Privy Council Appeal No. 26 *of* 1958

Beatrice Alexandra Victoria Davies - - - - - *Appellant*

v.

Perpetual Trustee Company (Limited) and others - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1959

Present at the Hearing:

VISCOUNT SIMONDS
LORD MORTON OF HENRYTON
LORD COHEN
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* LORD MORTON OF HENRYTON]

The only question arising for decision on this appeal is whether a devise contained in a codicil to the will of George Harris is or is not a valid charitable devise. The parties are in agreement that the devise is invalid unless it can be upheld as being charitable. It is in the following terms:— "I give and devise Block Seventy B upon which stands Ultimo House to the Presbyterians the Descendants of those settled in the Colony hailing from or born in the North of Ireland to be held in trust for the purpose of establishing a College for the Education and Tuition of their Youth in the Standards of the Westminster Divines as taught in the Holy Scriptures".

The testator lived at Ultimo, Sydney, New South Wales, and died on the 21st January, 1897. By his will dated the 18th April, 1894, the testator devised Block 70B to his wife for her life and thereafter to his nephew John Harris for life and thereafter to the next surviving eldest son of his brother John for life until the death of the last survivor of his nephews the sons of his brother John and then to his heir at law bearing the name of Harris. By the said codicil, which was dated the 3rd April, 1895, the testator revoked the ultimate devise to his heir at law and substituted the devise already set out. He also revoked several provisions of his will as to the destination of the ultimate residue of his estate and gave that residue to the College to be founded pursuant to the said devise, directing that it be "held at interest and this latter added to the income annually".

The last of the life tenants interested in Block 70B died on the 19th April, 1957. At that date Block 70B, which had been resumed by the Government of the State of New South Wales, was represented by investments representing the proceeds of sale thereof worth approximately £53,000, and the value of the residue was £286,750.

On the 26th October, 1918, one John Harris, who was then the sole trustee of the will, issued an originating summons in the Supreme Court of New South Wales in Equity, for the determination of a number of questions. Question 10 (*a*) asked whether the devise of Block 70B (and another devise not material for the present purposes) were valid devises. At the hearing of the originating summons by Harvey J., counsel

for certain of the defendants (who were among the next of kin of the testator) and counsel for the University of Sydney submitted that the devise in question was void for uncertainty and was not charitable as it was confined to a restricted class. These submissions were replied to by counsel for the Attorney-General. After the Attorney-General's address, the learned Judge made the following note, on the 18th December, 1918. "Subject to Affidavit by Attorney-General as to Presbyterian children, I answer 10 (*a*) in affirmative as being a vested remainder for a good charitable object".

Next day an affidavit was sworn by one William Wood, and it appears from the learned Judge's further note that this affidavit was put in evidence before him. The deponent stated that he was the Financial Secretary of the Presbyterian Church of Australia in the State of New South Wales, that he had occupied that position for over twenty-five years and that he had an intimate knowledge of the affairs and constitution of the Presbyterian Church in that State. He then deposed to the fact that "amongst the members of the Presbyterian Church in this State in the year 1897 there were numerous persons descendants of Presbyterian settlers in this State, and hailing from or born in the North of Ireland, and at the present time there are still a considerable number of adherents or members of the said Church similarly descended." This was the only evidence before the learned Judge as to the existence or otherwise of persons of the class required by that devise and he was apparently of the opinion that it satisfied the condition which he had imposed when answering question 10 (*a*) in the affirmative.

In his formal judgment delivered on 20th December, 1918, Harvey J. said "I have already held that the effect of the Codicil is to revoke both devises in the Will in favour of the testator's heir at law, but that the life interest in Ultimo House in favour of his widow and nephews, and the life interest in the residuary real estate in favour of his nephews are not disturbed by the Codicil. I have also held that the trust for founding a Presbyterian College is a good charitable trust being an immediately vested remainder waiting only for the determination of the antecedent life estates of the sons of John Harris. When this remainder falls in it will become necessary to settle a scheme for the administration of this trust."

This decision was upheld on appeal by the Full Court of the Supreme Court of New South Wales. In delivering the judgment of that Court, Acting Justice Langer Owen said, with reference to the devise now in question, "Harvey J. held that it amounted to a trust for founding a Presbyterian College, and it is a good charitable trust for the purposes mentioned in the Codicil, and we agree with him. We think that it should be construed as a devise for the benefit of Presbyterians descended from those settled in New South Wales hailing from or born in the North of Ireland to be held by trustees for the purpose of establishing a College for the education of their youth according to certain religious standards. It is not a devise to or for the Presbyterian Church of Australia as constituted by the Presbyterian Church of Australia Act, 1900. It is a devise for the benefit of certain individuals who are Presbyterians, and who come within a certain description, and the object is to afford facilities for religious education. It may be that, when the time arrives for carrying this charitable trust into effect, it may be found impracticable to do so. In that event there is nothing in our decision, and there should be no expression inserted in the decree, to prevent the beneficiaries under the Will and Codicil from contending that the *cy près* doctrine is not applicable to these devises."

The decree of the Full Court, so far as material, stated that the devises of Block 70B (and of another property not material for the present purpose) were valid charitable devises for the respective purposes contained in the codicil, and continued "but this declaration is without prejudice to the right of the beneficiaries or any of them under the said Will to contend that the *cy près* doctrine is not applicable to these devises or either of them if the said purposes are incapable of taking effect when the respective funds become available for the said purposes. The said

devise of Block 70B in the said Codicil is subject to the prior life estates therein given by the said Will in favour of the widow and certain nephews of the testator the sons of his brother John ".

After the death of the last of the life tenants interested in Block 70B, on the 19th April, 1957, special leave to appeal was granted to the present appellant, as representing the testator's next of kin. So it is that this appeal comes before their Lordships' Board nearly forty years after the decision of the Courts in Australia.

The main contentions of Mr. Jacobs for the appellant were, first, that the element of " public benefit " was lacking in the trust created by the codicil, and secondly that the gift was void for uncertainty as to the persons for whose benefit the trust was created, the uncertainty arising from the meaning of the words " the Presbyterians ", coupled with the words " those " and " their youth ".

Their Lordships now turn at last to considering the construction of the gift in the codicil. It is a gift to a body of trustees described as " the Presbyterians the descendants of those settled in the Colony hailing from or born in the North of Ireland." For reasons which will later appear, their Lordships will assume, without so deciding, that the words " the Presbyterians " in this context can be given a definite meaning. As the codicil speaks from the testator's death it is plain that the class of " Presbyterians " must be ascertained as at the 21st January, 1897, but it is not every Presbyterian living at that date who is selected as a trustee. A Presbyterian to qualify must be a descendant of Presbyterians—the word " Presbyterians " must clearly be implied after the word " those "—settled in the Colony and either hailing from or born in the North of Ireland. The phrase " hailing from " is not very explicit, but may be taken to refer to persons who were resident in the North of Ireland at the time when they embarked for New South Wales.

The persons to be educated at the College are limited to " their youth " ; that is, as their Lordships interpret the words, the children and remoter issue of the persons to whom as trustees the gift is made. Thus the class of persons eligible to attend the College is defined simply by relationship to one or more of a number of persons living on the 21st January, 1897. A boy would only be eligible if (i) he was descended from a Presbyterian living at that date, and (ii) that Presbyterian was himself descended from a Presbyterian who had settled in the Colony, and (iii) that settler either hailed from or was born in the North of Ireland.

Curious results follow if it be imagined that the College is founded in 1959 and it has to be ascertained whether particular boys belong to the class of " their youth ". Boy " A " is the son of members of a Presbyterian Church, but neither of his parents was living in 1897 and his ancestors then living were not Presbyterians. Boy " B " is the son and grandson of Presbyterians, but his Presbyterian ancestors living in 1897 were not descended from Presbyterian settlers, but themselves adopted Presbyterianism. Boy " C " is a descendant of Presbyterians living in 1897 and these Presbyterians were descended from Presbyterian settlers, but the Presbyterian settlers came from England or Scotland. No one of the three boys in question is within the class of beneficiary defined by the settler. Boy " D's " parents have no religion at all, but he has one grandparent who was living in 1897, was then a Presbyterian, and was descended from Presbyterian settlers who " hailed " from Northern Ireland. He is within the class of beneficiaries.

The law relating to charitable trusts must now be applied to these facts. In the course of his argument on behalf of charity, Mr. Wallace for the Attorney-General invited the Board to put a construction on the gift which would amount in effect to disregarding the words " the descendants of those settled in the Colony hailing from or born in the North of Ireland ". This is a tempting invitation, but it must be rejected. To follow such a course would be to make a new and perhaps a better codicil for the testator, instead of construing his words. It is to these words, as they have already been construed, that the principles laid down by the relevant authorities must now be applied.

It is to be observed at once that the object of the testator's bounty is *prima facie* a charitable object within the well-known classification in *Pemsel's* case [1891] A.C. 531 at p. 583, being concerned both with education and with the advancement of a particular religious faith. It is, however, now well established that an element of public benefit must be present even in such gifts, if they are to stand in the privileged position of a charitable gift. This aspect of the law relating to charitable trusts has been more fully discussed and developed by the Board and in the House of Lords since the decision of the Full Court in the present case. Thus in *Verge* v. *Somerville* (1924) A.C. 496 at p. 499, Lord Wrenbury said, in delivering the judgment of the Board, "to ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first enquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot." In *Oppenheim* v. *Tobacco Securities Co. Ltd.* [1951] A.C. 297 at p. 305, Lord Simonds said "It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community . . . With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to Lord Macnaghten's division in *Income Tax Commissioners* v. *Pemsel*, and as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class 'other purposes beneficial to the community'. This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal. In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it". No question of the relief of poverty arises in the present case. At page 306 Lord Simonds observed: "A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes", and later he added "it must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established".

Lord Normand said at page 309 "No general rule has yet been formulated by which to distinguish trusts which have this essential element of public benefit and those which have not, and the valiant attempts of counsel to arrive at a rule have failed to convince me. I am, however, satisfied that the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. That seems to me to follow from the principle that the trust purpose must be directed to the benefit of the community or a section of the community. (Tudor on Charities, 5th ed., p. 11, approved by Lord Greene, M.R., in *In re Compton* [1945] Ch. 123 at p. 128.) The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined".

Their Lordships find it unnecessary to refer to any other authorities. The principles thus laid down must be applied to the facts of each particular case, and their Lordships have not found it easy to decide on which side of the line falls the trust which the testator desired to establish. They will assume that the College to be established was intended to provide a general education and not only to give education in the standards of the Westminster Divines. Even so, they are unable to hold that the objects of the trust are either the community or a section of the community. They clearly are not "the community", for the testator has been at pains to impose particular and somewhat capricious qualifications upon

the persons who are to benefit from this education. Nor can these persons, in their Lordships' opinion, be "a section of the community" in the sense in which these words have been interpreted in the authorities. The facts which must be proved by any boy who claims to come within the class of beneficiaries have already been stated, and it is clear that the nexus between the beneficiaries is simply "their personal relationship to several propositi", namely certain persons living at the death of the testator. And these persons are not themselves, in their Lordships' view, a section of the community. They are certain Presbyterians who can establish a particular descent. Moreover the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator has in mind. It cannot be said that boys whose Presbyterian ancestors (living on 21st January, 1897), trace their descent from emigrants from Northern Ireland are in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors (living as aforesaid) are descended from emigrants from e.g. England or Scotland. In their Lordships' opinion the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than "a fluctuating body of private individuals" and the gift must fail because the element of public benefit is lacking. This being so they need not consider further the argument as to uncertainty already mentioned. Counsel for the respondent relied strongly upon the case of *In re Tree* (1945) Ch. 325. That case is, however, distinguishable from the present case on the ground that the element of poverty was present, but their Lordships doubt if the decision could have been justified had that element been absent.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and it should be declared, in answer to question 10 (*a*) of the originating summons, that the devise of Block 70B contained in the codicil of 3rd April, 1895, was not a valid charitable devise.

The costs of all parties to this appeal, as between solicitor and client, must be paid out of the funds representing the proceeds of sale of Block 70B. The order of the Full Court as to the costs of the proceedings before it will not be disturbed.

(39716) Wt. 8021—25 100 4/59 D.L.

In the Privy Council

BEATRICE ALEXANDRA VICTORIA DAVIES

v.

PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS

DELIVERED BY
LORD MORTON OF HENRYTON

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1959