

CASE NOTES

Australia

1. A nonprofit company limited by guarantee, established to improve patient care and health by enabling general medical practitioners to contribute to health planning, claimed exemption from payroll tax on the grounds that it was a charitable body. The activities of the company were almost wholly funded by Commonwealth government grants, about half of which were outcome-based funding agreements through which the government exercised effective control over the company's operations as part of its national health strategy, but the government had no power to control the board of the company. The Victoria Civil and Administrative Tribunal ruled that the company existed for the purposes of the community, but that it was too close to being an arm of government to be charitable. On appeal, the Victoria Supreme Court agreed that the practical reality was that the company was formed under the aegis of the government's general practice initiative to carry out government sponsored health care programmes. Accordingly, it could not be regarded as analogous to any recognised charity or otherwise within the equity of the Statute of Elizabeth. The decision was upheld by the Court of Appeal of the Supreme Court which held by a 2-1 majority that, although government funding of the company was not determinative of the issue, the company's activities were so closely associated with the implementation of government policy that it should properly be characterised as carrying out the work of government.

(Central Bayside Division of General Practice Ltd. v Commissioner of State Revenue [2005] VSCA 168, 1st July 2005)

2. In the course of a dispute one of the parties sought a preliminary declaration from the court as to whether it was a charitable trust having regard to its political objects. The trust was established as a foundation that provided financial support to the Henry George League and other organisations that sought to further the teachings of Henry George, including the view that taxation should only be levied on land values, with the object of establishing these economic

principles by legislation and common usage. The court held that:

- in order to identify the objects of the trust it was necessary to look at the constitutional documents and if these were ambiguous to look at the activities of the trust;
- in this case there was no ambiguity and there was no need to admit the minutes of the Henry George League and other evidence;
- the dominant purpose of the trust was education with the object of persuading people of the merits of the views of Henry George, even though the ultimate purpose of the education might only be realised by legislation and this might have been the motive for the creation of the trust;
- the trust would also have been saved by section 23(1) of the Charitable Trusts Act 1993 since it would have been possible to sever the political aspects of the trust and leave the educational aspects in force (applying *Public Trustee v Attorney-General for New South Wales* (1997) 42 NSWLR 600).

Accordingly, the court ruled that the trust was charitable.

(Attorney General for New South Wales v NSW Henry George Foundation Ltd, Supreme Court of New South Wales, [2002] NSWSC 1128; 5 ITELR 568)

Canada

1. A widow without any children made a will in 1998 by which she left her house to one charity and the residue of her estate to a foundation which was to distribute the money to several charities according to detailed instructions in the will. By a second will in February 1999 she left the house to two friends, Mr & Mrs Gnida, with the residue to go to the foundation on similar terms to the first will. Subsequently, the widow fell out with Mrs Gnida and made a third will in May 1999 which left her entire estate to two other friends, Mr & Mrs Rufenacks. Before the widow died she told the Rufenacks that she wanted her estate to go to charity, but she did not provide a list of her intended beneficiaries. Some of the charities that stood to benefit from the earlier wills challenged the validity of the May 1999 will, alleging first that the widow lacked testamentary capacity and second that, even if she had capacity, the court should impose a trust on the executors in favour of some or all of the charities. On the first issue the Surrogate Court found that there were no suspicious circumstances and therefore that the

widow was presumed to have capacity. With regard to the second claim the court held that:

- where no issue of fraud arose, the standard of proof required to establish a secret trust was the ordinary civil standard of proof that is required to establish an ordinary trust;
- oral evidence is admissible to establish a secret trust;
- where a secret trust is alleged, the legatees cannot rely on the provisions of the Statute of Frauds or a Wills Act requiring dispositions of property to be in writing;
- in the case of a secret charitable trust, the only certainty required was that all the property was to be given to purposes within the legal concept of charity;
- on the evidence of her communications with the legatees, the widow had intended that her entire estate was to be the subject of the trust and that it was to be distributed to such charities and in such amounts as decided by the legatees in their discretion.

Following an appeal by the Rufenacks against this decision (which is likely to be heard in 2006), several charities who claimed to be beneficiaries of the will sought to remove the Rufenacks as executors of the estate on the grounds that the launching of the appeal placed them in a direct conflict of interest with the charitable beneficiaries. The Court of Appeal granted the application and appointed a trust company in their stead.

(*Rufenack v Hope Mission*, Surrogate Court of Alberta, 2002 ABQB 1056, 6 ITELR 1; Alberta Court of Appeal, 2005 ABCA 129)

European Economic Area

1. In 2001 the Norwegian Government amended the tax law to provide favourable depreciation rates for large scale liquefied natural gas projects in Norway. One of the applicants, the Bellona Foundation, a Norwegian foundation established to combat environmental problems, complained to the defendant, the EFTA Surveillance Authority, that the measure constituted unlawful state aid under Article 61(1) of the Agreement on the European Economic Area. The defendant subsequently decided in 2002 to approve the measure as regional aid. The applicants sought to annul this decision by bringing an action before the EFTA

Court. The defendant sought a preliminary decision on the admissibility of the action, arguing that the appellants had no *locus standi* to challenge the decision. As regards Bellona's standing to bring the action, the court held that:

- any effect on Bellona's economic interests in various environmentally friendly enterprise projects would be either indirect or remote and insufficient to provide a basis for *locus standi*;
- since Bellona is a foundation without a defined membership it has no *locus standi* as a body representing a community of interests;
- although in certain circumstances participation by an organisation in the administrative proceedings that led to the defendant's decision can warrant standing for that organisation to bring an action, Bellona was not acting on behalf of any members who could be defined as "parties concerned" entitled to bring an action individually (applying *Scottish Salmon Growers Association v EFTA Surveillance Authority*, Case E-2/94, [1995] EFTA Court Report 59).

Accordingly, the application was declared inadmissible.

(*Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v EFTA Surveillance Authority*, EFTA Court, Case E-2/02, Judgment 19 June 2003)

India

1. The Jodhpur Chartered Accountants Society applied for registration as a charity under section 12A of the Income Tax Act 1961. The Tax Tribunal upheld the society's appeal against the rejection of the application by the Jodhpur Commissioner of Income Tax ([2000] TTJ (Jd.) 217). The High Court of Rajasthan rejected the appeal by the Commissioner on the grounds that, since the objects of the society emphasised the propagation and dissemination of knowledge about auditing, accounting and taxation by holding seminars and conferences, and applying the binding precedent decision of the Apex Court in *Ahmedabad Rana Caste Association v CIT* [1971] 82 ITR 704, the predominant object of the society was of general public utility to an identifiable section of the public.

(*CIT v Jodhpur Chartered Accountants Society*, High Court of Rajasthan Jodhpur Bench, [2003] 127 TAXMAN 90 (RAJ.))

Malaysia

1. The respondent contracted to sell two companies to the appellant, in consideration of which the appellant paid all of the purchase price except for a retention of MYR 10 million, which the appellant undertook to contribute to a charitable foundation which the respondent intended to establish in a separate agreement of the same date between the parties expressed to be entered into “in consideration of” the main agreement. The respondent’s representative died and the respondent did not take any steps to establish the foundation. Instead, the appellant established the foundation with charitable objects. The respondent sought a declaration that the gift to the foundation failed for uncertainty and that the appellant held the sum of MYR 10 million, and interest earned thereon, on trust for the respondent. The High Court granted the declaration. On appeal, the Court of Appeal held that:

- as a party to the agreement, the appellant was not a volunteer providing valuable consideration in the form of an obligation to hold the retention for the stated purpose;
- the promise made by the respondent constituted an enforceable trust of property which he had fully vested in the appellant;
- it does not matter whether the trust is completely constituted as equity will regard that as done which ought to be done;
- the terms in the supplementary agreement constitute a valid declaration of trust that a gift is for a charitable purpose notwithstanding that no specific charity is mentioned.

Accordingly, the monies retained by the appellant are held for the benefit of the foundation.

(Multi-Purpose Holdings Bhd v General Holdings Sdn Bhd, Court of Appeal (Kuala Lumpur), [2003] 2 MLJ 252)

New Zealand

1. Under current New Zealand law retirement pensions are exempt from income tax but the income of a retirement benefit scheme is generally taxable. The trustees of a defined benefit and contributory pension scheme providing retirement income to employees of the Church of Jesus Christ of Latter-day Saints and two related entities claimed exemption from income tax on the grounds that the income

of the scheme was derived by trustees for charitable purposes. The Church, itself a charitable body, does not have paid ministers but has a system of “callings” whereby Church members perform ecclesiastical functions. The salaries received by the members of the scheme related to their temporal jobs not their calling. The trustees relied on two cases where pension funds connected to religious bodies were found to be charitable: *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335 and *Presbyterian Church of New Zealand Beneficiary Fund v CIR* [1994] 3 NZLR 363. The High Court rejected the trust’s appeal on the grounds that the case could be distinguished from the *Presbyterian Church* decision because the members of the Church’s scheme were not clergy and in many cases the work of the employees could be done by non-members of the church. The Court of Appeal doubted the correctness of the *Presbyterian Church* decision but decided that it should not be overruled; all the judges were content to apply it to the facts of the present case and on those facts the wide scope of the beneficiaries of the scheme exceeded any charitable purpose. The denial of charitable status did not involve any discrimination between different churches, since any church could arrange its affairs so as to bring its pension arrangements within the narrow limits of the *Presbyterian Church* decision. The Supreme Court refused leave to appeal, finding that the proposed appeal did not raise any matter of general or public importance.

(*Hester & Ors v Commissioner of Inland Revenue*, Court of Appeal, [2005] 22 NZTC 19,007; Supreme Court SC 2/05, Judgment 3 May 2005)

2. A charitable trust was established in 1956 for the provision of accommodation for old and young people in need, with special preference for old people living in the Rodney County district, and funds for the general purposes of the Warkworth Diocese of the Church of England. The trustees applied to the High Court for approval of a scheme of arrangement under part III of the Charitable Trusts Act 1957 whereby the assets would be resettled into two new charitable trusts. The trustees, supported by the Attorney-General, argued that it was inexpedient to carry out the purposes of the original trust because the social trend was towards the care of old people in their own homes. The application was opposed by the Church, which owned homes for old people and could make use of the trust funds. The High Court refused the application on the grounds that there was still a need for residential facilities and institutions providing these facilities. The Court of Appeal held that:

- the concept of inexpedience was wider than an inability to carry out the original purposes; however, the question was not merely whether a new scheme would carry out the purposes of the trust better, the purposes had to have become unsuitable or inadvisable;

- the social change towards the care of old people in their own homes did not make it inexpedient to carry out the original purposes of the trust, nor was there any inexpediency caused by the geographical restrictions in the trust deed.

Accordingly, the appeal was dismissed.

(*Re McElroy Trust*, Court of Appeal, [2003] 2 NZLR 289)

Singapore

1. The plaintiffs sought a declaration that the appointment of the 21 defendants as the 7th management committee of an unincorporated temple association was null and void, and that the 6th management committee was still the duly elected management committee. The grounds for the claim were that, although notice of an extraordinary general meeting of the association had been given to all members including the plaintiffs, the notice did not state that an election to replace the 6th management committee would be held. The plaintiffs did not attend the meeting, at which the members present voted to appoint a new management committee. The High Court held, citing *Young v Ladies' Imperial Club* [1920] 2 KB 523, that the law was clear that meetings would be held to be invalid on the application of non-attending members if the notices convening the meetings do not specify sufficiently precisely the matters to be discussed and voted on at the meetings. Consequently, the notice was bad and the decisions taken at the meeting could not be validated notwithstanding that a majority of the members of the association had voted in favour of them.

(*Lau Ah Lang v Chan Huang Seng*, High Court, [2002] 3 SLR 318)