

*PHILLIPS V ROYAL SOCIETY FOR THE
PROTECTION OF BIRDS:*
CONSTRUCTION OF A GIFT TO A
DISSOLVED CHARITABLE COMPANY
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Even the best laid plans can go wrong, and where a charitable bequest turns out to be impossible to effect, the law must construct the will in order to decide how the testator's gift can best be distributed. In *Phillips v Royal Society for the Protection of Birds*,² an executor requested instructions from the High Court after finding that a charitable company nominated in the will had dissolved after the testatrix's death, but before he was able apply the gift. This note analyses the rules of construction as they were applied to complex facts and considers the wider impact of the judgment.

Rules of Construction

Incorporated charities are able to hold property beneficially.³ Where such an institution is nominated in a will, the court will presume that the testator has made an absolute gift to the institution *per se*, rather than fixing him with an intention to establish a trust for the charitable purposes it serves.⁴ It follows from this principle that where a gift is made to an expired incorporated charity, then seeing as there is no trust for the court to effect, the gift will *prima facie* lapse into the residuary estate and (in the normal course) pass to the next-of-kin.⁵

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2 [2012] EWHC 618 (Ch), hereafter, *Phillips* [2012].

3 *Re Vernon's WT* [1972] Ch 300 (Ch) at 303.

4 *Re Finger's WT*, [1972] Ch 286 (Ch) at 298.

5 *Re Finger's WT* [1972] Ch 286 (Ch) at 298.

However, three alternative rules of testamentary construction might be able to save the gift from lapse. First, and most obviously, if the testator has foreseen that the gift might become ineffective and provided for the eventuality in his will, then the court will follow his directions.⁶ Second, if there is strong evidence that the testator did in fact intend a trust, the court will substitute an alternative institution as trustee.⁷ Third, the *cy-près* doctrine might apply.⁸ Under this doctrine, if the gift only became impossible after the death of the testator, then the judge will be able prevent lapse and apply the funds to new charitable purposes as near as possible to those served by the nominated institution.⁹ In this instance of ‘subsequent failure’, the court will save the gift regardless of the testator’s intention.¹⁰ On the other hand, if the gift was initially impossible to effect (i.e. it was impossible from the moment of death), then the gift will lapse out of charity unless the judge can evidence an intention to give to more general charitable purposes.¹¹ As there is a strong presumption against a general charitable intention where the testator has nominated an expired charitable institution in his will, such an intention will be difficult to find.¹²

Facts of the Case

Mrs Vera Gwendoline Spear made a single specific bequest of her pet parrot. She provided for the remainder of her estate to be applied for the ‘general purposes’ of four animal welfare organisations. While three of the gifts were apparently applied without problems, the fourth gift to the New Forest Owl Sanctuary became the subject of the hearing. Unfortunately the Sanctuary, which had been an incorporated body, had closed in circumstances of scandal following a BBC undercover investigation alleging unacceptable practices and animal cruelty.

Legal problems arose soon after the BBC documentary was aired in June 2003. Mr Bruce Berry (who had been the effective manager of the Sanctuary) transferred

6 See *Goldschmidt, Re* [1957] 1 WLR 594 (Ch), *Re Broadbent (Deceased)* [2001] EWCA Civ 714 (CA).

7 *Re Vernon’s WT* [1972] Ch 300 (Ch) at 303.

8 *Re Finger’s WT* [1972] Ch 286 (Ch) at 298.

9 *A-G v Ironmongers’ Co* (1841) Cr & Ph 208 (HL) at 227 and generally, Mulheron ‘The Modern *Cy-près* Doctrine: Applications and Implications’ (2006) UCL Press 128-129.

10 Courts do not enquire if the testator would have preferred lapse in these circumstances for example, *Dominion Students Hall Trust, Re* [1947] Ch 183 (Ch).

11 *Kings v Bultitude* [2010] EWHC 1795 (Ch) at [54]. See Picton, ‘*Kings v Bultitude* – A Gift Lost to Charity’ [2011] Conv 69.

12 *Re Rymer* [1895] 1 Ch 19 (CA), *Re Harwood* [1936] Ch 285 (CA).

the Sanctuary's site lease to his friend, Mr Talbot, who, in turn, denied access to the birds and apparently impounded the charity vehicles. Mr Talbot then demanded a daily maintenance fee for each bird from the remaining charity trustees. Seeing as the trustees had no resources with which to resist Mr Talbot's claim, a deal was struck. In return for the legal transfer of approximately half of the birds to Mr Talbot's company, he was persuaded to release the remaining birds from the site. They were moved to an estate in Cheshire under an arrangement made by a charity trustee named Mr Poole. The charity vehicles (which were of considerable value) remained on the site, presumably taken without payment. Unfortunately the difficulties did not end there. At the hearing, a Mrs Broughton, representing a charity named the North Wales Bird Trust, alleged that some fifty birds were stolen or sold, with Mr Poole retaining the proceeds. However, Mrs Broughton acknowledged that the remainder of the birds (i.e. those that had not been sold or stolen) were transferred into the care of the North Wales Bird Trust.

As the New Forest Owl Sanctuary's birds (and other assets) had been dispersed, the Charity Commission recommended it be wound up and, in August 2006, the organisation was removed from the register of charities. Mrs Spear died during the process of its dissolution under what was then section 652 of the Companies Act 1985.¹³ At the point that she died, a letter had been written to the company enquiring if it was carrying on business and a notice had been published in the Gazette that the company might be dissolved after three months.¹⁴ The company formally dissolved by removal from the register of companies on 6th February 2007, reportedly just a few days after Mrs Spear's death.

Three key arguments were considered by the judge. First, the North Wales Bird Trust submitted that it should receive the gift under a successor clause contained in the will which provided *inter alia* that if 'all the assets' of the Sanctuary had been transferred to another charitable body before the gift had taken effect, then the trustees 'shall give effect to the gift as if it were a gift to the body... to which the assets had been transferred.' Second, the Attorney General argued that the presumption of an absolute gift could be rebutted in the case, so that the testatrix's bequest could be saved from lapse as a charitable purpose trust. And, in the alternative, the Attorney General also argued that the gift could be constructed and saved from lapse under the *cy-près* doctrine.

¹³ Currently Companies Act 2006, s 1000.

¹⁴ This sequence of events is presumed from the report.

The Construction of the Gift

1. The Successor Clause

The construction of testamentary clauses will often turn on the particular facts of the case before the judge. The North Wales Bird Trust claimed that it should benefit from the successor clause because, at the point at which the Sanctuary had been wound up, the charity had no further realisable assets to transfer, and because the Trust had been the only charity to receive the Sanctuary's birds. Yet HHJ David Cooke (sitting as a High Court judge) rejected the submission. On a broad reading,¹⁵ he held that the underlying purpose of the clause was to effect the gift for the benefit of a successor body undertaking the same activities as the transferor. Seeing as, *inter alia*, not all of the Sanctuary's birds were in the care of the North Wales Bird Trust, it was not possible to say that the Trust was performing that role.

Nor could a narrower reading help the Trust's claim.¹⁶ The judge was prepared to interpret the phrase 'all the assets' so that it might cover a situation where some minor assets had not been transferred, or a situation where some assets had been disposed of in the course of operations. Yet HHJ David Cooke was not able to stretch the phrase to cover the specific facts of the case. He found that having 'no realisable assets' at the point of winding up was not the same as having transferred 'all' the assets.¹⁷ As the charity vehicles had not been disposed of, some valuable assets had remained untransferred.

2. Rebuttal of the Presumption of an Absolute Gift

Although counsel for the Attorney General submitted that the testatrix had intended the Sanctuary to take as trustee, the judge observed that the points had not been made with any great force. First, it was submitted that the charity had been referred to as 'the Owl Sanctuary' in the will, rather than by its correct name, indicating that the testatrix may not have known that the New Forest Owl Sanctuary was an incorporated body. Yet the point was rejected on the basis that, as a matter of law, an absolute gift was presumed whether or not the testatrix knew that the Sanctuary was a charitable company.¹⁸

¹⁵ *Phillips* [2012] at [11].

¹⁶ *Phillips* [2012] at [13].

¹⁷ *Phillips* [2012] at [16].

¹⁸ *Phillips* [2012] at [19].

Counsel also argued that a charitable purpose trust arose as a consequence of the gifts being made for the ‘general purposes’ of the nominated charities. Yet HHJ David Cooke found that an absolute gift for an incorporated charity would, as a matter of course, be applied for the general purposes of the organisation on the basis that, ‘a gift such as this which is expressed to be to a company for its general purposes emphasises the general position rather than indicating a separate trust.’¹⁹ Following the rejection of counsel’s arguments, there was no further positive indication in the will that the testatrix had made anything other than an absolute gift for the New Forest Owl Sanctuary to spend as it thought fit.²⁰

3. *Cy-près* Construction

At the date of the testatrix’s death, the Sanctuary was defunct in practical terms. If HHJ David Cooke had found that the institution had in fact ceased to exist by the death of the testatrix, there would have been an instance of *cy-près* initial failure. In such circumstances, the gift would have lapsed to the next-of-kin, unless the presumption against constructing a general charitable intention where an expired charitable institution is nominated could have been overcome. However, the gift was found to be effective at the point of death on two grounds. First, the judge was led to the construction by parity of reasoning with the law as it relates to unincorporated trusts,²¹ where it has been long established that funds do not actually have to vest in the charity in order for a gift to be effective.²² Second, it was found that, if the directors of the Sanctuary had known about the bequest, they would have been able to halt the process of dissolution in order to ensure that the Sanctuary received the funds.²³ The gift had been possible on death, so there was an instance of supervening failure, and the gift could be applied *cy-près* to a new organisation without constructing a general charitable intention.²⁴ In light of this finding, the judge accepted the Attorney General’s submission that the gift should be applied *cy-près* to the North Wales Bird Trust.²⁵

¹⁹ Phillips [2012] at [19].

²⁰ Phillips [2012] at [22].

²¹ Phillips [2012] at [26].

²² *Re Slevin* [1891] 2 Ch 236 (CA), *Re Tacon* [1958] Ch 447 (CA).

²³ Phillips [2012] at [24].

²⁴ Phillips [2012] at [28].

²⁵ Phillips [2012] at [28].

Trusts for Specific Charitable Purposes

HHJ David Cooke did not find that gifts to existing incorporated institutions can never lapse. Having found an instance of subsequent failure he noted:²⁶

...unless the court finds that the particular method specified is the only possible way of giving effect to the donor's charitable intentions, it may direct that the funds be applied *cy-près*...

Seeing as application *cy-près* is automatic in cases of subsequent failure, the judge must have been referring to a specific charitable purpose trust that fails initially even though the incorporated trustee still formally exists on death. If the testator's gift is dependent on the instrumentality (i.e. the functional existence) of the incorporated charity, the gift would only be effective if the nominated institution was actually operating as a functional charity at the point of death.²⁷ In this instance, even if the nominated charity had not been formally dissolved, there would be an initial failure of the separate purpose trust, and so the gift would likely lapse out of charity because the testator would have no general charitable intention. However, in light of the strong presumption of an absolute gift where an incorporated charity is nominated, it would be very difficult to evidence the testator's intention to establish this type of specific purpose trust where the nominated incorporated charity still exists. Even so, it is possible to imagine circumstances where it might appear likely to the court, such as a gift motivated by an intention to repair the dilapidated buildings of a particular institution,²⁸ or a gift to a specific independent church.²⁹

Conclusion

The ratio in *Phillips*, that *so long as an incorporated charity exists at the date of death then an absolute gift to the charity is effective even if that charity dissolves before it receives the property*, marks the logical application of the rules to complex facts. Yet the case might also be seen as part of a wider context. Unusually, in this area of law judges acknowledge an underlying legal policy. The court will avoid the lapse of bequests where it is possible to do so.³⁰ The construction in *Phillips* turned on the fact that the incorporated charity was still formally in existence. While HHJ David Cooke was correct to say that at the time

²⁶ *Phillips* [2012] at [27].

²⁷ See *Kings v Bultitude* [2010] EWHC 1795 (Ch) at [43].

²⁸ See *Re Withall* [1932] 2 Ch 236 (Ch) at 243.

²⁹ *Kings v Bultitude* [2010] EWHC 1795.

³⁰ See *Re Roberts* [1963] 1 WLR 406 (Ch) at 412, *Re Watt* [1932] 2 Ch 243 (CA) at 246.

of the testatrix's death the New Forest Owl Sanctuary was technically capable of being revived to receive property, it was otherwise defunct in practical terms. Its birds had been transferred and its other assets had disappeared. Finding the 'charity' to exist in such circumstances suggests construction in a generous spirit. Yet the principle could have the opposite effect in slightly different circumstances. Had the testatrix died a few days later, the incorporated charity would have been formally dissolved and there would have been an instance of *cy-près* initial failure. Even so, the likely impact of the case upon future decisions is not certain. No two wills or sets of circumstances are precisely identical, and the wider policy against lapse might prevent rigid application of the principle should the court think it inappropriate.