

APPEARANCES

Peter Goldsmith Q.C., Douglas Close and Graham Ritchie instructed by Messrs. Charles Adams Ritchie & Duckworth for the Appellant.

Terence Etherton Q.C., Christopher Tidmarch and Angus Foster instructed by Messrs. W.S. Walker & Company for the First & Second Respondents.

Michael Hart Q.C. and William Helfrecht instructed by Messrs. Ian Boxall and Company for the Third Respondent.

Allan Boyle Q.C., Nicholas Harrison and Nigel Clifford instructed by Messrs. Hunter & Hunter for the Fourth Respondent.

Stephen Barrie instructed by Messrs. C.S. Gill & Company for the Fifth to the Fifty Fourth Respondents.

BEFORE: Rt. Hon. Edward Zacca, President, Hon. James Kerr and Hon. Gerald Collett, Justices of Appeal.

JUDGEMENT

The subject matter of this Appeal is the Continental Foundation and its validity or otherwise in law as a charitable trust. The foundation was set up by a Memorandum of Agreement under seal dated 20th July, 1976, made between Thorleif Monsen as the ostensible settlor, Robert Slatter of Nassau, Bahamas as the first trustee and three gentlemen described as advisors to the trustees, who are invested with certain supervisory powers thereunder.

We are concerned in this Appeal essentially with the question of the proper construction of this agreement but a brief resume of the history of the matter is necessary to set it in context. The Appellant here represents the insolvent estate of one Andrew Jahre who died in 1982 and who is alleged by the Appellant to have been the real and effective settlor, using Mr. Monsen as a front, and the substantial ultimate contributor of the funds made available to the foundation after its establishment.

The 1st and 2nd Respondents are trustees of another allegedly charitable foundation, the Aall Foundation, set up by a separate Memorandum of Agreement dated 7th October, 1982 of which the ostensible settlor was also Thorleif Monsen. The connection between these two foundations is that, shortly after the death of Mr. Jahre, the vast

majority of the assets then subsisting in the Continental foundation were transferred to the trustees of the Aall Foundation, where they remain today.

Litigation having been commenced in the Grand court in connection with these transactions, preliminary issues were ordered to be tried as to the validity of each of the Continental and Aall Foundation, in which the present 1st and 2nd Respondents were the Plaintiffs, and the Defendants were respectively the Attorney General of the Cayman Islands, the present Appellant, Compass Trust Co. Ltd., as legal personal representative of Thorleif Monsen deceased and various individual partners of a Canadian law firm engaged in the preparation of the trust deeds in question.

At the hearing of the preliminary issues in the Grand Court it appears to have been conceded by the present Appellant that, as a matter of construction of the deed of 7th October, 1982, the Aall Foundation was a valid charitable trust in law and the court so found. No issue was therefore raised in this Appeal as to the decision of the Grand Court in that respect, so that we are now solely concerned with the validity or otherwise of the Continental Foundation.

It is also not in dispute that, if Continental Foundation is not valid as a charitable trust it is void and of no effect in law; this for two reasons as counsel for the Appellant has

submitted. The first is that it would offend the relevant rule against perpetuities and the second that it is a 'purpose trust' whose beneficial objects are not identifiable. Only a trust which is exclusively charitable can be valid if it is capable of extending beyond the legal perpetuity period and only such a trust can avail of the services of the Attorney General on behalf of the Crown to enforce its provisions in the absence of identifiable beneficiaries. If, therefore, Continental Foundation is not a valid charitable trust, it must fail and a resulting trust in favour of the settlor will arise instead. See **In Re Vandenvell's Trusts (No.2) (1974 ICh. 269.**

Before the Grand Court several issues were raised and decided with which we have not been greatly troubled on appeal. The first of these concerns the governing law. This law was in accordance with Clause 39 of the Memorandum of Agreement originally that of the Bahamas, being the place where the majority of the original trustees resided. That clause also empowered the trustees to transfer the situs and/or the governing law to another jurisdiction in the exercise of their discretion and this they did by a further Memorandum of Agreement dated 22nd December, 1976. The validity of that transfer was in issue at the Grand Court hearing and after careful consideration of the Trusts (Foreign Element) Law 1987 and in particular Section 4(4) thereof, the learned Chief Justice concluded that it should be upheld as valid. In consequence the preliminary issue raised with respect of Continental Foundation fell to be determined by Cayman

Islands rather than Bahamian or any other law. While this particular issue was not extensively canvassed before us for reasons which will be apparent, we see no reason to question or to depart from the Chief Justice's ruling in that respect and are content to adopt it and proceed accordingly.

At the Grand Court hearing further argument was advanced by those concerned to uphold the validity of the foundation as to the extent to which the law relating to charitable trusts in England and Wales also applies in the Cayman Islands. A suggestion was advanced on behalf of the Attorney General that a more liberal construction was proper here than in England for various socio-economic reasons. That suggestion was rejected by the learned Chief Justice and his judgement in this respect has not been further challenged on appeal. Before this court it was generally accepted by all parties that, to paraphrase the judgement of Luckoo P. in **Attorney General –v- Royal Trust Co. (1983) 36 WIR 1 at p.12** in the Bahamas Court of Appeal, the law of the Cayman Islands “is the same as that of England in relation to the broad legal principles by which a court exercising equitable jurisdiction should be guided in determining whether particular purposes are charitable in the eye of the law”.

It will shortly be necessary to examine those legal principles but, before doing so, the pertinent terms of the Continental Foundation should be set out so that the question of

its proper construction may be examined in the light of the relevant authorities. These terms are as follows;-

First Recital:

“Whereas the settlor wishes to establish a trust for the benefit of worthy individuals, organisations and corporations all upon the terms and conditions hereinafter set forth, and to be known as the “Continental Foundation”.

Clause 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 organisations or institutions operating for the public good (and the trustees shall be sole and absolute judges of whether any organisation or institution so qualifies are (sic) 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”.

Clause 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 organisation who at that time qualify as beneficiaries who are entitled or contingently or prospectively entitled to receive income as herein before provided”.

Clause 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 hereinunder”.

Mention should also be made of Clause 5 of the Agreement, which empowers the trustees with the approval of the advisors to transfer the whole or part of the trust fund for resettlement upon new trusts in favour of the beneficiaries or prospective or contingent beneficiaries of the trust. This appears to have constituted the legal basis for the transfer of assets out of the Continental Foundation and into the Aall Foundation in 1982.

The argument for the Appellant in this court essentially falls under two separate heads. The first introduces a new point which was not raised at the hearing in the Grand Court. This is of course no reflection upon its validity in law but the late stage at which it has now been raised deprives us of such assistance as we might have otherwise derived from a consideration of it by the trial judge. The point is comprised in paragraph 1(5) of the Memorandum of Grounds of Appeal. The Appellant also contends that no exclusively charitable intent can be derived from the wording of the Memorandum of 20th July, 1976 but, in this alternative new argument, he submits that, even if such a charitable intent could be found, the Continental Foundation still fails because, on its true construction, no trust is created but only a mere compendium of miscellaneous powers in the so called trustees without any obligation to exercise them.

The argument proceeds upon this basis. An essential feature of every trust is that it is imperative – conferring a duty upon the trustee(s). A mere power is quite different in that it may or may not be exercised. For the Continental Foundation to be a valid charitable trust there must be a duty to distribute either capital or income or both to the allegedly charitable objects. No such duty, either express or implied, can be found, it is said, in the wording of the Memorandum properly considered in its context. Accordingly, the trustees hold the capital of the trust fund upon a resulting trust in favour of the settlor, irrespective of whether or not the objects are legally charitable.

The operative clauses of the Memorandum, including those already quoted, do not disclose the existence of any express obligation upon the trustees to stand possessed of the trust fund upon trust to apply the capital or distribute the income arising therefrom to any of the objects specified in Clause 3. Counsel for the Respondents however, point out that the trustees have by that clause only two options available to them namely, to distribute income among those beneficiaries or to accumulate it to the extent that the governing laws permits. They submit that a trust in favour of those beneficial objects ought to be implied and that the Memorandum should be construed as a trust to apply the income to the beneficiaries coupled with a power to accumulate income for an indefinite period in the meantime subject to that limitation. Some analogy could perhaps be drawn with the statutory trust for sale of real property under the current

English law of real property, when conveyed or devised to two or more beneficial owners, which is coupled with an indefinite power in the trustees to postpone sale. In such a case the sale may never happen; similarly with the distribution here.

The authorities cited by counsel for the Appellant in support of this argument do not greatly assist. **Re Weekes Settlement (1897) 1 Ch. 289** and **Re Combe (1925) Ch. 210** were both of them instances of private will trusts in favour of those members of a defined class of objects who might be selected in the exercise of a limited power of appointment, the question being in each case whether the terms of the respective will disclosed an intention on the part of the testator to benefit the class as a whole in the absence of any exercise of that power. That is far from the present case, where the question is rather whether the settlor by deed inter vivos intended to impose upon his trustees an obligation to apply income arising from the trust fund in favour of objects which, ex hypothesi for the purpose of this ground of appeal, should be regarded as legally charitable and capable of taking benefit.

Nor is much assistance here to be derived from **In Re H.J. Ogden (1933) Ch. 678** where the question was whether an immediate bequest of capital to a class of institutions not necessarily charitable was void for uncertainty or valid where the executors were empowered to select those who should benefit. Indeed Lord Tomlin at

p. 683 said, "I can find no trust at all", but nevertheless he upheld the validity of that gift in its context.

This question is ultimately to be answered by our seeking to discover, from the terms of the Memorandum itself, whether it must have been the intention of the settlor that the trustees should apply at least the income of the trust fund to the objects specified in Clause 3. The fact that no positive obligation to distribute capital is included, as opposed to the discretionary power to do so contained in Clause 5, is of itself no bar to the validity of a charitable trust: see Tudor on Charities, 8th Edition, p. 140 and the cases there cited. Nor is the existence of a power of revocation, as for instance here in Clause 31, any bar to the validity of such a trust pro-tem.

What indications, if any, exist in this Memorandum as to the intentions of the settlor in this regard? One of the most powerful must be the opening words of the first recital "Whereas the settlor wishes to establish a trust for the benefit of....". It must be apparent from these opening words that, if an imperative obligation has not been imposed upon his trustees by the succeeding words of the document, his overriding intention has been frustrated by the inattention of the draftsman. Is the obligation to invest and the carefully detailed provisions for management of the trust fund merely to give rise to a resulting trust in favour of the settlor himself? It is noteworthy that even

the provision for amendment or revocation of the Memorandum contained in Clause 31 is subject to a provision barring any future benefit for the settlor himself. We are, of course, concerned here with an exercise of interpretation of the deed itself and speculation as to the ultimate motives of Mr. Jahre, who is not even mentioned there, lies wholly outside its scope.

A further indication of the settlor's intentions occurs after the words in parenthesis in Clause 3 of the Memorandum: ".....the intention being to enable the trustees to endeavor to act for the good of mankind in general or any section of mankind in particular.....". "Enable" presumably refers to the provision of the trust funds. If the stated intention is that the trustees should endeavour to use the funds for such a purpose, is it reasonable to suppose that they should have no obligation so to do but should be left to decide entirely in their discretion whether to pursue those endeavours or not? This seems extremely unlikely to be the intention of the settlor.

Finally, if at the end of the day one is left in any doubt as to whether or not an intention to create a valid trust is imputable to the settlor of the Continental Foundation, it would be legitimate to invoke the benignant rule that the courts will strain to hold dispositions in favour of charitable objects valid rather than allow them to fail by adopting a narrow or conservative construction: 'Ut res magis valeat quam pereat! This rule was

considered with approval by the learned Chief Justice in the Grand Court in admittedly a different context, though he did not have to rely upon it. He cited a passage from the speech of Lord Hailsham L.C. in **I.R.C. v McMullan (1981) AC at p. 14** which explains this doctrine and, since for the purposes of this particular issue the objects must be taken as charitable, it is right that it should be put into the balance here should any doubt remain as to the imperative nature of the deed.

In the result we are of the clear view that an intention to create a trust in favour of the objects specified in Clause 3 of the Memorandum is to be implied and accordingly the points raised in paragraph 1(5) of the Memorandum of Grounds of Appeal lack substance and afford no basis for disagreement with the judgement of the court below. We now, therefore, turn to the main complaints made against that judgement in subparagraphs (1) to (4) of Ground 1 of that Memorandum: namely the question whether exclusively charitable purposes are to be found in the Memorandum of 20th July, 1976.

The law relating to charitable trusts in England and Wales, which as we have seen is also that of the Cayman Islands and of the Bahamas, is a creature of Equity and has developed over many centuries. As the Chief Justice observed in his judgement, a trust will only qualify as charitable if it falls within one or other of the four heads of charity established by case law and is 'within the spirit and intendment of the preamble to the

Charitable Uses Act 1601, often referred to as “the Statute of Elizabeth I”. These four heads were comprehensively defined in the well known dictum of Lord MacNaughten in **Pemsel’s case (1891) AC 531** at p. 583 as follows:-

‘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”.

The four heads of Lord MacNaughten’s classification are indeed a compendium of miscellaneous purposes. Reference to the preamble to the statute of Elizabeth I itself shows quite how miscellaneous it is; it comprises specifically the repair of roads, ports, havens, causeways and seabanks, the relief stock or maintenance of houses of correction, the supportation, aid and help of young tradesmen and handicraftsman and the relief or redemption of prisoners or captives, apart from those specific purposes which can be grouped under one or other of the three other stated heads of that classification. Many yet further purposes not set out in the preamble have subsequently been held by decisions of the courts of Equity over the years to be charitable under the fourth head of the classification by a process of analogy. The promotion of health, the provision of recreational facilities, social rehabilitation and the protection of animals

have, according to Picada's Law and Practice relating to Charities, been recognised by the courts as charitable purposes within the spirit and intendment of the preamble. It is evident that the fourth head of Lord MacNaughten's classification is far from closed and this fact is generally recognised.

Nevertheless, it is also clear from the authorities that, although new purposes may be held legally charitable under the fourth head of classification, that head is by no means co-extensive with every purpose which is for the public good or public benefit. As Lord Cave pointed out in **A.G. v National Provincial Bank (1924) AC 262 at p. 265**:-

“My lords, it has been pointed out more than once, and particularly by the members of the Court of Appeal in **Re. Macduff (1986) 2 Ch. 451** that Lord MacNaughten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust”.

In perhaps the most recent extension of the fourth head of legal charity, the courts both in England and Australia have held the purpose of the gratuitous editing and publication of the reports of their legal decisions to be both for the public benefit and also by analogy within the spirit and intendment of the preamble: see **Incorporated Council of Law Reporting for England and Wales –v- A.G. (1972) Ch. 73** and **Incorporated Council of Law Reporting of Queensland –v- F.R.C. (1971) 125 CLR 659**. Russell L.J. in the former case at p.88 had this to say:-

“The statute of Elizabeth I was a statute to reform abuses: in such circumstances and in that age the courts were not inclined to be restricted in their implementation of Parliament’s desire for reform to particular examples given by the Statute: and they deliberately kept open their ability to intervene when they thought necessary in cases not specifically mentioned, by applying as the test whether any particular case of abuse of funds or property was within the ‘mischief’ or ‘equity’ of the Statute. For myself I believe that this rather vague and undefined approach is the correct one, with analogy as its handmaid and that, when considering Lord MacNaughten’s fourth category in Pemsel’s case of ‘other purposes beneficial to the community (or as phrased by Sir Samuel Ramilly in argument in **Morice –v- Bishop of Durham (1805), 10 Ves. 522 at p.531** – ‘objects of general public utility’) 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”.

We are content to adopt that formulation as the right approach to the difficult question of definition of the extent of the fourth head of classification of legal charity. However, the problem of construction which arises in the instant case is not to determine whether a particular purpose or object, such as law reporting, can be considered charitable as being of undeniable public utility and within the spirit and intendment of the preamble by analogy. Rather it is to decide whether the phraseology adopted by the draftsman of the Memorandum of 20th July 1976 in Clause 3 and elsewhere in that document discloses an intention to confine the objects and purposes which the trustees are empowered to benefit to such as are legally charitable not only under the first three but also under the fourth and last of Lord MacNaughten’s heads of classification. Such a task requires a close analysis of the text of the document. Before undertaking it, however, a brief review can profitably be made of some of the authorities which were cited and relied upon by counsel in argument.

There is a particular line of authority which might perhaps be designated as the 'disjunctive purpose' cases, where the mention of legally charitable purposes has been coupled by the draftsman of the relevant instrument often by use of the word 'or' with mention of public purposes of a different kind. Examples are **Re Macduff (1896) 2 Ch 451** – “charitable or philanthropic purposes”; **A.G. –v- Royal Trust (1983) WIR 1** – “education and welfare of Bahamian children”; **A.G. –v- National Provincial Bank (1924) AC 262** – “patriotic purposes ...or charitable objects”; **Blair –v- Duncan (1902) AC 37** – “such charitable or public purposes as my trustee thinks proper”; and **Houston –v- Burns (1918) AC 337** “public, benevolent, or charitable purposes”.

The principle underlying the decisions in each of these cases is that, once the different purposes are shown by the process of interpretation to have been used disjunctively, logic then requires the court to conclude that mention of the non-charitable purposes is intended to extend the ambit of the beneficial objects of the trust beyond the grounds of legal charity. Hence, the objects cannot be viewed as exclusively charitable and the instrument is not a valid charitable trust.

The words used in the dispositive part of Clause 3 of the Memorandum of 20th July, 1976, before the parenthesis to describe the objects of the trust are “one or more religious, charitable or educational institutions or institutions or any organisations or institutions operating for the public good”. It was common ground between the parties

that the reference in this passage to ‘charitable’ was to its alternative eleemosynary meaning of ‘for the relief of poverty’, which seems to be the proper explanation for its use in this context. The first three of these objects, corresponding to the first three heads of Lord MacNaughten’s classification albeit in a different order, are therefore prima facie charitable in law but the question remains, is the object comprised in the “organisations or institutions operating for the public good” necessarily limited to such as are legally charitable? Certainly the words ‘or any’ which precede that particular phrase are such as to point to a disjunctive intent: the phrase stands on its own. It follows that, unless the context in which it appears can be seen to confine its ambit to legally charitable objects, this phrase must be regarded as comprising both charitable and non-charitable objects, given that not all public purposes beneficial to the community can be accepted as being charitable in law, which we have already seen.

Another line of authority which was considered by the learned Chief Justice in this connection comprise what are known as the locality cases. An outright gift to or for the benefit of the inhabitants of a particular locality is presumed to be implicitly limited to charitable purposes and is good. This doctrine reached its apogee in **Re Smith (1932) 1 Ch 153** a decision of the English Court of Appeal in which many of the earlier cases were reviewed. Amongst these were **West –v- Knight (1669) 1 Ch Cas 10** – gift to the parish of the testator’s birth; **A.G. –v- Lord Lonsdale 1 Sim 105** – gift over ‘to the

good of the county of Westmorland’; **A.G. –v- Mayor of Carlisle** – defence of and preservation of the peace within a city; **Mitford –v- Reynolds 1 Ph 195** – gift to the Government of Bengal for the benefit of the native inhabitants; and **Nightingale –v- Goulburn 5 Hare 484** – bequest to the Chancellor of the Exchequer ‘to be by him appointed to the benefit and advantage of Great Britain’. Each of these gifts were upheld as charitable gifts not bad for uncertainty.

In **Re Smith** the bequest was simply “unto my country England for own use and benefit absolutely” and this also was upheld as a good gift to be applied to charitable purposes for the benefit of the country as a whole.

The relevance of this line of authority culminating in **Re Smith** to the question of construction which faces us in this case is not readily apparent. For this is not a locality case. The discretion of the trustees is at large and not confined to the inhabitants of any particular locality. So much is quite apparent from the words in Clause 3 which immediately follow the parenthesis – ‘to enable the trustees 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’. Such a dedication is almost the direct antithesis of a gift to a defined locality, be that a parish, city, county or a country.

The learned Chief Justice found in certain observations of Lord Hanworth M.R. in **Re Smith** support for a general proposition that “very general words of gift may in some instances be interpreted as being confined to charitable purposes” although he did not rely upon it in coming to his conclusion. In view of this passage it is perhaps necessary to point out that such a proposition was not the ratio of the decision of the Court of Appeal in **Re Smith**. Lawrence L.J. at p. 173 stated his conclusion thus: “the present case falls within the principle of the cases in which the gift is for the benefit of a particular class and, therefore, for a specified public purpose and not within the line of cases in which the gift is for public purposes of a general and wholly unrestricted nature” (emphasis added): and Romer L.J. at p. 176 was content to rest his conclusion by analogy with the cases which establish the principle that a gift of trust for the inhabitants of a particular place is a good charitable gift or trust.

Counsel for the 1st and 2nd Respondents sought to urge upon us an extension of that general proposition by inviting the court to hold that, where there is a gift in very general words for the public benefit and there is nothing which renders it impossible to imply a dedication to exclusively charitable purposes, then such a dedication ought to be presumed. This proposition must be regarded as an attempt substantially to extend the law of charitable trusts by extrapolating from the locality cases a doctrine of general application to cases of a different nature. If accepted, it would also extend the

rebuttable presumption which applies to the first three heads of Lord MacNaughten's classification, that they are charitable unless it can be shown that no public benefit will ensue, to the fourth head also. But it is precisely because these first three heads are recognised as specifically charitable in nature and because the fourth contains a miscellany which may or may not be charitable that such a presumption cannot rightly be applied to general words of public benefit not referable to any such recognised charitable head. If it were to be so applied, the floodgates would be opened. This proposition must therefore be rejected.

We come then finally to the question of construction and the reasons which led the Grand Court to impute to Continental Foundation the status of a valid charitable trust. It is evident from passages in the latter part of the Chief Justice's judgement that he founded it essentially upon an application of the canon of construction known as 'ejusdem generis' and 'noscitur a sociis'. The passages are as follows:- "We have four categories set out in Clause 3, each represented by the word 'or'; it is clearly disjunctive in the sense that it enumerates them separately but not in the sense that it treats institutions operating for the public good as different from, and alternatives to, the preceding three categories which are clearly charitable. What it does is define a fourth category, which, like the other three, is limited to the spirit and intendment of the preamble to the statute of Elizabeth I. Lord MacNaughten must have intended that, so

must the draftsman of C.F. in the sense in which that phrase has been interpreted in the intervening years. The context overwhelmingly imports that meaning. It is a classic case for an ejusdem generis construction, the genus being ‘charity’.

Counsel for the 1st and 2nd Respondents in argument put the same point in this way: “The public good object, in the context of an express reference to three of the four heads of charity is so evocative of Lord MacNaughten’s fourth head of charity, that it would be perverse not to credit the draftsmen with a knowledge of those four heads and an intention to repeat them in Clause 3”.

In support of his application of the ejusdem generis rule the learned Chief Justice referred to in **Re Pardoe (1906) Ch. 184** where a residuary gift ‘to and amongst such public charities and institutions or for such charitable purposes for the public advantage or benefit’ as the trustees should in their discretion select was upheld. Kekewich J., although not holding all public institutions to be necessarily charitable, found in the context a clear indication that a limitation to such public institutions as are legally charitable should be implied in the will; “It is all coloured”, he said “with the notion of charity”.

Attractive as this line of argument is at first sight, there are on close examination formidable difficulties about its adoption in the present case. Clause 3 of the Continental Foundation Memorandum is not notably coloured with the notion of legal charity. The only mention of the word in the clause is in its other eleemosynary sense. The charitable context if it exists can only be gathered by regarding the whole of that part of the clause as a restatement in somewhat different order and in different language of Lord McNaughten's classification of charitable heads.

It is interesting to compare the language of Clause 3 of the Continental Foundation Memorandum with the corresponding language of the Aall Foundation Memorandum of 7th October, 1982 because there are clear similarities in the scheme of the two deeds, although significant differences in the language employed. In defining the beneficial interests in its Clause 3, the Aall Foundation memorandum specifies them thus – “The beneficiaries shall be any charitable, religious or educational organisations, institutions or other such objects anywhere in the world”. This admirably brief description leaves no doubt as to the charitable context in which it is employed, by contrast with Clause 3 of the Continental Foundation Memorandum, which leaves the question open.

Nevertheless, had Clause 3 of the latter deed stood alone, it might have been possible to resolve the patent ambiguity which it presents in favour of a restriction to purely

charitable objects by adopting the rule as to a benignant construction in favour of charity, reference to which has already been made in a different context. But it does not stand alone. When seeking to discern whether the intent is to benefit purely charitable objects, all relevant parts of the document require consideration as part of the context. This requires us to examine also the first preamble and also Clause 31.

In the preamble the settlor has expressed an intention to benefit “worthy individuals, organisations and corporations”. In the first place it is impossible to equate ‘worthy’ with ‘charitable’: **Re Atkinsons Will Trusts (1978) 1 WLR 586**. Secondly, as all parties seem to agree, the reference to individuals and perhaps also to corporations can only be given effect to by operation of Clause 31, and this consideration counters the argument that, until that clause is actually implemented, it has no bearing upon the real intent of the settlor as to the nature of the beneficial objects.

When one turns to the terms of Clause 31 itself it becomes apparent that its scope is not merely limited to amendment of the machinery for implementing the trust or to its eventual revocation. The clause extends to any alterations which the trustees with the consent of the advisors may wish to make to the beneficial objects of the trust, subject to the sole limitation that the settlor himself and past and present trustees can take no benefit. No restriction to exclusively charitable objects is expressed and none may be

implied because it is only by including non-charitable objects in any such alteration that the trustees could give effect to the settlor's earlier expressed desire to benefit worthy individuals and most (e.g. trading) corporations considered worthy.

Once again comparison with the Aall Foundation memorandum is instructive; Clause 39 of which (as amended) empowers the trustees and advisors of that foundation also to amend or revoke any provision of the deed but subject to the express limitation that "in no event shall any amendment whatsoever be made which alters the charitable nature of the trust"!

It is therefore impossible in our judgement to dismiss as irrelevant the terms of the first preamble and Clause 31 of the Continental Foundation deed when considering whether or not its objects are intended to be confined to such as are legally charitable only. When the effect of these provisions is taken into account, one is driven to the conclusion that the settlor did not intend so to confine them and that, by giving his trustees by Clause 3 a discretion to select institutions or organisations operating for the public good so as to benefit mankind in general or any section of mankind in particular anywhere in the world or throughout the world, he meant them to have and ensured that they did have power to do so on a virtually unrestricted basis. The ejusdem generis canon of construction cannot operate in such a context. Just as in A.G. for New

Zealand -v- Brown (1917) AC 393, references in other parts of the deed have destroyed the context in which it could have otherwise been applied. Philanthropic the intention may well have been, but not necessarily charitable in the legal connotation of that word; and that of course is not enough. Various sophisticated arguments have been deployed to persuade the court that a charitable intent is nevertheless implicit in this Memorandum. But the answer to all of them becomes apparent when one asks, if its validity as a charitable trust is upheld, how would our courts restrain the trustees from applying income to objects clearly not within Lord MacNaughten's classification? If for instance with the blessing of the advisors they were to devote the entire income to the campaign against further oil exploration in the world's oceans, clearly a controversial political and therefore not a charitable object, how could it be said to be a breach of trust? Many would vehemently declare that in the interest of environmental conservation, a ban upon such exploration is for the general public good. Others would equally vehemently disagree. The courts would find themselves ensnared in a political debate which they could not sensibly resolve because the issue which it raises is not a justiciable issue. This is precisely the dilemma which the sometimes difficult and technical rules of charity law are designed to avoid.

With some reluctance, therefore, we feel obliged to differ from the conclusion reached in the Grand Court that on the true construction of the Memorandum of Agreement

dated 30th July 1976 (known as the Continental Foundation) the trusts declared therein are valid. The Appeal is allowed and that declaration is now revoked. In its place there will be a declaration that the said trusts are not valid charitable trusts.

The Appellants must have their costs of this Appeal to be paid by the 1st and 2nd Respondents. We shall hear counsel further as to the incidence of the costs of the other Respondents to the Appeal and also as to the incidence of the costs of the hearing in the Grand Court in substitution for the orders made therein.



President



Justice of Appeal



Justice of Appeal