next conference is planned for August 2016 in Melbourne.

The current Board members of CLAANZ are: Anne Robinson (Principal, Prolegis Lawyers, Sydney) (Chair); Jennifer Batrouney SC (List A Barristers, Melbourne); Dr Matthew Harding (Associate Professor, Melbourne University Law School); Dr Matthew Turnour (Partner, Neuman & Turnour Lawyers, Brisbane); Seak-King Huang (Company Secretary & Executive Counsel, World Vision Australia, Melbourne); Sue Barker (Director, Sue Barker Charities Law, New Zealand).

How you can get involved:

- Become a member – Membership is open to anyone with an interest in charity law. Benefits of membership include receiving information about relevant events and legislative changes, and discounted fees for seminars and conferences. Members can also participate in website forums or contribute to the blog. Applications for Membership can be accessed via the Association's website www.claanz.org.au.
- Assist with the organisation of, or participate in meetings, seminars and conferences relating to charity and NFP law issues either as a presenter or simply attending.

Administrator: Merrin Marks admin@claanz.org.au; ph. 0401 486 844.

JUSTICE CONNECT & NOT-FOR-PROFIT LAW

Justice Connect is a community legal centre committed to improving access to justice. It helps disadvantaged individuals to access legal services through a pro bono referral service, and also runs programs targeting unmet legal needs of particular client groups. Justice Connect aims to develop a sector-based hub of not-for-profit legal expertise and support in the Not-for-profit Law program.

Not-for-profit Law is a specialist community legal service established to provide free and low cost legal assistance to not-for-profit organisations. Not-for-profit Law 'helps the helpers' by providing tailored legal information, advice and training to not-for-profit community organisations. Its focus is on improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate. To this end, it operates a national Information Hub (www.nfplaw.org.au) as well as facilitating pro bono legal services and education opportunities for community organisations, predominantly in Victoria and New South Wales. In its policy and law reform work, Not-for-profit Law is focused on reducing red tape for the not-for-profit sector, helping not-for-profits be more efficient and run better, and ensuring that reform takes into account impacts on the not-for-profit sector.

By relieving the burden of legal issues, Not-for-profit Law aims to empower organisations to focus their time and energy better on achieving their mission, whether that's supporting vulnerable people, delivering community services, enhancing diversity or bringing the community together. Not-for-profit Law works with a range of community peak bodies, including through a formal partnership with the Australian Centre for Philanthropy and Nonprofit Studies, and we are grateful to the ACPNS for their tremendous support and encouragement.

Not-for-profit Law can be contacted on 1800 NFP LAW.

CONTACT INFORMATION

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