30.4.96

C13

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 296/94

IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 20TH JULY 1976 (KNOWN AS THE CONTINENTAL FOUNDATION)

AND IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 7TH OCTOBER 1982 (KNOWN AS THE AALL FOUNDATION)

AND IN THE MATTER OF THE TRUSTS LAW (REVISED)

BETWEEN: (1) BRIDGE TRUST CO. LTD
(2) ROBERT N. SLATTER — PLAINTIFFS

AND: (1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
(2) EVEN WAHR-HANSEN
(3) COMPASS TRUST CO. LTD — DEFENDANTS

Mr. Terence Etherton QC. Mr. Christopher Tidmarsh and Mr. Angus Foster appeared on behalf of the plaintiffs

Mr. Michael Hart QC and Mr. William Helfrecht appeared on behalf of the first defendant

Mr. John Martin QC, Mr. Douglas Close and Mr. Graham Ritchie appeared on behalf of the second defendant

Mr. Alan Boyle QC, Mr. Nicholas Harrison and Mr. Nigel Clifford appeared on behalf of the third defendant

Mr. Robert Smith QC and Mr. Stephen Barrie appeared on behalf of the 24th to 73rd defendants

BEFORE HARRE CJ

JUDGMENT

The arguments which continued for some eight days before me on this trial of preliminary issues were arguments of law, not fact. I can therefore adopt as an introduction to the issues, as was done by Mr. Etherton in opening for the plaintiffs, the historical summary of the case of the second defendant contained in an affidavit sworn by him in English proceedings. The second defendant represents the estate of one Anders Jahre.

In 1939 a Panamanian company called Pankos Operating Company SA (Pankos) was formed. Anders Jahre was closely connected with that company, and it is alleged that in fact he was always the true owner of its shares or assets. In 1976 80 per cent of the shares in Pankos, by then called Continental Trust Company Inc (CTC), were purportedly settled on the trusts of the Continental Foundation (CF), said to be a charitable or public purpose Foundation. The second defendant alleges that the transfer to the Foundation was invalid and/or that the trusts of the foundation were void, so that Anders Jahre remained the true owner of the shares and assets. His affidavit to which I have referred continues as follows -

> "In 1979 the other 20 per cent of the shares were bought in by CTC for about US$14,250,000. That sum was paid, not to Anders Jahre but to or at the direction of Thorlief Monsen, a Norwegian-born, naturalised Canadian shipbroker resident in the Bahamas, who was an associate of Anders Jahre; and it was used by Thorlief Monsen and members of his family for their own purposes. In 1982, Anders Jahre died; and within eight months of his death the large majority of the assets of the Continental Foundation had been transferred to a new foundation called the Aall foundation, the settlor of which was Thorleif Monsen. At about the same time a further US$1,456,000 or so was paid by CTC to Thorlief Monsen or at

his direction and again was used by him or his family for their own purposes. Assets held on the trusts of the Aall Foundation were used for the benefit of Thorlief Monsen and his family and for the benefit of Thorlief Monsen or companies in the Aall Group, which was itself controlled by the Monsen family. Several of the instances of misuse of the funds of the Aall Foundation were implicitly acknowledged by its trustees in 1992 to have been breaches of trust. In essence, my claim is first to trace the assets originally transferred to the Continental Foundation, the US dollar payments made to Thorlief Monsen, and the assets retained by CTC after the second of those dollar payments was made; and secondly to make liable, primarily for breach of trust or as constructive trustees, persons who have participated in the misapplication of assets truly belonging to Anders Jahre or his estate. The total value of the claim including interest, is in the region of US$250 million."

The matters in the originating summons which I am now trying as preliminary issues are that it may be determined on the true construction of the Memoranda of Agreement dated 20th July 1976 (known as the Continental Foundation) and 7th October 1982 (which established the Aall Foundation) whether the trusts declared therein are valid or void.

Although issues concerning the validity of both CF and the Aall Foundation are referred to it is conceded that as a matter of construction of the Memorandum of Agreement constituting the Aall Foundation the trusts declared in that memorandum are valid.

The Memorandum of Agreement dated 20th July 1976 which established CF was made between Thorleif Monsen, described as the settlor of the first part, Robert Slatter of Nassau in the Commonwealth of the Bahamas, called the trustee, of the second part, and Hugo Kindersley, Thorleif Monsen and John Worsley, called the advisors.

It recites as follows:-

> "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;"
>
> And WHEREAS the Trustees have agreed to stand seized and possessed of the trust funds upon the terms and conditions hereinafter provided;
>
> AND WHEREAS the Advisors have agreed to act as Advisors to the Trustees..."

The agreement contained in the indenture is described as being in consideration of the foregoing.

Clause 3 is the heart of the trust. It is as follows:-

> "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 the 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."

The following is clause 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, organisations or corporations who at the time of such resettlement qualify as beneficiaries or prospective or contingent beneficiaries of this Trust, such Fund to be held and administered upon terms and subject to such conditions and with such power and authority and discretion by such Trustees as shall be contained in a Deed of Trust entered into by the Trustees of this Trust and the Trustees under whose administration the new Trust is established...".

It was in accordance with clause 5 that the assets in the CF were transferred to the trustees of the Aall Foundation.

Then there are clauses 31 and 32:-

"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.

32. The Trustees may by majority agreement and upon obtaining the approval of the Advisors to the Trustees remove the assets and the administration of the Trust from one jurisdiction to another and so on from time to time as the Trustees in the exercise of an absolute discretion shall consider advisable and, without limiting the generality of the foregoing, in the event that a trustee or Trustees should be appointed in another jurisdiction or other jurisdictions then the whole or any part of the assets or administration of the Trust may be removed to such other jurisdiction or jurisdictions as may best suit the convenience and

benefit of the Trust, the beneficiaries and the trustees."

The next clause to which I need to refer now is clause 39 -

"39 This Trust shall have its situs and be subject to the laws of such country as the Trustees shall from time to time elect in writing with power to the Trustees to transfer such situs or country of all or part of the Trust as they in the exercise of an absolute discretion consider it appropriate so to do but in the absence of such determination at any time the Trust shall have its situs subject to the laws of the country where a plurality of the Trustees are normally resident."

I shall refer to clause 39 from now on as the shifting law clause. That clause was invoked in a further Memorandum of Agreement made on 22nd December 1976 by the same parties as the original agreement, together with a company called Thorand (Cayman) Ltd. That company was included as an additional trustee. By clause 2 of the further agreement the trustees elected that the CF should have its situs and be subject to the laws of "Grand Cayman BWI". It is not in dispute that the original law of CF was the law of the Bahamas.

Important policy issues arise and I think it is right that I should express my view of these next. They are expressed as follows in an affidavit sworn on behalf of the Attorney General and dated the 19th December 1994 -

"Certain aspects of Cayman Islands public policy are, in my respectful submission, relevant to the determination of the issues before the court. These concern the extent to which, in the application of the law of charities to trusts or other entities established in the Cayman Islands, the court should be concerned to adopt a wide or narrow concept of legal charity. It is my view, as Attorney General that Cayman Islands public policy considerations point in the direction of the court adopting the widest possible concept of charity. In summary those considerations are the following.

> As the court well knows the Cayman Islands economy rests on its role and reputation as one of the world's most sophisticated and successful offshore financial centres..... Given its role it is home to countless trusts and foundations which have been funded by foreigners. Statistical evidence as to how many of these trusts and foundations have, or include, as their objects charitable/public benefit purposes does not exist, but the probability is that a very substantial number do. Any judgment of the court which casts doubt, as a matter of Cayman Islands law, on the validity of such trusts or other entities might have very damaging effects on the confidence of those who have hitherto used this jurisdiction for these purposes or who might otherwise consider doing so in the future."

The affidavit continues by making the point that in view of the tax regime in the Cayman Islands, upholding a gift to charity here does not confer a valuable fiscal privilege at the expense of the general body of taxpayers and that in view of the large expatriate population here any interpretation of the public benefit requirement of the law of charities which limited the available public to those resident within the Cayman Islands would severely limit the number of types of charities which could be valid under Cayman Islands Law and the role of these Islands as an international financial base suggests that Cayman Law should recognise those charitable trusts which have as their object benefit of foreign publics anywhere in the world.

These arguments were developed by Mr. Hart and Mr. Helfrecht on behalf of the Attorney General.

The opposite point of view, as put by Mr. Martin on behalf of the second defendant, is this. First, that the court should be wary of departing from long established English precedent, particularly on grounds of alleged local policy considerations, unless the

justification for so doing is overwhelmingly strong. A judgment of this court based upon the English and Commonwealth authorities would promote certainty in the Cayman Law of charity and far from damaging the confidence of actual or prospective settlors would confirm that which it is to be assumed they always believed. Far from encouraging prospective charitable trusts to the jurisdiction the fundamental change proposed by the plaintiffs would have precisely the opposite effect on prudent settlors. In support of these arguments which were developed in detail both in the second defendant's oral and written submissions the following passage from Command Paper 694 of 1989 entitled Charities: a framework for the future was adopted -

> "Defining charitable purposes as purposes beneficial to the community would have the merit of simplicity but this would also be open to major objections. Such a definition would allow the courts to admit to a charitable status virtually any organisation which was not obviously for private benefit or profit. Definition on the simple lines which was intended to supersede existing case law, would greatly expand the ambit of charity in ways which might be far from desirable. It would be notably subjective and would be likely to give rise to a great deal of litigation."

I have referred to this policy matter at an early stage of my judgment because it is important to make clear at the outset that the plaintiffs disclaim, in any event, as indeed did Mr. Hart in his submissions on behalf of the Attorney General an intention to urge me to make a bold departure from the bounds of broad principle. In the words of Mr. Etherton -

> "I do not wish to rest my case, and I do not rest my case, on any suggestion that in order to uphold

> the validity of the Continental Foundation, your lordship must deviate from the strict line of English authority. I do not suggest that and I intend to address your lordship on the basis that the common law principles applicable here are, indeed, exactly the same as in England. But, having made those submissions and I hope made good that argument, I shall be saying to your lordship that in any event you are not bound to follow the same line of authority in precisely the same manner in which it is done in England. I do not wish to expose the plaintiff's case, because it does not have to suffer this, to the suggestion that I have to invite this court to make swinging alterations to the law of England. In order to sustain my case, I do not, but it is of critical importance in my submission for the court to appreciate that we are here with the first building block in a real sense of the jurisdiction of this country."

I do not doubt that courts in different jurisdictions - and the Cayman Islands is no exception - can and do take into account questions of public policy and differences in social mores. This is illustrated by the cases of Re Hawley (1940) 1R109, Maguire v. AG (1943) 1R238 and Cocks v Manners (1871) 12 Eq 574 in relation to the different attitudes towards the charitable status of gifts supporting certain Catholic observances in England and Ireland. These are striking examples in that these trusts had as their objects the advancement of religion, an object which is prima facie charitable. But, as I understand Cocks v. Manners that presumption was displaced in England by a finding that there was no public benefit to be derived from the gift. The judgment of Sir John Wickens V.C. in that case dealt with the question as follows -

> "A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to

> religious services tending directly or indirectly towards the instruction or the edification of the public; an equity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable."

A different view of that has been taken in Ireland.

In leaving this topic I need only say that had I been asked to do so - and I emphasise again that I was not - I would not have regarded it as being in the best interest of the Cayman Islands as a respectable offshore financial centre to take any radical new approach in relation to the law of Charity. Any perceived policy reason that I should do so is in my view misconceived. It does not in any event arise in this case.

The following description of the basic principles of that law - the law of Charity - will be considered trite by those who are at all familiar with the subject, but I need to embark on it for the benefit of those who are not. A purpose trust which is not wholly and exclusively charitable will fail for two reasons. The first is that such a trust will offend the common law rule against perpetuities (now, but not at the material time, qualified here by statute) which prevents tying up of estates for ever before there is a vested interest in them. The second is that such a trust will not specify with sufficient certainty who the beneficiaries are, or who can enforce the trusts. In the case of a charity that problem is avoided because the Attorney General can enforce it on behalf of the Crown. He has a duty to uphold charity and he is a party to these proceedings.

A trust will not qualify as charitable unless it falls within one or other of the heads of charity established by case law and is within "the spirit and intendment" of the preamble to the Charitable Uses Act 1601. That is frequently referred to as "The Statute of Elizabeth I". The purposes set out in that preamble - as instances but not as the only objects of charity - are, in modernised English, these -

> "The relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and schools and universities, the repair of bridges, ports, havens, causeways, churches seabanks and highways, the education and preferment of orphans, the relief, stock or maintenance of houses of correction, the marriage of poor maids, the supportation,, aid and help of young tradesmen, handicraftsmen and persons decayed, the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."

From that Statute I go to the four heads of charity which are described in the celebrated dictum of Lord McNaughten in the case known generally as "Pemsel's case." The full title and reference is <u>The Commissioners for Special purposes of the Income Tax v. John Frederick Pemsel</u> (1891) AC 531. It is this -

> "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."

So, under English law, a trust does not qualify as charitable unless

it both falls within the four heads enumerated by Lord McNaughten and is within the spirit and intendment of the Statute of Elizabeth. All the income and capital must be applied for charitable purposes.

See Morice v. Bishop of Durham (1804) 9 Ves 399 at 404-6 (affirmed 10 Ves 521, see 539, 541); Re Macduff [1896] 2 Ch 451 at 465-7, 467-9, 470; Hunter v. A-G [1899] AC 309 esp. pp. 314-5 per the Earl of Halsbury LC, pp. 323-4 per Lord Davey (adopted by Lord Watson at p. 318); A-G for New Zealand v. Brown [1917] AC 393 at 396; Chichester Diocesan Fund and Board of Finance v. Simpson [1944] AC 341 at pp. 370-1; Re Sir Robert Peel's School at Tamworth (1868) LR 3 Ch App 543 at pp. 549-50.

These broad principles have already been adopted under the law of the Bahamas, which was the law originally applied to the CF. Attorney General v. Royal Trust Co and anor (1983) 36 WIR 1 stands for that proposition. The case went to the Privy Council but the relevant passage is in the judgment of Sir Joseph Luckhoo P in the Court of Appeal of the Bahamas. It is this -

..... the law of the Bahamas 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 were charitable in the eyes of the law."

In reaching that conclusion Luckhoo P found, after an exhaustive analysis, that it was the common law as at 2nd December 1799, as

developed by the Court of Chancery in England, which became a part of the law of the Bahamian Islands in respect of charitable trusts and that that position had never been altered by any statute or by different judicial development in the Bahamas or otherwise. The position in the Cayman Islands is comparable. Section 40 of the Interpretation Law (1995 Revision) provides that English laws and Statutes apply here so long as they have not been repealed by a Cayman Law and so long as they can be regarded as having been introduced or received here before 1728.

With regard to that, Mr. Etherton had this to say -

> "My lord, I could advance, were I a very, very bold person - indeed bolder than I am - the proposition that that whole line of cases by which in England reference to the spirit and intendment of the preamble became a critical part of establishing a charity does not apply here, because that is part of the development of the common law of England after the date on which these Islands were settled. But I do not need to go that far. Although I do not say that is not a course which could in theory be sustained, it is not necessary for me to go that far and I do not propose to do so."

His submissions were adopted by the other parties who argued for the validity of CF, that is to say all parties other than the second defendant.

Mr. Martin, for the second defendant, addressed the matter thus -

> "Your lordship will see if you do no more really than glance through the judgment of the President of the Court of Appeal, Sir Joseph Luckoo, starting

> at page 4, that the way in which the matter was dealt with was, first of all, to consider at some length whether it could be said that English charitable law had ever reached the Bahamas at all and then, once it had been decided that it would be appropriate to apply the broad legal principles. We then see a very familiar series of cases, starting at page 12, being considered, without any reference to local policy or any suggestion that there might be some distinct point of difference between the English and Bahamian application of the principles. I do not think that I need take your lordship in detail to this case; it is enough for me to point out to you that faced with a remarkably similar problem not so much in terms of what the disposition was but in term of what to apply and how to apply it, judges in a jurisdiction with great similarities to this jurisdiction decided that the only sensible and safe thing to do was to apply the common law as it had developed in England over the intervening years.
>
> We suggest your lordship should do the same and reject any suggestion that it is sensible and desirable to depart from those principles."

I am also of the opinion that this is the only sensible thing to do. I regard myself therefore as absolved from conducting the equivalent of the interesting historical exercise carried out by Luckhoo P in the Bahamas. All are agreed as to the broad principles which I should adopt.

So far I have done no more than fill in a broad factual and legal background. I now turn to the first of the specific issues which I have to determine. The question is what is the governing law of CF. The Trusts (Foreign Element) Law 1987 is the enactment to which I need to refer in considering what is the effect of the shifting law clause, clause 39 of the deed establishing the CF. I am satisfied that the similar enactment in the Bahamas - the Trusts (Change of Governing

Law) Act 1989 does not apply to the purported change of law made by the memorandum of agreement dated 22nd December 1976. As far as the Bahamas are concerned the law in that regard is the common law.

Section 3 of The Trusts (Foreign Element) Law 1987 applies it to every trust and every disposition of property on trust made before or after its commencement and section 5 provides that, in relation to a trust for the time being subject to the laws of the Cayman Islands or (subject to certain exceptions) questions relating to the validity of the trust or any disposition of property into that trust are to be determined according to the laws of the Cayman Islands without reference to the laws of any other jurisdiction.

Rather than resting upon that paraphrase I should set out the relevant provisions as they stood at the material time. They are these -

"Application

3. This Law applies to every trust and every disposition of property in trust made before or after the commencement of this Law, whether such property is situate in the Islands or elsewhere.

Governing Law

4. (1) In determining the governing law of a trust regard is first to be had to the terms of the trust and to any evidence therein as to the intention of the parties; and the other circumstances of the trust are to be taken into account only if the terms of the trust fail to provide such evidence.

(2) A term of the trust expressly selecting the laws of the Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances.

(3) A term of the trust that the laws of the Islands are to govern a particular aspect of

the trust or that the Islands or the courts of the Islands are the forum for the administration of the trust or any like provision is conclusive evidence, subject to any contrary term of the trust, that the parties intended the laws of the Islands to be the governing law of the trust and is valid and effective accordingly.

(4) If the terms of a trust so provide, the governing law of the trust may be changed to or from the laws of the Islands provided that:-

(i) in the case of a change to the law of the Islands, such change is recognised by the governing law of the trust previously in effect.

(ii) in the case of a change from the law of the Islands, the new governing law would recognise the validity of the trust and the respective interests of the beneficiaries.

(5) A change in governing law shall not affect the legality or validity of, or render any person liable for, any thing done before the change.

Matters determined by governing law

5. All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including, without prejudice to the generality of the foregoing, questions as to:-

(1) the capacity of any settlor,

(ii) any aspect of the validity of the trust or disposition or the interpretation or effect thereof, the administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal, or

(iv) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined according to the laws

of the Islands without reference to the laws of any other jurisdictions with which the trust or disposition may be connected, provided only that:-

(a) this section does not validate any disposition of property which is neither owned by the settlor nor the subject of of a power in that behalf vested in the settlor, nor does this section affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power;

(b) this section takes effect subject to any express contrary term of the trust or disposition;

(c) as regards the capacity of a corporation this section does not affect the recognition of the laws of its place of incorporation;

(d) this section does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;

(e) this section does not validate any trust or disposition of real property situate in a jurisdiction other than the Islands which is invalid according to the laws of such jurisdiction;

(f) this section does not validate any testamentary trust or disposition which is invalid according to the laws of the testator's domicile.

Exclusion of foreign law

6. Without limiting the generality of the foregoing section, it is expressly declared that no trust governed by the laws of the Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that:-

(a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or

(b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests".

The Trusts (Foreign Element) Law 1987 presents problems of construction. It clearly contemplates shifting law clauses and circumstances in which they can take effect. Its main objects are twofold - to provide a procedure for establishing the governing law of a trust and then a method of dealing with "foreign elements" in a trust governed by Cayman law, as, for example, the domicile of a settlor in a country where the establishment of a trust to defeat heirship rights or the transfer of assets abroad is prohibited. That only arises when governance by Cayman law is established. The question of whether Cayman law does in fact govern is quite a different one. A decision one way or the other on the governing law in no way, as was suggested, reduces the statute to a nullity. If a law other than that of the Cayman Islands is found, using the tests set out in section 4, to be the governing law, section 5 simply does not come into play. If the contrary it does.

The difficulty arises in relation to section 4 (4).

A change of law to these Islands can only take place if "such change" is recognised by the law of the Bahamas. The second defendant argues that "such change" must mean the specific change in relation to a

particular trust. The other parties say it means in general terms the recognition of the principle of a change of law. The core of the second defendant's argument, based on the premise which I have just mentioned, is simple. It is that it is only possible to change the governing law of a trust by the valid exercise of a valid power, and that under Bahamian law CF, and consequently the change of law clause, was wholly invalid. Even if the change of law clause remained effective in spite of the non-charitable nature of the dispositive provisions of clause 3 of the trust instrument, all that could be then transferred would be a resulting trust in favour of the original settlor whoever that might be.

This argument leads to an intractable difficulty in the application of Section 4 (4) of the Trusts (Foreign Element) Law. If it is correct, it will never be possible to determine whether the exercise of a shifting law clause has been effective without considering the trust laws of both the relinquishing and the receiving jurisdiction. Each side invited me to take a different approach to this problem. The second defendant invited me first to determine the construction and validity (or otherwise) of CF as a matter of Bahamian Law; second, to establish the validity or otherwise of the shifting law clause under Bahamian law in the light of that determination; third if the shifting law clause is (and was in 1976) valid, determine whether that provision could have been and was validly exercised. The contrary submission of the plaintiffs is that the court must first consider under Cayman Islands law whether the trust is valid and if it is then consider next whether on that basis the clause was operated and is

recognised under the original governing law.

This is not an easy point and I acknowledge the force of the second defendant's argument that under common law a change of governing law will not be recognised unless the proposed new governing law would recognise the validity of the Trusts on which the assets are held and the interests of the actual beneficiaries under those Trusts in accordance with the original governing law. That, it was submitted, applies equally to the Declared Trusts and to a resulting trust. Thus, on the hypothesis that the declared trusts of CF were void, even if the power to change the governing law of CF had somehow survived (which the second defendant says it could not have done) it could not be exercised unless the declared beneficial trusts would also be regarded as void under the new governing law, and Bahamian Law provides the conclusive answer on the validity of CF. So the concluding submission of the second defendant is that it follows that if CF is invalid under Bahamian Law its validity or otherwise is to be conclusively determined in accordance with the substantive law of that jurisdiction. Even if the governing law has been changed, that change cannot have affected the invalidity of CF or the interests of the beneficiaries under the resulting trusts which arise.

As an aid in the resolution of this problem I was referred to the following passages in Halsbury's Laws of England, 4th Edition Volume 44 at paragraphs 860 and 895 -

> "Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language which may be due to want of skill or knowledge on the part of the draftsman, unless such language is intractable" ; and -
>
> "Consequences to be disregarded where the statute is unambiguous. It is the duty of judges to give fair and full effect to statutes which are plain and unambiguous without regard to the particular consequences in the special case or to what Parliament would have done if a particular case had been presented to its notice, for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence. However, it must not be assumed that Parliament foresees every result which may accrue from the use of a particular word and where a study of the statute as a whole leads inexorably to the conclusion that Parliament has erred in its choice of words to such an extent that the error defeats the intention of the statute, the court should eliminate the error by interpretation, if the language of the statute is susceptible of being so modified."

In fact the wording of the statute itself leads me to the conclusion that the Trusts (Foreign Element) Law requires this Court to ask, not whether the Trusts are valid under Bahamian law, but whether the change of law is recognized under that law. There is some significance, I think, in the use of the word "recognised" rather than 'valid'. Section 4 as a whole provides what I may describe as a summary procedure for determining the governing law of a trust. Subsection 4(1) must, in my judgement, refer to the terms of the trust instrument, and the evidence therein as to the intention of the parties, as being the primary source in determining its governing law. The intention of the parties, on the face of the trust instrument, was to create a valid shifting law clause. The whole thrust of the

subsection, and indeed of subsection 4 (2) is to eliminate consideration of other circumstances if the terms of the trust instrument provide the answer. The proposition that in determining the terms of the trust its validity under another foreign law has to be ascertained seems to me to be the very mischief which these subsections were intended to address. So I find that the change of law provision was effective and shall consider whether the dispositive provisions of clause 3 of CF are effective as a matter of Cayman law. This point of interpretation is of some general importance, although there is nothing in the evidence of the eminent experts on the law of the Bahamas which was before me to lead me to think that applying one law or the other would lead to a different result.

I shall now seek to extract what I believe to be the core elements of arguments on the dispositive provisions of clause 3 of CF. I do not intend to embark upon extensive citation of authority with regard to the broad principles of the law of charity, since it is not those, but their applicability to the wording of this particular trust, which are in dispute. I shall instead borrow the words of learned counsel, in the first place Mr. Martin -

> "Your lordship knows that there are four heads of charitable objects set out in Pemsel's case. There is the relief of poverty, the advancement of education, the advancement of religion, and the attainment of other purposes beneficial to the community. At the moment we are looking at the first three. All of those three have implicity in them benefit to the community.
>
> The English courts have accepted Lord Macnaghten's classification in examining the

purposes of any particular trust, and it is to be observed that, as Lord Wright stated in National Anti-Vivisection Society v. Inland Revenue [(1948) AC 31] -

"'The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears'". Your lordship knows of course that the traditional shorthand classification is just relief of poverty, advancement of education, but nevertheless for those as for the fourth head there is a requirement of benefit to the community, so that if one were actually to write it out in full one would say that the four heads of charity were relief of poverty for the benefit of the community, advancement of education for the benefit of the community, advancement of religion for the benefit of the community and other purposes for the benefit of the community. As that quotation shows you assume the benefit unless the contrary is shown, and the contrary is shown in cases like Cocks v. Manners, where the fact that it is a closed order means that there is no public benefit. But as Lord Wright says there you have got an assumed public benefit. So once one adds in that rider you have four heads of charity, all four of which have implicit in them, or in the case of the fourth explicit in it, the requirement of public benefit. And when you go to the fourth of those heads it is not all other purposes beneficial to the community. So you have poverty benefit, education benefit, religion benefit, some other purposes benefit. I am sorry to take it quite like this but once you look at it in that way you can see that the first three heads are defined already by reference to two descriptions, religion benefit as it may be; whereas in the fourth you have only got the benefit; and then an unlimited category hidden under the words 'other purposes'.

What is happening then in cases where one is construing a gift for religious purposes as charitable is that the courts are taking religious purposes as a reference to the first of the two heads of description, religion benefit. They say there it is, it is religion; assume it is beneficial until the contrary is shown. You can do that for

> religion because of the double description, you can do it for educational purposes and you can do it for poverty because of the double description. But you cannot do it when all you are saying is beneficial purposes, because you have not covered both elements of the description. In order to bring yourself within the fourth head it is not enough to point merely to the beneficial aspects, you have somehow to point to one of the qualifying elements in the other purposes. You can do that by saying other charitable purposes. You can do it by describing a specific purpose. But what you cannot do is do it by simply saying I give my property for purposes beneficial to the community."

In support of that the second defendant relied above all on the following passage from the speech of Lord Cave in AG v. National Provincial Bank (1924) AC 262.

> "My lords, it has been pointed out more than once, and particularly by the members of the Court of Appeal in re Macduff, that Lord Macnaghten 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."

The response to that by the plaintiffs and their supporters (to whom I shall refer from now on as "the trust defenders") was this -

> "In a gift for "charitable or public purposes" or "charitable or public institutions" or "public, benevolent, or charitable purposes" where the "or" is plainly disjunctive - there is often no scope for implying a charitable limitation on the trust to the public

> institution or public purposes: prima facie, on the ordinary reading of language, there is a distinction between the charitable part of the gift, on the one hand, and something other than charitable on the other.
>
> By contrast, there is in clause 3, a plain context in which a limitation to charity would be appropriate:
>
> (a) On its proper construction - all the four heads of charity are specified.
>
> (b) The trusts for religious and educational institutions are, on clear authority, prima facie impliedly limited to charitable purposes. Why should not the fourth head (for the public good) also be so limited?
>
> (c) That part of clause 3 which follows the reference to "public good" governs everything that goes before it - so treating all the earlier part of the clause as coherent whole."

That reliance on context will lead me before long to a consideration of the applicability of the maxim "noscitur a sociis" and the "ejusdem generis" principle to the question whether the reference to the public good takes on a charitable flavour from what has gone before, and indeed from the words which declare the intention of the whole gift to be "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" and other provisions of the trust instrument.

It is clear from the arguments to which I have just referred that it is common ground that the first three of the four heads of charity enumerated in Pemsel's case are enumerated albeit in a

different order in the trust deed, the word "charity" being used in the sense of "relief of poverty." The argument of the trust defenders in relation to the expression "any organization or institutions operating for the public good" is that it coincides precisely with the fourth head of charity, namely "other purposes beneficial to the community, not falling under any of the preceding heads," and that the references to the first three heads are the "socii" - the companions - from which the limitation to charity of the phrase "any organisation or institutions operating for the public good" can become known.

The opposite view expressed on behalf of the second defendant is that it is not possible to draw any rational or logical distinction between the words used in clause 3 and those used in cases such as Blair v. Duncan (1902) AC 37 ("charitable or public purposes"); Houston v. Burns (1918) AC 337 ("public, benevolent or charitable purposes"); Re Davis ("charitable or public institutions"); A-G v. National Provincial and Union Bank of England (1924) AC 262 ("patriotic purposes" read disjunctively from other words of gift); Re Macduff (1896) 2 Ch 451. ("charitable or philanthropic purposes").

There is copious authority for the proposition that for a particular object to fall within the language of the fourth class - other purposes beneficial to the community not falling under any of the preceding heads - that object must be shown to be beneficial "in a way which the law regards as charitable." What

that means is that it must fall within the spirit and intendment of the preamble to the Statute of Elizabeth I. That principle is undoubted, and accepted by all parties.

The trust defenders, however, rely heavily on the approach adopted by Russell L.J. in Incorporated Council of Law Reporting for England and Wales v. A-G (1972) Ch 73 and 88. It is to be found in the following passage in his judgment -

> "The Statute of Elizabeth I was a statute to reform abuses: in such circumstances and in that age the courts of this country 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 the "equity" of the Statute. For myself I believe that this rather vague and undefined approach is the correct one, with analogy its handmaid, and that when considering Lord Macnaghten's fourth category in Pemsel's case [1891] A.C. 531,583 of "other purposes beneficial to the community" (or as phrased by Sir Samuel Romilly (then Mr. Romilly) in argument in Morice v. Bishop of Durham (1805) 10 Ves. 522, 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.
>
> 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."

The following reference was made to that passage in Brisbane City Council v. A-G (1979) AC 411 at 422. The Privy Council was then considering a conveyance by trustees for "showground, park and recreational purposes" -

> "It is common ground that the trust is only a valid charitable trust if it falls within the fourth class of charitable purposes defined in Income Tax Special Purposes Commissioners v. Pemsel [1891] A.C. 531 as a trust beneficial to the community within the spirit and intendment of the preamble to 43 Eliz. 1, c. 4. The lack of precision of the latter's words has to be made good by reference to decided authorities which, as has been said, are legion and not easy to reconcile (Williams' Trustees v. Inland Revenue Commissioners [1947] A.C. 447, 455). It has been said in the Court of Appeal in England (Incorporated Council of Law Reporting for England and Wales v. A-G [1972] Ch. 73, 88 per Russell L.J. and endorsed by the other members of the court) that, if a purpose is shown to be beneficial to the Community or of general public utility, it is prima facie charitable, an approach which might help to simplify the law, but this doctrine, even assuming it to be established in the law of England, does not yet seem to have been received in Australia: see Incorporated Council of Law Reporting of Queensland v. Federal Commissioner of Taxation (1971) 125 C.L.R. 659, 666 -667, per Barwick C.J. Their Lordships will therefore follow the route of precedent and analogy in the present appeal."

It will be seen that their Lordships made reference to Williams Trustees v. Inland Revenue Commissioners (1947) A.C. 447 at 455. The following passage in the speech of Lord Simonds in that case

will by now have a familiar ring -

> "..... the classification of charity in its legal sense into four principal divisions by Lord Macnaghten in Income Tax Commissioners v. Pemsel must always be read subject to the qualification appearing in the judgment of Lindley L.J. in Re Macduff : "Now Sir Samuel Romilly did not mean, "and I am certain Lord Macnaghten did not mean, to say "that every object of public general utility must necessarily be a charity. Some may be, and some may not be."

I have already referred to Lord Wright's analysis of Lord Macnaughtens' classifications in National Anti-Vivisection Society v. Inland Revenue Commissioners (1947) 2 All ER 217 at 220, in which he said -

> "The test of benefit to the community goes through the whole of Lord Macnaughten's classification, though, as regards the first three heads, it may be prima facie assumed unless the contrary appears."

This was among the authorities referred to in A-G v. Royal Trust Co. (1983-6) 36 WIR 1, a case which is of particular interest not only because the English authorities were reviewed in meticulous detail but because it is from the Court of Appeal of another Caribbean nation with social conditions comparable in some respects to our own.

I find these earlier analyses to be consistent with what I believe to be the true interpretation of what was said by Russell L.J. in Incorporated Council of Law Reporting for England and Wales v A-G, Russell L.J. was dealing with a specific purpose

set out in the memorandum of association of a company limited by guarantee. It was -

> "The preparation and publication .... at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England."

Russell L.J. was not in the passage from his judgment to which I have just referred abandoning the equity of the statute. His "line of retreat" for a court faced with a particular expressed object of general public utility is based upon that very thing. That is not at all the same as defining "charitable purposes" simply as "purposes beneficial to the community."

The proposition that a particular identified purpose which is found to be beneficial to the community is prima facie charitable is perfectly consistent with the proposition that some such purposes are charitable and others not. It would not save a disposition for such purposes, standing alone, as a charitable disposition, for the fundamental reason that not all such purposes are charitable.

So now we come in more detail to the arguments about the construction of the particular words of the instrument establishing CF.

The legion of authorities with which I was presented can indeed, as suggested by the trust defenders, be seen as falling into

categories - not neatly, unfortunately, for there is little neatness about this branch of the law. But these categories can be perceived. The first which I shall consider is where it is submitted that when general words are compatible with the trust being exclusively charitable they should be construed as confining the purposes to exclusively charitable purposes.

In Re Smith, Public Trustee v. Smith (1931) 1 Ch 153 the so-called "locality" cases are extensively reviewed. The particular bequest - it was a will, not a trust inter vivos - was "to my country England to and for - own use and benefit absolutely." The case is of such importance in the present matter, and many others of relevance are reviewed in it, that I am afraid that I shall have to read from it at some length.

What follows is from the judgment of the Master of the Rolls, Lord Hanworth -

> "We have to construe the will, and it is said that that bequest 'unto my country England for - own use and benefit absolutely' is so vague as to be void for uncertainty, and that it cannot be held to be a charitable bequest so as to take it out of the rule against perpetuities, and therefore the will is ineffective. It is noticeable that it is an out-and-out gift without any conditions at all 'unto my country England for - own use and benefit absolutely'. The court leans in favour of making the testamentary dispositions of a testator effective if possible within the limitations and in accordance with the principles of law."

Leaving Lord Hanworth for a moment, I see no reason why this court should lean any less in that direction where a settlement made by a settlor who, on any view as to his identity, is now deceased is being challenged by a party whose own case is that he is the personal representative of the true settlor. I now return to the speech of Lord Hanworth.

> "I then come to the question: is a bequest to a country, here England, good? Two questions are somewhat mixed up. One has to consider, at the same time whether it is good as not being uncertain, and whether it is a charitable gift so as to eliminate any danger from the other rules of law. As far back as West v. Knight, which was decided in 1669, it was decided that a gift by a testator to the parish of Great Creaton, where he was born without saying to what use, was good. There were no specific indications of the purposes for which it should be used, and all that was indicated was the parish where the testator was born. It was held that it was good, and that the matter was to be referred to the Master in order to see that the money was disposed of for the benefit of the poor of the parish. That ultimate destination is a matter with which I will deal later on, but the noticeable fact is that the gift to the parish without any specific use was held to be good as a gift to that area, or, rather, of course, for the benefit of those who lived within that area.
>
> Then A-G v. Lord Lonsdale is a noticeable case. There had been there a deed and a will whereby a certain sum was to be used for charity, and the particular charity that was then indicated was a school. In due course the school was established and carried on for some forty years. At the end of that time the school came to an end and the tenant for life who was in enjoyment of the estate used the money, which was coming in and had been devoted to the school, for his own purposes. The Attorney-General then brought proceedings, claiming that the money ought to be restored to a charitable purpose. The

> alternative to the school was this, 'or otherwise upon such other trusts, and for such other purposes as my executors shall think most conducing to the good of the county of Westmorland, and, especially of the parish of Lowther.'
>
> The observation that is made there by Sir John Leach VC is this. 'This amounts to a clear direction that, if, for any reason, the testator's intention as to the school should fail, the manor, lands and rectory intended for the endowment of the school should be applied to other charitable purposes: and the court is bound to carry this intention into effect.' I say the case is a noticeable one because is was argued with cogency that, inasmuch as the specific bequest to the school had come to an end or failed, the indefinite purpose ought not to be brought out of obscurity and given effect to; but it was held by the Vice Chancellor that the second bequest upon the failure of the first was effective and good, and he clearly indicated that the bequest was valid because the money was to be applied to charitable purposes, although it was given simpliciter for the good of the County of Westmorland and especially of the parish of Lowther without any more specific indication as to the mode of its application."

Lord Hanworth also refers to Mitford v. Reynolds 1 Ph 185 and the argument in that case that the whole bequest was void for uncertainty. Lord Lyndhurst "held otherwise and that the bequest to the government of Bengal for the purposes of the natives of Dacca was good.

He continues thus -

> "Then comes Nightingale v. Goulburn, where there was a bequest to the Queen's Chancellor of the Exchequer for the time being to be appropriated to the benefit and advantage of Great Britain. That bequest was held to be valid so far as related to the personalty. The question there discussed was whether the

> bequest given to the benefit and advantage of Great Britain was so wide and vague as to be void. Vice Chancellor Wigram in his judgment drew attention to the well known case of Morice v. Bishop of Durham and he said "I do not understand the observations of Sir William Grant ...." as deciding that no general words could be equivalent to the word charity. Nor do I think it would be right with reference to the decided cases to lay down any such general rule".

Then he founded himself on West v. Knight, Jones v. Williams and the other cases there mentioned and continued -

> "As to the word charitable he said that the bequest in Reynolds was for the benefit of all the native inhabitants of Dacca in general, both rich and poor, and that it was held good. He added that in the case with which he had to deal the British public would stand in the situation of the person indicated by a bequest to a trustee for the advantage of AB. That case went before Lord Cottenham on appeal and after discussion the Lord Chancellor said 'Many bequests have been held as good charitable gifts to parishes, towns, counties and provinces'.... 'Why then is the present gift not good? Why (my emphasis) is this kind of charitable gift to be held void because the particular objects are not specified when that objection does not prevail in what has been called proper charities? It is no criterion of the invalidity of a charity bequest that it is not capable of being administered in this court.
>
> Now I want to turn back for a moment to Morice v. Bishop of Durham for that is the basis on which the judgment of Lord Macnaghten in Pemsel's case is founded. What was decided there was that a bequest for such objects of benevolence and liberality as the trustee in his own discretion shall most approved cannot be supported as a charitable legacy. They were objects of benevolence and liberality. Those words are certainly too wide within the decision in Pemsel's case and were held within

> the decision in Morice to be too wide. They would be too indefinite. That was the ground on which the trust failed. But Lord Eldon when the latter case came before him made this observation 'with reference to those in which the court takes upon itself to say it is a disposition to charity where in some the mode is left to individuals, in others individuals cannot select either the mode or the objects but it falls on the king as parens patriae to apply the property, it is enough at this day to say the court by long habitual construction of those general words had fixed sense and where there is a gift to charity in general, whether it is to be executed by individuals, selected by the testator himself, or the king as parens patriae, is to execute it. It is the duty of such trustees on the one hand, and on the Crown on the other, to apply the money to charity, in the sense which the determinations have affixed to that word in this court: viz, either such charitable purposes as are expressed in the statute or to purposes having analogy to those'. That passage, to my mind, is of importance, because it clearly shows that a gift to charity in general terms may be good, although it would fall to those who have the responsibility of executing it to see that it is confined to objects which are charitable within the proper sense of that word as construed in these courts, and that you may have a general bequest in which that duty falls on the king as parens patriae to administer it. But he does not say that a bequest general in its terms is to be held void by the court because of those general terms; he seems to indicate, inclose alliance with the authorities I have already cited, that you may have a gift to charity in general, afterwards to be devoted to purposes chosen by it maybe by the king or it may be other persons."

So very general words of gift may in some instances be interpreted as being confined to charitable purposes. That, of course, does not answer the question in this case, but it indicates that it is one for consideration as a matter of

construction and in the light of prevailing social attitudes and conditions.

Another category of cases of which In re Macduff, is an example, is where purposes have been treated as alternatives among which was a non-charitable purpose. In Macduff the alternatives were "charitable or philanthropic", and in that case there appeared this important passage in the speech of Lord Hanworth -

> "Where you can treat the words conjunctively they may be overshadowed by the word charitable, but where you get an alternative proposed, as in Re Macduff in Blair, for charitable or public purposes, using the words disjunctively, that shadow cannot be brought forward from the word charitable so as to prevent a distribution of the money for some objects which are not charitable."

Mere limitation to a particular locality of such specific words does not cure the difficulty.

Re Tetley was another example referred to by Lord Hanworth. In that case the bequest was for "such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select ....."

It was in relation to that disposition that Lord Cave had said that it was "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."

Of that Lord Hanworth said this -

> "I have read these words very carefully. I think that they are intended to be directed to the cases where there is an alternative, where you cannot make the word 'charitable' conjunctively limit the other purposes: they are intended to indicate that where an alternative is given it cannot be shown that it is necessarily for a charitable trust. I cannot find that those words are intended to overrule the principle of the sequence of cases from West v. Knight right away down to Nightingale's case and the approval expressed of them, to which I have already referred. I think one must interpret those words in reference to the case upon which they were spoken, and not otherwise."

The submission of the trust defenders, which was expressed after an analysis by Mr. Hart to which I have been much indebted in what I have said during the last few minutes, was that where there is nothing in the general words to make it impossible to imply a dedication to exclusively charitable purposes that should be followed and there is no reason to confine the principle to cases where the benefit is in some way localised.

That is a very broad principle and I do not need to go as far as that in the view I take of this case. That leads me back to the point which I left some time ago; consideration of the principles of ejusdem generis and noscitur a sociis. I do so by way of the following extract from the judgment of Lord Green MR in Strakosh dec'd, In re Temperly v. AG (1949) i Ch 529 at 541 (my emphasis) -

> "If we are right in holding that the principle laid

> down is that general words that money is to be applied for the benefit of a district or country are construed as meaning for such purposes as are recognised by the law as charitable purposes, the principle has no application here where the purpose is expressed. Lord Simonds in his speech in Williams' Trustees v. Inland Revenue Commissioners (I) referred shortly to this class of case. After referring to the difficulty he said, "But I would suggest that it is possible to justify as charitable a gift 'to my country' upon the ground that, where no purpose is defined, a charitable purpose is implicit in the context. In the cases to which we have referred this was we think the basis of the decisions and there is therefore no inconsistency between these cases and the law as stated in Williams' Trustees v. Inland Revenue Commissioners."

Earlier, at p. 539 it was said that the question was "how, on the true construction of the gift, it would be permissible to apply the trust funds."

That is precisely this case.

The converse application of the same point is in Scottish Burial Reform and Cremation Society v. Glasgow Corporation (1968) AC 138 at 147 per Lord Reid -

> "There is, however, another line of cases where the bequest did not clearly specify the precise object to which it was to be applied but left a discretion to trustees or others to choose objects within a certain field. There the courts have been much more strict, so that if it is possible for those entrusted with the discretion could, without infringing the testator's directions, apply the bequest in any way which would not be charitable ... then the claim that the bequest is charitable fails."

A striking example of noscitur a sociis in relation to charity is, Re

Pardoe [1906] 2 Ch 184. In that case a gift of residue to trustees in trust to pay and distribute the same amongst "such public charities and institutions or for such charitable purposes for the public advantage" as the trustees should think fit was upheld as a valid charitable bequest. While Kekewich J did not hold that a public institution was necessarily charitable he held that in the particular context the expression meant a charitable public institution. The concluding words referring to "or for such charitable purposes for the public advantage" coloured the preceding words. "It is all", he said, "coloured with the notion of charity."

So, a charitable purpose may be implicit in context. There is a line of cases which shows that the context may be a particular locality or even "my country England".

It is also well established that a gift may be charitable even though the trust may benefit foreign persons, institutions, cities or countries. Camille and Henry Dreyfus Foundation Inc. v. IRC (1954) 1 Ch. 672; Mitford v. Reynolds (1844) 1 Ph. 185 (to the Government of Bengal for charitable beneficial and public works in the city of Dacca); Vagliano v. Vagliano (1905) WN 179 (for charitable objects in the Island of Vagliano); Re Robinson (1931) 2 Ch. 122 (to the German Government for the benefit of its soldiers disabled in World War I); Re Jacobs (1970) 114 SJ 515 (planting of grove trees in Israel).

I accept that the intention of the expression following the parenthesis in Clause 3 was to indicate that there was to be no

geographical restriction on the disposition of the trustees in relation to all the dispositive provisions of clause 3 and not simply the fourth. The second defendant argues, however, that the words, in addition, clarify beyond doubt the settlor's intention that the widest possible intention be given to the "public good" and this significantly weakens rather than reinforces the plaintiff's contentions. He does not go so far as to suggest that this in itself would make an otherwise charitable gift non-charitable. That would mean that none of the objects in clause 3 were charitable, which would be directly contrary to Lord Chelmsford's analysis in Whicker v. Hume. (1858) 7HL 124. That case was dealt with in some detail by Mr. Hart and I need to say something about it. A testator gave to trustees funds to be applied by them "for the advancement and propagation of education and learning all over the world." That was held to be a valid charitable bequest and not void for uncertainty. It is important to remember that what was said about the geographical element, to which I shall refer in a few moments, was in relation to a specific purpose which had been found to fall under the second head of Lord Macnaughten's classification. In that respect it differs from this case.

The following is from the speech of Lord Chelmsford, the Lord Chancellor -

> "..... it is to instruct, to teach and to educate throughout the world. Then the mere circumstance of this spacious area being open to the discretion of the trustees would not prevent the gift from being available as a

> good charitable bequest, the discretion being sufficiently pointed and specific to make it definite and certain."(my emphasis).

Lord Cranworth also dealt with this point, as follows -

> "Well, then it is objected that it is extended all over the world. I can only say that I think that was a silly provision, but I cannot say that it creates a fatal objection to the validity of the will, because the testator has said not that it shall be applied all over the world, that would be absurd, but that it shall be for the benefit of mankind in general, in every part of the world, as far as circumstances will permit. In settling the scheme for this charity, it will be the duty of the court to see that the trustees make it as extensive as the nature of the income will permit. Therefore, in conclusion, I cannot have any doubt whatever that it is a perfectly valid charity."

The question before me is whether I should take those principles - the implication of charity from context and the extension of charity in an appropriate case to the whole world - together as giving rise to a valid trust in this instance.

We have four categories set out in clause 3, each separated 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 CF, 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".

There is no previous case like the present one, where the clear intention of the settlor was to enumerate the four heads of charity, and confine the object to which the trustees could apply the trust fund to charitable objects I regard the effect of the recitals and the power to changethe object of the trust as irrelevant so long as it remains unexercised.

Having come to that conclusion I do not think I am making any bold, or even timorous innovation in the law of charity. All I have sought to do is interpret the specific words of a document in the light of well established canons of construction. It will be in connection with specific purposes that the approach of Russell LJ will fall for consideration. I see no reason at present why it should not be adopted in the Cayman Islands.

There has been some difficulty introduced by references to the ejusdem generis rule as an example of benignant construction. I think that it was in the end accepted by all that it is a canon of construction which is in itself neutral in its effect. It is based on the principle noscitur a sociis. Words, however general, may be limited in respect of the subject matter in relation to which they are used and general words may be restricted to the same genus as the specific words which precede them. These principles of construction are based on the presumed intention of

the author of the document. Had I been left in doubt I would have been prepared to adopt a benignant construction ut res magis valeat quam pereat, in reliance on the following passage in the speech of Lord Hailsham in 1 RC v. McMullan (1981) AC 1 at 14F -

> "But before I part with the question of construction, I would wish to express agreement with a contention made on behalf of the appellants and of the Attorney-General, but not agreed to on behalf of the respondents, that in construing trust deeds the intention of which is to set up a charitable trust, and in others too, where it can be claimed that there is an ambiguity, a benignant construction should be given if possible. This was the maxim of the civil law: "semper in dubiis benigniora praeferenda sunt." There is a similar maxim in English law: "ut res magis valeat quam pereat." It certainly applies to charities when the question is one of uncertainty (Weir v. Crum-Brown (1908) A.C. 162, 167), and, I think, also where a gift is capable of two constructions one of which would make it void and the other effectual (cf. Bruce v. Deer Presbytery (1867) L.R. 1 Sc & Div 96, 97; Houston v. Burns (1918) A.C. per Lord Finlay L.C., at pp 341-342, and cf. also In re Bain (1930) 1 Ch. 224, 230). In the present case I do not find it necessary to resort to benignancy in order to construe the clause, but, had I been in doubt, I would have been prepared to do so."

That disposes of the case, and the declarations are -

(1) that on the true construction of the Memorandum of Agreement dated 20th July 1976 (known as the Continental Foundation, the trusts declared therein are valid.

(2) that on the true construction of the Memorandum of Agreement dated 7th October 1982 (Known as the Aall Foundation) the trusts declared therein are valid.

Had my decision gone the other way another issue would have arisen for decision. It is a pure issue of law - whether, notwithstanding the invalidity of the dispositive provisions of the trust, until the death or incapacity of the settlor or the settlor called for the property to be vested in him the trustees of CF continued to have a power or mandate to apply the trust property and operate the provisions of CF (including the shifting law clause) in accordance with the purposes set out in the trust instrument. That is a matter on which the eminent experts profoundly disagreed. Since any observation of mine would of necessity be obiter they are unlikely to be helpful in the event of the matter being taken elsewhere.

Dated 30th April 1996

G.E. Harre

Chief Justice