

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : THE SYNOD OF THE ANGLICAN CATHOLIC
CHURCH IN AUSTRALIA -v- TEE [2012] WASC 46

CORAM : McKECHNIE J

HEARD : ON THE PAPERS

DELIVERED : 15 FEBRUARY 2012

FILE NO/S : CIV 2537 of 2011

BETWEEN : THE SYNOD OF THE ANGLICAN CATHOLIC
CHURCH IN AUSTRALIA
Plaintiff

AND

BRIAN LENNOX TEE
Defendant

Catchwords:

Trust for charitable purposes - Whether a trust for the use and benefit of a parish is a trust for charitable purpose

Trustees Act 1962 (WA) - Whether gift valid - Application for interlocutory injunction - Whether necessary - Costs of action and injunction

Legislation:

Trustees Act 1962 (WA), s 102

Result:

Gift a valid gift for charitable purposes
Costs, except for injunction to be paid from estate

Category: B

Representation:

Counsel:

Plaintiff : Ms W F Gillan
Defendant : Mr T J Carmady

Solicitors:

Plaintiff : Lynn Hudson
Defendant : Williams & Hughes

Case(s) referred to in judgment(s):

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531
Dunne v Byrne [1912] AC 407
Farley v Westminster Bank [1939] AC 430
Green v Trustees of the Property of the Church of England in Tasmania [1992]
TASSC 41
In Re Ashton (decd); Siddall v Gordon [1955] NZLR 192
In Re Eastes; Pain v Paxon [1948] Ch 257
In Re Flinn; Public Trustee v Flinn [1948] Ch 241
In Re Garrard; Gordon v Craigie [1907] 1 Ch 382
In re Tomkins (decd); Sandhurst & Northern District Trustees Executors &
Agency Co Ltd v Pitt [1958] VR 310
Re Gulbenkian's Settlement Trustees; Wishaw v Stephens [1970] AC 508
Re Macgregor; Thompson v Ashton (1932) 32 SR (NSW) 483
Re Norton's Wills Trust; Lightfoot v Goldson [1948] 2 All ER 842
Re Rumball (decd); Sherlock v Allan [1956] Ch 105
Union Trustee Co of Australia Ltd v Church of England Property Trust, Diocese
of Sydney (1946) 46 SR (NSW) 298

McKECHNIE J:**How this case comes to court**

1 Ms Barbara Grimes and her husband, Ken, were for many years members of the Anglican Catholic Church in Western Australia, St Ninian's Parish.

2 Mr Tee is a clerk in Holy Orders and was once a solicitor. In 2006 he was a priest in the Parish of Peter the Apostle, a parish of the Anglican Catholic Church. He assisted Mrs Grimes in the preparation of her Will which she executed on 9 December 2006. After making some relatively small bequests, she left the balance of her estate on trust to be divided into two parts:

3. (1) To pay transfer and make over one of such two equal parts thereof as to both capital and income to the SYNOD OF THE ANGLICAN CATHOLIC CHURCH IN AUSTRALIA (WESTERN AUSTRALIA) INCORPORATED.

(2) To pay transfer and make over the other of such two equal parts thereof as to both capital and income to the SYNOD OF THE ANGLICAN CATHOLIC CHURCH IN AUSTRALIA (WESTERN AUSTRALIA) INCORPORATED for the use and benefit of the parish of St Peter's Church, Brentwood, in the said State.

3 Mrs Grimes died on St Andrew's Day 2010. The Reverend Tee is the executor of her Will and questions have arisen as to the interpretation of cl 3(2).

The issues

1. Is cl 3(2) a gift for charitable purposes and thus a valid disposition?

Yes.

2. In any event, is the gift saved by the *Trustees Act 1962* (WA) s 102?

Yes.

3. Should the parties' costs be paid from the estate?

Yes, except the costs of the injunction application which the plaintiff must bear.

Further background

4 Bishop Entwistle is the Regional Bishop of the Australian Catholic Church Synod of Western Australia.

5 The Synod's Parish of St Peter was constituted and declared with the effect from 23 October 2005. In October 2010 there appears to have been a schism within the Anglican Catholic Church. Reverend Tee resigned from the church and as priest.

6 I suspect that the schism accounts for the fact that the parties were originally unable to resolve their differences in Christian amity. However, they have now joined together in common submissions.

These proceedings

7 The church commenced proceedings for interlocutory injunctive relief against Reverend Tee as executor of the estate. Ultimately, those proceedings were not pursued, in part because of an undertaking which he gave. In an affidavit sworn by him on 20 October 2011, the Reverend Tee explains his position as to the estate and why he advised the church's solicitors that he intended waiting for a period of at least six months before making payment of Mrs Grimes' residuary estate. His reasons seem sensible.

8 At a directions hearing, I ordered possible beneficiaries should be served with notice of the proceedings. This has been done. Each of the three possible beneficiaries have indicated that they do not desire to be joined as parties and they are happy to wait the court's decision.

The Parish of St Peter the Apostle

9 At one time, it may have been a question whether the Parish of St Peter continues in existence. In correspondence, Reverend Tee has adopted a neutral position on the answer. It is a preliminary matter to be resolved.

10 The Synod of the Anglican Catholic Church in Australia (Western Australia) Incorporated was incorporated on 16 August 1989. The Objects for which the Synod is established (subject to the Fundamental Declarations and Ruling Principles):

4.1 To promote the Christian Faith, including Christian worship, Christian living and Christian charity.

...

4.3 To establish under the spiritual authority of the Anglican Catholic Church in Australia and to promote and provide for the administration of

- (a) Churches and chapels
- (b) Parishes and other ecclesiastical districts
- (c) Schools, colleges and other educational institutions
- (d) Charitable organizations for the education, care, relief and/or rehabilitation of the aged, the disabled, the handicapped and the poor
- (e) Other Christian works of mercy
- (f) Organizations for the publication of Christian devotional materials and other literature.

11 Among the Powers to be exercised by the Synod is:

5.16 To take any gift of property whether subject to any special trust or not, for any one or more of the objects of the Synod

12 'Parish' is defined by cl 32.13:

'Parish' means any congregation of twenty or more adult communicant members of this church recognized as such by the Bishop acting with the advice and consent of the Management Committee.

13 'Provisional Parish' is defined by cl 32.14:

'Provisional Parish' means any congregation of not less than three adult communicant members of this church recognized as such by the Bishop acting with the advice and consent of the Management Committee.

14 On 10 April 2006, Archbishop Hepworth declared that the provisional parish of St Peter the Apostle had been duly constituted with effect from 23 October 2005. The declaration was made pursuant to Parochial Ordinance 2000, No 1 of 2000 assented to 26 July 2000. Clause 9 of the Ordinance provides for the reduction and status or abolition of a parish or provisional parish. Bishop Entwistle has deposed that no procedure under cl 9 has commenced. Bishop Entwistle deposes that the church has not yet appointed a new parish priest to the St Peter parish but it is its intention to do so once it has an appropriate candidate for appointment. While some parishioners appear to have withdrawn from the church, about six parishioners continue to worship at the St Ninian parish. Despite the earlier indications referred to by the

Reverend Tee, no submission is made that the parish of St Peter has been dissolved. I find that the parish of St Peter is a continuing parish of the Anglican Catholic Church in Australia.

Is a gift for the use and benefit of the parish a gift for charitable purposes?

15 A gift for the advancement of religion is a gift for charitable purposes: *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 580. No issue is taken as to cl 3(1) of the Will. The search is to discover Mrs Grimes' intentions as to the gift in cl 3(2).

16 Her gift in par 3(1) was a simple gift to the church. Her gift in par 3(2) was a purposive gift to the church for the use and benefit of the parish. It creates a trust with the church as trustee. It is the creation of a trust for charitable purposes or for other non-charitable purposes.

Cases on similar purposive gifts

17 The decisions in some of the cases are not easy to reconcile. As Sir Raymond Evershed MR has remarked: 'Questions of this kind are notoriously difficult, and, no doubt, the distinctions illustrated by the cases appear at times very fine'. The issue is whether the gift, is for charitable purposes - the advancement of religion - or mixed with non-charitable purposes. The church submits that there is no material difference between a gift to a diocese and a gift to a parish.

18 I commence this summary with an acknowledgement to Crawford J.

19 In *Green v Trustees of the Property of the Church of England in Tasmania* [1992] TASSC 41, the issue was whether a trust as an endowment fund for 'the diocese of northern Tasmania' constitutes a valid charitable trust which is capable of being taken into effect. Crawford J usefully summarised the state of authority:

I do not propose to add much to the extensive reviews of authorities which have been carried out in a great number of cases. Many authorities in favour of and against the validity of the gifts can be cited if all that is done is compare the words of these trusts with the words considered in the cases. Those tending to favour validity include *Re Rumball* (1956) Ch 105, *Re Garrard* (1907) 1 Ch 382, *Re Flinn* (1948) Ch 241 and *Re Simson* (1946) Ch 299. Those tending against validity include *Dunn v Byrne* (1912) AC 409, *Re Jackson* (1930) 2 Ch 389 and in particular *Queensland Trustees Ltd v Halse* (1949) St R Qd 270. In *Queensland Trustees Ltd v Halse* (supra) the gift was 'to the Archbishop for the time being ... to apply the income thereof, as he shall in his sole and uncontrolled discretion think fit, for the benefit of the said Diocese'. The

Full Court held that the gift did not constitute a good charitable trust as being a trust for the advancement of religion. Two main reasons were expressed, the first being that the Archbishop was given an unfettered discretion to decide on the objects to which he would apply the gift, and he therefore had the power to apply it to purposes which were not religious in the technical sense, and the second was that the application of the gift 'for the benefit' of the Diocese could also extend to objects which were not religious in the technical sense. Macrossan CJ and Mansfield SPJ both relied on statements made by the Privy Council in *Dunne v Byrne* (supra) and the House of Lords in *Farley v Westminster Bank Ltd* [1939] UKHL 1; (1939) AC 430 and of the Court of Appeal in that case ((1938) Ch 482). *Dunne v Byrne* (supra) concerned a direction to expend money 'as such Archbishop may judge most conducive to the good of religion in this Diocese' and *Farley v Westminster Bank Ltd* (supra) concerned a gift to certain vicars and church wardens 'for parish work' [21].

20 In a passage, which I find to be relevant to the present circumstances, Crawford J said:

The particular terms of a trust must be considered, together with the surrounding circumstances which may be taken into account, when construing the trust and its effect. Courts should take great care not to give undue weight to the decisions of other courts which depend to a significant extent on the specific terms of particular trusts. When determining whether the gifts for the new diocese are valid charitable trusts it is first necessary to construe and interpret the words used by the testator and testatrix and the constitution and organisation of the Church at the time.[24].

21 The trust was held to be for charitable purposes and valid although the trust failed because it was not capable of being carried into effect.

22 In *Re Macgregor; Thompson v Ashton* (1932) 32 SR (NSW) 483, a gift to the Anglican bishop for the time being 'for diocesan purposes' and 'for diocesan purposes generally' was a gift for a charitable purpose.

23 In *Re Rumball (decd); Sherlock v Allan* [1956] Ch 105, a gift to 'the Bishop for the time being of the diocese of the Windward Islands ... to be used by him as he thinks fit in his diocese' was a gift for charitable purposes. Jenkins LJ:

So, in the present case, a gift to the bishop for the time being of the diocese of the Windward Islands, without more, would have been a charitable legacy to him for ecclesiastical purposes in his diocese. The words 'to be used by him as he thinks fit' merely direct that he is to settle the particular mode of application within the charitable purposes of the legacy (that is to say, ecclesiastical purposes in his diocese); and the addition of the words

'in his diocese' is no more than an express of that which, if not expressed, would have been implied [81].

24 This continued a line of reasoning by Jenkins LJ from in *Re Norton's Wills Trust; Lightfoot v Goldson* [1948] 2 All ER 842 where a gift 'to the church council ... for the benefit of church and parish' was held by Jenkins LJ that it was a gift to the council for the advancement of religion albeit with the discretion as to the particular mode of its application. Jenkins LJ said:

So far, it is, in my judgment, a gift to the council 'for the benefit of the church and parish' with a discretion to the council as to the particular mode of its application within those limits (843).

25 An earlier, somewhat more restrictive decision is in *Farley v Westminster Bank* [1939] AC 430. The testatrix, Emma Mary Ashton, bequeathed the residue of her estate in equal shares to two charities and to the respective vicars and church wardens of two named churches 'for parish work'.

26 The House of Lords overturned the earlier decision of the Court of Appeal with Lord Atkin J saying:

The expression covers the whole of the ordinary activities of the parish, some of which no doubt fall within the definition of religious purposes, and all of which, no doubt, are religious from the point of view of the person who is responsible for the spiritual care of the parish in the sense that they are conducive, perhaps, to the moral and spiritual good of the congregation. But that, I think, quite plainly is not enough; and that the words are so wide that I am afraid that on no construction can they be brought within the limited meaning of 'charitable' as used in the law (435).

27 A similar view was reached in New Zealand in a case coincidentally also *In Re Ashton (decd); Siddall v Gordon* [1955] NZLR 192.

28 In that case the gift was a testamentary gift 'to help in any good work'. Because this encompassed both charitable and non-charitable purposes, the gift failed as a charitable disposition although it was rescued from invalidity by the equivalent of the *Trustees Act* s 102.

29 The third case involving a person named Ashton is *Re Macgregor; Thompson v Ashton*. The gift in question was a gift to the Anglican Bishop of the Diocese of Grafton and Armidale to be used respectively 'for diocesan purposes' and 'for diocesan purposes generally'.

30 Long Innes J, partly in reliance on in *Re Van Wart; Ramsay v Bourne* (The Times, 17 February 1911) held:

If a gift to a Bishop for the parochial purposes of his diocese is a charitable gift, I should think that a gift to a bishop for diocesan purposes was, *a fortiori*, a charitable gift (495).

31 He concluded:

It is sufficient for the present to say that, in my view, every diocesan purpose proper is a religious purpose and charitable in the legal sense, and that, consequently, each of the gifts in the present case, is in my opinion, valid (498).

32 In another case from New South Wales, *Union Trustee Co of Australia Ltd v Church of England Property Trust, Diocese of Sydney* (1946) 46 SR (NSW) 298 Nicholas CJ in equity considered a trust to be used:

[In] such manner and for such purposes relating to the work of St John the Baptist Church of England at Ashfield as the Rector and Church Wardens for the time being of the said Church shall in their absolute discretion think fit [299].

33 The Chief Justice held that the words were so vague that they encompassed non-charitable as well as charitable purposes. The trust was nevertheless saved from invalidity by the equivalent of the *Trustees Act* s 102.

34 In *Dunne v Byrne* [1912] AC 407 the Privy Council considered a gift 'that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expanded wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese'. The deceased was a Roman Catholic clergyman. In the opinion delivered by Lord Macnaghten:

The fund is to be applied in such manner as the 'Archbishop may judge most conducive to the good of religion' in his diocese. It can hardly be disputed that a thing may be 'conducive', and in particular circumstances 'most conducive', to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the Court attaches to the word, and indeed without being in itself in any sense religious (410).

35 Lord Macnaghten managed to distinguish the case from the general principle that a gift for religious purposes is a good charitable gift by reasoning:

This is not in terms a gift for religious purposes, nor are the words synonymous with that expression. Their Lordships agree with the opinion of the Chief Justice that the expression used by this testator is wider and more indefinite (411).

36 *In re Tomkins (decd); Sandhurst & Northern District Trustees Executors & Agency Co Ltd v Pitt* [1958] VR 310 Smith J at 312 held:

[T]he words 'charitable and church purposes' do not here mean 'charitable church purposes' (312).

37 By construing the language in accordance with its ordinary and natural meaning, the words 'church purposes' were not intended to relate only to such purposes as are charitable.

38 The result may be contrasted with *In Re Flinn; Public Trustee v Flinn* [1948] Ch 241 where the gift was:

To His Eminence the Archbishop of Westminster Cathedral London for the time being ... to be used by him for such purposes as he shall in his absolute discretion think fit' (241).

39 Jenkins J held:

[W]ould be a good charitable gift to the Archbishop for the time being virtute officii for ecclesiastical purposes (249 - 250).

40 If the gift stood alone it would be a valid charitable gift for ecclesiastical purposes.

41 *In re Tomkins (decd)* a gift for church purposes was not for exclusively charitable purposes. This may be contrasted with *Re Macgregor. In Re Garrard; Gordon v Craigie* [1907] 1 Ch 382 a gift to the vicar and church warden 'to be by them applied in such manner as they shall in their sole discretion think fit' was upheld as a charitable trust. See also *In Re Eastes; Pain v Paxon* [1948] Ch 257, a gift to the vicar and church wardens of St George's Church are 'for any purposes in connexion with the said church when they may select'.

42 An earlier conclusion to the same effect is *In Re Garrard*. A gift to the vicar and church warden to be applied by them in such manner as they in their sole discretion think fit it was held by Joyce J that a legacy to the

vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes.

43 *In Re Flinn* a bequest to the Archbishop of Westminster Cathedral 'to be used by him for such purposes as he shall in his absolute discretion think fit' was upheld as a charitable trust.

Conclusion

44 The authorities, as I have remarked, are not immediately easy to reconcile and there are sometimes fine distinctions which determine validity or invalidity. However, there is sufficient authority to reason by analogy that a trust 'for the use and benefit of the parish of St Peter's Church, Brentwood' is a trust for charitable purposes.

45 In considering Mrs Grimes' intentions and construing the words she used, the context is important. The context includes the gift to the church under cl 3(1) an undoubted gift for charitable purposes. Applying the approach recommended by Lord Upjohn in *Re Gulbenkian's Settlement Trustees; Whishaw v Stephens* [1970] AC 508, 522 in my opinion, Mrs Grimes' intention in cl 3(2) was for the advancement of religion, a charitable purpose. Construing her Will, I hold that she has validly achieved that purpose.

The Trustees Act 1962 (WA) s 102

46 If I am wrong in this conclusion, the trust is at least partly charitable being at least for the benefit of the parish. The *Trustees Act* s 102 provides that a mixed charitable and non-charitable trust shall be given effect as if no non-charitable and invalid purpose could have been deemed: *Union Trustee Co of Australia Ltd v Church of England Property Trust, Diocese of Sydney; Ashton*. On either account the plaintiff will be required to administer the trust solely for charitable purposes and the gift in cl 3(2) is valid.

Costs

The first issue: Were injunction proceedings necessary?

47 On 12 May 2011 Reverend Tee advised through his solicitors:

1. as your client is of the view that there is a real dispute concerning the provisions of clause 3(2) of the Will of the late Mrs Grimes he intends to seek the direction of the Court concerning the distribution of the late Mrs Grimes' residuary estate;

2. he will not distribute the late Mrs Grimes' residuary estate pending the outcome of his application to the Court for directions.

48 However, matters moved on and in response to a letter written to him by the plaintiff's solicitors on 3 July 2011, the Reverend Tee, in a letter dated 10 July 2011, advised:

I confirm that if, when the time comes to distribute the residue of the estate, your client disputes the way in which I intend to distribute it, I will seek directions from the court.

49 He also said:

In my view, the provisions of the Will of the deceased, insofar as the residuary estate is concerned, are quite clear. She bequeathed one half to the Synod, and one half to the Synod as bare trustee for the parish of St Peter. That being the case, I can see no reason why, were I to receive a request from St Peter's parish to pay its share directly to it, I should not do so.

I will write to you again prior to distributing the residuary estate of the deceased in order to ascertain whether your client at that time disputes the way in which I then intend to distribute it.

50 That response was disputed by the plaintiff's solicitor in a letter dated 21 July 2011 which elicited a response from the Reverend Tee on 25 July 2011 when he said:

As you have already been advised, I do not intend to distribute the residuary estate of the deceased until at least six months have elapsed after the date of grant of probate [that date being 14 June 2011]. I am not prepared, at this stage, to issue a Summons for Directions in the Supreme Court seeking directions as to the correct interpretation of clause 3(2) of the Will.

51 The Reverend Tee responded to a letter from the plaintiff's solicitor of 31 July 2011, on 2 August 2011 essentially reiterating his position.

52 That position included an assertion that it was for him to decide what he would accept as a proper and legitimate discharge and from whom he would accept it.

53 Shortly after the institution of proceedings, Reverend Tee filed an undertaking that he would not make any distribution of the residue of the estate until order of the court.

Conclusion on injunction proceedings

54 I do not consider the church's application for an injunction was necessary. The church considers that the parish of St Peter is part of the Anglican Catholic Church and the Reverend Tee has not adopted a contrary position. The distribution of the proceeds under cl 3(2) will be to the church as trustee. There is no evidence that the Reverend Tee proposed to act unlawfully in the distribution by paying money to another entity. Moreover, his position throughout has been generally consistent. He would wait for at least six months and notify the church of his intentions before final distribution. There is no sufficient basis to conclude that he had intended any other course of action. There was no evidence of immediate harm to the church which would justify an injunction. The church must bear its own costs of the injunction application.

The second issue: Costs generally

55 As to the substantive declaration sought by originating summons, the Reverend Tee deposes in his affidavit of 20 October 2011 that he would have needed to seek directions of the court as to disposition of the moneys under cl 3(2). It was proper for the church to also seek a declaration as the prospective trustee. The Reverend Tee does not oppose an order for costs of all parties to be paid from the estate.

56 The church's costs of and incidental to the application (excluding any costs referable solely to the interlocutory injunction application) should be paid from the estate.

57 Reverend Tee has not engaged in any disentitling behaviour. He is also entitled to have his costs taxed and paid from the estate.