

26-06-00

Privy Council Appeal No. 37 of 1998

The Attorney-General of the Cayman Islands (Third Appellant) and Others

Appellants

v.

Even Wahr-Hansen

Respondent

FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 26th June 2000

Present at the hearing:-

- Lord Browne-Wilkinson
- Lord Steyn
- Lord Clyde
- Lord Hobhouse of Woodborough
- Lord Millett

[Delivered by Lord Browne-Wilkinson]

This appeal raises a short question as to the validity of a memorandum of agreement dated 20th July 1976 ("the Continental Foundation"). Although the point is a short one, in order to understand how it arises it is necessary to give some background information.

Mr. Anders Jahre was ostensibly a wealthy Norwegian shipowner. However, when he died on 26th February 1982 he appeared only to have left a small estate. The sole respondent to this appeal, Mr. Wahr-Hansen, is the administrator of that estate. In that capacity the respondent has brought proceedings in England and elsewhere to recover assets alleged to be, in truth, beneficially owned by Mr. Jahre. Amongst the claims put forward it was

alleged that Mr. Jahre was the true beneficial owner of the property the subject matter of the Continental Foundation. It is said that in June 1976 it was reported that Mr. Jahre's business affairs were the subject of an investigation by the Norwegian central banking and revenue authorities and that the Continental Foundation was purportedly then set up with assets primarily provided by Mr. Jahre. The ostensible settlor of the Continental Foundation was Mr. Monsen but it is alleged that the true settlor was Mr. Jahre.

Following Mr. Jahre's death, on 8th October 1982 Mr. Monsen established a new foundation, the Aall Foundation, which was regulated by a memorandum of agreement of 7th October 1982. On the same day, 8th October 1982, the trustees of the Continental Foundation in purported exercise of powers contained in the Continental Foundation Trust Deed transferred all the assets subject thereto to the Aall Foundation. In these proceedings the respondent claims that the trusts of both the Continental Foundation and the Aall Foundation are void and that accordingly the assets subject to those foundations have at all times been held on resulting trusts for the original settlor, be he the ostensible settlor Mr. Monsen or, as the respondent alleges, Mr. Jahre. It was to determine that issue that the trustees of the Aall Foundation started these proceedings in 1994 in the Grand Court of the Cayman Islands (where the Aall Foundation is located) raising the questions:

1. whether the trusts of the Continental Foundation were valid or void;
2. whether the trusts of the Aall Foundation were valid or void;
3. on what trusts the trustees held the assets vested in them.

Preliminary issues were directed to be heard to determine whether the trusts of the Continental Foundation and Aall Foundation were valid or void. Those preliminary issues were heard by Harre C.J. who on 30th April 1996 declared that the Trusts of both funds were valid.

The respondent appealed to the Court of Appeal against the decision that the trusts of the Continental Foundation

were valid. There was no appeal to the Court of Appeal against the decision that the trusts of the Aall Foundation were valid since it is immaterial whether or not they are valid: if, as the Court of Appeal held, the trusts of the Continental Foundation were void the purported vesting of the funds subject to the Continental Foundation in the trustees of the Aall Foundation would be invalid and those funds would at all times have been held on resulting trusts for the settlor of the Continental Foundation.

Against that background their Lordships turn to the terms of the Continental Foundation as declared by the memorandum of agreement of 20th July 1976. This memorandum was expressed to be made between Mr. Monsen as settlor of the first part, trustees of the second part and three persons defined as the "Advisors" of the third part. The first recital recorded that the settlor wished "to establish a Trust for the benefit of worthy individuals organizations and corporations all upon the terms and conditions hereinafter set forth, and to be known 'The Continental Foundation'". The memorandum then provided as follows (so far as relevant):-

"3. The Trustees may accumulate and add to the capital, the net annual income derived from the Trust Fund for so long as the law applicable to the Trustees permits them so to do. In any year that the law applicable to the Trustees requires them to distribute income or in any year that the Trustees not being required to distribute income decide in the exercise of an absolute discretion to distribute income then such income or any part thereof shall be paid to any one or more religious, charitable or educational institution or institutions or any organizations or institutions operating for the public good (and the Trustees shall be the sole and absolute judges of whether any organization or institution so qualifies ... as a beneficiary hereunder) the intention being to enable the Trustees to endeavour to act for the good or for the benefit of mankind in general or any section of mankind in particular anywhere in the world or throughout the world. In the case of any question as to the propriety of any distribution or selection by the Trustees the written approval of the Advisors to the

Trustees, if such exist, shall be an absolute and final determination which shall not be open to question. ...

4. The Trustees may at any time or from time to time prior to the date of final distribution provided they first obtain the written approval of the Advisors but otherwise in their discretion, pay or transfer any part of the capital of the Trust Fund (and even if it shall result in a complete distribution of the entire Trust Fund), to any person, persons, institution or organization who at that time qualify as beneficiaries who are entitled or contingently or prospectively entitled to receive income as hereinbefore provided.

5. The Trustees may at any time or from time to time prior to the date of final distribution provided they first obtain the written approval of the Advisors but otherwise in their discretion pay or transfer part or the whole of the Trust Fund, including any accumulated or undistributed income on hand, to any person or persons or other Trustee or Trustees whomsoever and wheresoever resident or situate for the purpose of resettling a new trust or trusts on such persons as Trustees so that the fund resettled shall be administered for the benefit of any persons, institutions, organizations or corporations who at the time of such resettlement qualify as beneficiaries or prospective or contingent beneficiaries of this Trust ...

31. By unanimous agreement at any time between the Trustees and upon obtaining the written approval of the Advisors to the Trustees any term or provision of the Trust may be amended or revoked or additional terms may be added thereto provided always that in no event shall any amendment whatsoever be made which results in any part of the capital or income of the Trust Fund being paid to the Settlor or to a person who is or has been a Trustee hereunder."

Under clause 32 the Trustees were given power with the approval of the Advisors to move assets of the Trust from one jurisdiction to another.

A number of different points were argued before the Court of Appeal of the Cayman Islands (Zacca P., Kerr

and Collett J.J.A.). In the event, the Court of Appeal allowed the appeal of the respondent on the grounds that the Continental Foundation Trusts were not valid charitable trusts and were therefore void. The Attorney-General of the Cayman Islands, representing the interests of charity, brought this appeal to their Lordships. Although there are numerous other parties to the litigation, only the Attorney-General as appellant and the respondent as respondent appeared on the appeal.

On the appeal, the Attorney-General had to confront two major problems. First, the Continental Foundation does not contain any express mandatory obligations: everything is expressed in terms of powers. Therefore, it is said by the respondent, no valid trusts at all (whether charitable or otherwise) have been established and the funds have been held from the outset on resulting trust. Their Lordships find it unnecessary to express any view on this point since, in their view, the Attorney-General's case fails on the second issue, viz. assuming there to be trusts declared by the memorandum of agreement those trusts were not charitable. There being no time limits as to the vesting of interests or the exercise of powers all provisions of the Continental Foundation are void for perpetuity.

In order to demonstrate that trusts are, in law, charitable it must be shown that those trusts are exclusively charitable. If it is shown that, consistently with the provisions of the trust deed, property can be applied for purposes other than charitable purposes the trust will fail. In the present case the purposes stated by clause 3 fall into two groups. The first group consists of "any one or more religious, charitable or educational institution or institutions". The second group, crucially introduced by the word "or", consists of "any organizations or institutions operating for the public good". The objects specified in the first group are plainly charitable. But, on their literal construction, the purposes stated in the second group are not exclusively charitable. Applications of monies for public philanthropic or benevolent purposes would be for the public good but would not necessarily be legally charitable: *In re Macduff* [1896] 2 Ch. 451; *Chichester Diocesan Fund and Board of Finance Inc. v. Simpson* [1944] A.C. 341. Accordingly, unless the Attorney-General can demonstrate that the words of clause

3 are not to be given their literal meaning the trusts and powers declared concerning the Continental Foundation are not charitable and are all void from the outset.

How then does the Attorney-General seek to restrict the meaning of the words used in the second group of purposes? First he points to the so-called locality cases. These are cases where the gift is made, for example, to a parish (*West v. Knight* (1669) 1 Ch. Cas. 134) or "for the good of" a specific county (*Attorney-General v. Lord Lonsdale* (1827) 1 Sim. 105) or for "charitable, beneficial, and public works" (*Mitford v. Reynolds* (1842) 1 Ph. 185) or for "the benefit and advantage of Great Britain" (*Nightingale v. Goulburn* (1847) 5 Hare 484) or "unto my country England" *In re Smith* [1932] 1 Ch. 153). In all these cases the gifts were held to be valid charitable trusts, even though the breadth of the words used, literally construed, would certainly have authorised the applications of the funds for non-charitable purposes in the specified locality. The courts have held that such purposes are to be impliedly limited to charitable purposes in the specified community. So, it is argued in the present case, although the second group of purposes ("organizations or institutions operating for the public good") is not limited to a particular locality, the same principle ought to be applied and the purposes should be limited to those organisations operated for the public good by charitable means.

In their Lordships' view, this argument is fallacious. There is a limited class of cases where gifts in general terms are made for the benefit of a named locality or its inhabitants. For reasons which are obscure, such cases have been benevolently construed. They are now so long established that in cases falling within the very circumscribed description of gifts for the benefit of a specified locality they remain good law. But they have been widely criticised and indeed have been said to be wrongly decided: see, for example Michael Albery, *Trusts for the benefit of the inhabitants of a locality* (1940) 221 L.Q.R. 49. To apply the same principle to all cases where there are general statements of benevolent or philanthropic objects so as to restrict the meaning of the general words to such objects as are in law charitable would be inconsistent with the overwhelming body of authority which decides that general words are not to be artificially

construed so as to be impliedly limited to charitable purposes only.

The Attorney-General sought to pray in aid the remarks of Russell L.J. in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General* [1972] Ch. 73. In considering the proper approach to the question whether or not a specified purpose fell within the fourth head in *Pemsel's Case* [1891] A.C. 531, i.e. as being a purpose for the benefit of the public at large within the spirit and intendment of the preamble to the Statute of Elizabeth I, Russell L.J. said (at page 88E-G):-

“... the courts, in consistently saying that not all such are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (e.g. a political purpose) which could not have been within the contemplation of the Statute even if the then legislators had been endowed with the gift of foresight into the circumstances of later centuries.

In a case such as the present, in which in my view the object cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute: and I think the answer to that is here in the negative.”

The Attorney-General contends that this presumption in favour of a beneficial purpose being charitable ought to be applied in the present case so as to provide a presumption that the institutions “operating for the public good” should be restricted to such organisations as are operating in a charitable manner. Although, in the judgment of their Lordships, Russell L.J.’s approach has much to commend it in deciding whether or not a purpose specified by the donor falls within the spirit and intendment of the preamble to the Statute of Elizabeth I, it has no application at all to the quite different problem which is raised in the present case, viz. are general words to be artificially restricted to purposes which are within the spirit and

intendment of the Statute and thereby rendered charitable. The principle has no application to such a case nor was it ever intended to.

Finally, the Attorney-General submitted that the words in the second group of purposes were to be construed as being *ejusdem generis* with those in the first group, i.e. institutions "operating for the public good" were to be restricted to such institutions as were operating for the public good by charitable means. It is said that the word "charitable" in the first group refers only to eleemosinary charities for the relief of poverty. Then it is said that it cannot be mere chance that the draftsman in stating the purposes of the Continental Foundation reflects the same four categories as those commonly known as the four heads of charity mentioned in *Pemsel's* case – the advancement of religion, the advancement of education, the relief of poverty and other public purposes. Therefore, it is said, the second group of objects must be construed as being of the same nature as those in the first group, i.e. objects which are in law charitable and as being limited to those purposes which fall within the fourth head in *Pemsel's* case. This argument has only subtlety to recommend it. Their Lordships can see no reason to give this artificially limited construction to the second group of objects which are entirely general. On the contrary there are clear indications that no such implied limitation was intended. The first recital demonstrates that the purpose of the Trust was, amongst other things, to benefit "worthy" individuals, a purpose which is plainly not charitable: see *In re Atkinson's Will Trusts* [1978] 1 W.L.R. 586. Moreover, even clause 3 itself states that the intention is "to endeavour to act for the good or for the benefit of mankind in general". This demonstrates a much wider intention than to benefit those objects which are strictly charitable. Their Lordships are of the view that the memorandum of agreement clearly manifests an intention to establish general welfare trusts without confining those trusts to purposes which are in law charitable.

For these reasons (which are substantially the same as those of the Court of Appeal) their Lordships will humbly advise Her Majesty that the appeal should be dismissed. By an oversight the order of the Court of Appeal did not discharge an order made by Harre C.J. on 20th January

1997 which declared that the assets held by the trustees of the Aall Foundation were held on the trusts of the memorandum of agreement of 7th October 1982. The order of the Court of Appeal of 28th November 1997 will therefore be affirmed but subject to correcting it so as to revoke the order of 20th January 1997. The Attorney-General must pay the respondent's costs before their Lordships' Board.