



## Précis Paper

### ***Australian Youth & Health Foundation v Perpetual Trustee Company Ltd [2017] NSWCA 127***

Nigel Cotman SC and Mahsa Curci discuss the NSW Court of Appeal decision in *Australian Youth & Health Foundation v Perpetual Trustee Company Ltd* and the construction of charitable trusts.

#### **Discussion Includes**

- The construction of charitable trusts
- The relevance of s63 of the Trustee Act.
- Construing wills through language and the intention of the testator.
- The effects of a prospective or retrospective proviso
- Advice for practitioners
- Costs orders in judicial advice cases

In this edition of BenchTV, Nigel Cotman (SC, Barrister) and Mahsa Curci (Solicitor) discuss the NSW Court of Appeal decision in *Australian Youth & Health Foundation v Perpetual Trustee Company Ltd* [2017] NSWCA 127 which considered the construction of a charitable trust. Both presenters represented the appellant.

#### **Background**

1. Eric storm died in 2000. By his will, he settled a charitable trust 'The Eric Storm Charitable Trust' to be divided amongst four named beneficiaries. This included the Australian Youth and Health Foundation ('The Foundation'), the Salvation Army, Mission Australia and Mamre Plains. The form of the bequest for the Foundation included a direction that the monies were 'to be applied for the promotion of natural health in accordance with the present philosophy and practices of the Hopewood Health Centre at Wallacia'.

2. The will created the proviso that if, in the opinion of the trustee, any of the organisations, ceased to exist or ceased to operate under their fundamental objects and purposes, or "shall not apply the funds for the charitable purposes set out above", then there would be a gift over of the relevant share to such charities as the trustee selects.

### Supreme Court

3. The trustee applied for judicial advice under s63 of the Trustee Act. The trustee had made inquiries and formed the view that the Foundation was not operating under its respective fundamental objects and purposes or had applied funds other than for the charitable purpose set out, i.e. the promotion of natural health. The trustee sought judicial advice, as to whether the trustee was justified in this opinion.
4. The Foundation appeared in the proceedings because it would be bound by any adverse decision per s63 (11) of the Trustee Act. Practitioners advising beneficiaries of a will, who receive notice of an application for judicial advice, that may adversely affect their interests, should give consideration to how they can most effectively participate in those proceedings.
5. The proper construction of the will was considered. Firstly, it was questioned, whether the proviso, 'shall not apply the funds for the charitable purposes set out above' should be construed as talking about the past, 'has not applied the funds', or the future, 'will not so apply the funds' and secondly, if a proviso opinion has been formed, is that a once and for all decision or is it a decision to be made annually?
6. In the clause that provided for the shares and the gift over, there was a direction given to the trustee that all income to be paid in accordance with the clause shall be paid within three months of the 30th of June of each year. This could be lent to the view that the trustee was directed to consider each year, whether the proviso was satisfied and do so by the 30th of September, and if not so satisfied, make the distribution. The other view was that forming the proviso opinion was to be a once and for all disqualification of the named beneficiary from further participation and the gift over would operate thereafter in relation to that percentage share.
7. The trustee formed the view that the Foundation triggered the proviso in two respects. Therefore the 44% of the income share that it would otherwise have received under the will would be applied to such charities as the trustee selects.
8. Stevenson J agreed with the view of trustee that the proviso entailed a retrospective question and that the decision of the trustee was final. His honour was of the opinion that the trustee was justified in forming the view that the Foundation had not applied monies for the promotion of natural health, in that, it had reimbursed itself out of the monies received from the trust for expenditure that it had made from its own monies on the trust purpose. These matters occurred in 2012 and 2013.
9. His Honour declined to give advice on whether the trustee was entitled to suspend distributions whilst it made enquiries because the inquiry and decision had been made and found justified.

### Court of appeal

10. The Foundation appealed the construction findings and the factual findings in relation to the breach of the proviso. The Court of appeal was of the view that the construction of the proviso was the threshold question and a dispositive question.
11. The court considered the intention of testator and the deliberate use of language to conclude that the question posed for the trustee in considering the proviso was prospective, i.e. could the trustee relevantly form the opinion that the Foundation would not in the future apply the money 'for the promotion of natural health in accordance with the present philosophy and practices of the Hopewood Health Centre at Wallacia'?
12. The court also held that it was unlikely that it was the intention of the testator, having regard to the size of the bequest, the nature of the work being done and the idea of an annual consideration built into the clause, that it was to be a once and for all decision. On the proper construction of the provision, one looks at what can be anticipated in the future in relation to each distribution year. The trustee's decision about the past was therefore an irrelevant opinion and the question of the proviso being activated fell away.
13. Particularly, Bathurst CJ observed, if the intention of the will was to direct the attention of the trustee to the past, it would have been an easy matter to express, instead of using the word 'shall' which has a future element to it. Furthermore, the manifest intention of the testator was to benefit the charities. It is thus unlikely that the testator would have wished to deprive beneficiaries of benefits merely because on some occasions during the life of the trust the trustee formed the view that the beneficiary had applied some part of the funds for a purpose other than that which is designated.
14. His Honour was of the view that the draftsman was taking care to refer to the income of the trust as being that which was the subject of the holding and dispersal of the trustee. Reference in the clause to the use of the funds, was a reference to that which would be passed into the hands of the beneficiary. The clause reverted to talking about the income when talking about the gift over. This indicated that the obligation on the trust is to consider, in each year, whether the proviso applies. This finding meant that, that which the trustee had brought forward for judicial advice, an opinion of past breaches was an irrelevant consideration and thus advice that it was justified was in turn irrelevant.
15. Stevenson J had declined to answer whether the trustee was justified in suspending distributions to the beneficiary whilst inquiries were made. What appears from the reasoning of the court of appeal and Stevenson J's discussion is that the imperative clause, or subclause of the bequest that required distribution by three months from 30th June, did not enable the trustee to distribute, or, suspend, as either the proviso had been satisfied by an opinion or not, and if not, then there was an obligation to distribute by the 30th September. Although the court of appeal did not specifically address the question of suspension, the reasoning of court of appeal is strongly in favour of the view that there was no power to suspend.

### Orders

16. The court of appeal has yet to enter orders to give effect to the judgment. However, at the very least, the judgment is emphatic that the first instance judicial advice orders have been superseded.

### Considerations for practitioners

17. Firstly, the construction of the will is based on the language used, the apparent intent of the testator, and the extent to which that intent then informs what view one should take of the language. The trustee argued that the difficulty in knowing how the money would be used in the future, compared to how it was used in the past should be a matter for consideration in the construction. This found some favour with Stevenson J but it did not find similar favour with Bathurst CJ or Meagher JA. If the clause produced difficulty for the trustee, it was for the trustee to deal with the difficulty, not for the clause to be construed to remove the difficulty in the first place. The testator's intention is paramount, as applied to the reading of the language of the clause.
18. Secondly, it is important for beneficiaries to be vigilant to whether proceedings for judicial advice may impact on their position and if it does how they can affectively insert themselves into the determination process.
19. Thirdly, there is an unresolved question from the appeal, which is the correctness of Stevenson J's view that the reimbursement of expenses incurred on the requisite purposes by the beneficiary would be outside the direction in the will.
20. As a practical matter, if one is acting for an organisation that is the subject of a purpose gift, the segregation of money and the clear capacity to trace the use of those monies to the requisite purpose may solve or remove a lot of scope for argument between donor and donee. It is of particular significance to charitable bodies that may be audited or called upon to account for money being used for particular purposes.
21. Lastly, both at first instance and at the court of appeal it was accepted that in seeking to form the proviso opinion the obligation on the trustee was to form the opinion in good faith, after a real, genuine and informed consideration of the issue. The beneficiary may well have an obligation to tell the trustee the information that is needed to allow the trustee to properly form an opinion, although it is outside the purview of the decision.

### Costs

22. The court of appeal ordered that costs should fall on the estate, that being the ordinary order in judicial advice cases.
23. The case concerns the construction of a clause that operates generally in relation to the charitable trust for the benefit of the trust as a whole. If the trustee brings an appeal, or the issues are particular to one beneficiary the ordinary order for costs may be departed from.

## **BIOGRAPHY**

### **Nigel Cotman SC**

Barrister, Nine Wentworth Chambers, Sydney

Nigel Cotman was called to the bar in 1975 and took silk in 1996. His principal practice centres on civil litigation in the Supreme Court and Federal Court of Australia, in commercial, equity matters and insolvency. Nigel's background is in accounting and taxation, practicing and teaching the subject at UNSW. Further, he was appointed as an Assistant Commissioner of ICAC to conduct the Grains Board Inquiry.

### **Mahsa Curci**

Solicitor, Pavuk Legal, Sydney

Mahsa was admitted as a solicitor in 2014. She practices in various areas of law including banking, finance, wills and estates, employment, family law and immigration. Mahsa has been involved in major litigation matters in the Supreme Court, Court of Appeal and the High Court of Australia.

## **BIBLIOGRAPHY**

### **Focus Case**

*Australian Youth & Health Foundation v Perpetual Trustee Company Ltd* [2017] NSWCA 127.

### **Cases**

*Perpetual Trustee Company Ltd* [2016] NSWSC 1273.

### **Legislation**

*Trustee Act 1925* (NSW).