

91473

1.

1967/23

IN THE PRIVY COUNCILNo. 18 of 1967.

## ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES  
in its Equitable Jurisdiction in Suit  
instituted by Originating Summons No. 754  
of 1964.

IN THE MATTER of the Trusts of the Will  
of EDMUND RICHARD EMIL  
RESCH deceased

10 A. B E T W E E N:

VERA CAROLINE LE CRAS (Defendant) Appellant

- and -

PERPETUAL TRUSTEE COMPANY LIMITED  
(Plaintiff) Respondent

TRUSTEES OF THE SISTERS OF CHARITY OF  
AUSTRALIA

EDNA MAVIS SKEWES

ALICE NOLAN ELPHICK

FREDERICK McDONOUGH

20 FAR WEST CHILDREN'S HEALTH SCHEME

THE SPASTIC CENTRE

ROYAL NEW SOUTH WALES INSTITUTION FOR

DEAF AND BLIND CHILDREN

THE SALESIAN SOCIETY INCORPORATED

STEPHEN deBONO

BRIAN deBONO and

THE ATTORNEY GENERAL FOR NEW SOUTH WALES  
(Defendants) Respondents

AND

B.

B E T W E E N:

FAR WEST CHILDREN'S HEALTH SCHEME  
THE SPASIC CENTRE  
ROYAL NEW SOUTH WALES INSTITUTION FOR  
DEAF AND BLIND CHILDREN  
(Defendants) Appellants

- and -

PERPETUAL TRUSTEE COMPANY LIMITED  
(Plaintiff) Respondent

TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA 10

EDNA MAVIS SKEWES  
ALICE NOLAN ELPHICK  
FREDERICK McDONOUGH  
THE SALESIAN SOCIETY INCORPORATED  
VERA CAROLINE LE CRAS  
STEPHEN deBONO  
BRIAN deBONO and  
THE ATTORNEY GENERAL FOR NEW SOUTH WALES  
(Defendants) Respondents 20

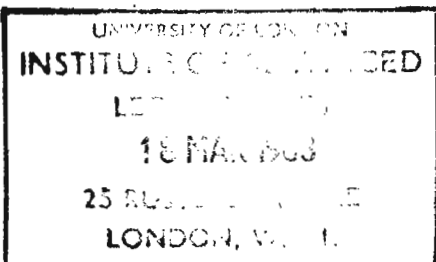
C A S E FOR VERA CAROLINE LE CRAS  
THE APPELLANT TO THE FIRST APPEAL AND  
THE SEVENTH RESPONDENT TO THE SECOND  
APPEAL

Record

INTRODUCTION

1. This appeal of Vera Caroline Le Cras the first named appellant is one of two consolidated appeals by leave of the Supreme Court of New South Wales from a decretal order of that Court in its Equitable Jurisdiction (holden by Jacobs J.) made the 27th day of July 1966 in a suit instituted by originating summons dated the 21st day of July 1964 by the Perpetual Trustee Company Limited a respondent to both appeals.

30



91475

2. Perpetual Trustee Company Limited is the executor and trustee of the Will of Edmund Richard Emil Resch deceased who died on the 2nd day of October 1963. His last will dated the 5th day of December 1960 and three codicils thereto dated respectively the 22nd day of May 1962, the 24th day of September 1962 and the 5th day of September 1963 were admitted to probate on the 7th day of November 1963 by the Supreme Court of New South Wales in its Probate Jurisdiction. At the date of the commencement of the suit the residuary estate of the said testator was valued at approximately eight million dollars (Australian).

3. Two questions are involved in the appeal by the first-named appellant:-

(a) Whether the gift of two-thirds of the income of the testator's residuary estate to "the Sisters of Charity for a period of two hundred years or for so long as they shall conduct St. Vincents Private Hospital whichever shall be the shorter period to be applied for the general purposes of such hospital" is a valid gift for charitable purposes;

(b) Whether (if the gift aforesaid is not a valid gift for charitable purposes) the relevant income is undisposed of and whether it and the corpus of two-thirds of the residuary estate passes to the first-named appellant as the next of kin of the testator.

4. The originating summons posed five questions arising out of the provisions of the will and codicils of the testator for the determination of the Court. The appeal of the appellant Vera Caroline Le Cras is brought in respect only of the answers to the first and second questions so posed which were in the following terms:-

(a) Whether upon the true construction of

Record

the Will of the Testator and in the events which have happened the direction to the Trustee to pay two-thirds of the net income of the residue of his real and personal estate to the Sisters of Charity as therein provided is a valid bequest?

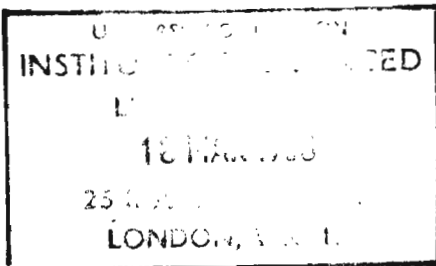
(b) If the answer to question (a) is "No" upon what trusts should the Trustee hold the net income and the corpus of the residue of the testator's real and personal estate? 10

5. The Supreme Court answered the first question in the affirmative and for that reason did not answer the second question. The appeal of the appellant Vera Caroline Le Cras is from that part of the Decretal Order which answers the first question in the affirmative and does not answer the second question.

6. The provisions of the Will of the said Testator which are relevant to the appeal of the first-named appellant are in the following terms:- 20

pp.21-22

"I DIRECT my said Trustee from time to time to pay or apply the income of the residue of my real and personal estate and of the investments for the time being representing the same in paying or discharging all costs charges and expenses of my said Trustee of and incidental to the administration of the trusts of this my Will and subject thereto to pay two-thirds parts of the net income of the said residue and of the investments representing the same to the SISTERS OF CHARITY for a period of two hundred years or for so long as they shall conduct ST. VINCENTS'S PRIVATE HOSPITAL whichever shall be the shorter period to be applied for the general purposes of such Hospital and upon the expiration of the said period of two hundred years or upon the said Sisters of Charity ceasing to conduct such Hospital whichever shall 30 40



10 first happen to pay the said two-third parts of the said net income to FAR WEST CHILDREN'S HEALTH SCHEME of Manly THE SPASTIC CENTRE of Mosman BOY'S TOWN of Engadine and ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN of Sydney in equal shares and to pay one-third part of the said net income to the said FAR WEST CHILDREN'S HEALTH SCHEME, 20 THE SPASTIC CENTRE, BOY'S TOWN and ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND BLIND CHILDREN in equal shares for the general purposes of such institutions PROVIDED that if any of the said institutions shall amalgamate with or be absorbed by or otherwise become merged with any other charitable institution its share of income shall thenceforth be paid to the institution with or by which such 30 institution shall amalgamate be absorbed or merged PROVIDED HOWEVER that in the event of any institution entitled to a share of income as aforesaid being dissolved or ceasing to exist without any such amalgamation absorption or merger as aforesaid then the share of income payable to it shall thenceforth be paid to the other institution or institutions for the time being entitled to receive a share of the said income AND in the event of all 40 the said institutions being dissolved or ceasing to exist without any such amalgamation absorption or merger as aforesaid then I DIRECT my said Trustee to pay or apply the income of the said residue of my estate and of the investments for the time being representing the same to such institution or institutions person or persons for such purposes and objects for the relief care education and/or maintenance of poor and/or sick persons in New South Wales as the Supreme Court of New South Wales in its Equity Jurisdiction shall upon application made by my said Trustee from time to time determine AND I DECLARE that the receipt of the Secretary or Treasurer or other

Record

proper officer of the respective institutions as aforesaid shall be a sufficient discharge to my said Trustee for all moneys paid to the said institutions respectively and my said Trustee shall not be concerned or bound to enquire into the application thereof AND I DECLARE that any such institution entitled to a share of the income of my estate shall not be entitled to receive any part of the capital of my estate. "

10

THE RELEVANT FACTS

7. The evidence establishes the following matters:-

(a) St. Vincents Private Hospital is a hospital conducted by the Sisters of Charity of Australia in Sydney, New South Wales. It was established in 1909 and has been conducted continuously since that time. The buildings in which it is conducted are erected upon land which is vested in trustees pursuant to the provisions of the St. Vincents Hospital Act, 1912. "St. Vincent's Hospital" is an institution separate and distinct from "St. Vincent's Private Hospital" and is a "public hospital" within the meaning of those words as used in the Public Hospitals Act, 1929-1959 and as those words are commonly understood in New South Wales; namely, a hospital to which all persons are eligible for admission and who are charged fees only according to their means (if any). Public hospitals are subsidised by the Government of the State of New South Wales and their administration, expenditure and charges are regulated and supervised by the Hospitals Commission of New South Wales established under the provisions of the Public Hospitals

20

30

40

p.33 L.22  
p.37 L.31  
p.38 LL.1-5

p.49 LL.30-32  
p.50 LL.1-10

p.64 LL.8-23

p.29 LL.3-6

Act, 1929-1959. In short, to the extent to which the revenue of public hospitals does not meet their expenditure (both revenue and capital) the difference is provided from public moneys of the State.

- 10 (b) The Sisters of Charity of Australia is a "Congregation" of Sisters of the Roman Catholic Church which carries out in various places throughout Australia activities of diverse character. "St. Vincent's Hospital" and "St. Vincent's Private Hospital" are conducted by a community of Sisters described as a House of the Congregation within the meaning of the Constitutions of the Congregation. p.45 LL.7-9
- 20 (c) The purposes for which "St. Vincent's Private Hospital" was established were as deposed to on behalf of the Sisters of Charity as follows:-
- "(a) To relieve the pressing demands of the public for admission to the General Hospital. p.35 LL.4-7
- (b) To cater for those unwilling to enter a public hospital but willing and desirous of having hospital accommodation with more privacy and comfort than were possible in the General Hospital. p.35 LL.12-17
- 30 (c) To provide an opportunity to members of the honorary medical staff of the General Hospital to admit for treatment under their care in the private hospital their patients who were reluctant to enter the General Hospital and were capable of and willing to pay reasonable and proper fees for admission and treatment in a private hospital. "
- 40

Record  
p.36 LL.7-13  
26-28

(d) It was the original intention and purpose of the establishment of "St. Vincent's Private Hospital" as deposed to on behalf of the Sisters of Charity that it should be conducted in such a way that profits would be made therefrom which would be applied primarily to the support of the general or public hospital known as "St. Vincent's Hospital" and secondly to other works of the Congregation. 10

p.36 LL.20-22

(e) Considerable profits or surpluses of revenue over expenditure have been made since the inception of the private hospital and at all times it has been self-supporting.

p.61 LL.5-6

A summary of the disposition of surplus moneys of the said hospital is as follows:- 20

p.77 LL.18-25

Amounts paid to the maintenance account of the general hospital from 1910 to 1914 £24,900. 0. 0.

Amounts paid to the building account of the general hospital between 1910 and 1914 £8,795.17. 7.

p.74 LL.28-30

Amounts paid from the private hospital building account for the purpose of purchasing property for the purpose of the general hospital between 1937 and 1950 £20,014.12. 3. 30

Amount paid from the private hospital building account for the purpose of the purchase of a vacation home for the Sisters at Leura, New South Wales in 1952 £6,000. 0. 0.



Record

Contributions from the funds of  
the private hospital to the general  
funds of the Congregation between  
1922 and January 1965 £20,246. 0. 0.

Credit balance of the private  
hospital building account as at  
the 30th June 1964 £79,978.10. 0.

p.49 LL.22-24

Overall surplus of the private hospital  
working account. Balances for the  
years 1944-1965 inclusive  
£51,744. 5. 6.

p.49 LL.7-12  
p.58 LL.7-8  
p.76 LL.23-29  
p.78

10

(f) Of the Sisters who constitute the  
House which conducts both the general  
and private hospitals only four to  
six are employed regularly in  
nursing and supervisory duties in St.  
Vincent's Private Hospital. All  
other staff of the private hospital  
are salaried employees.

p.45 LL.27-29

20

(g) All medical treatment of private  
hospital patients is provided by  
medical practitioners engaged by the  
patients themselves; the salaried  
medical staff of the general hospital  
does not, except in cases of extreme  
emergency, provide any medical  
treatment for patients in the private  
hospital.

p.50 LL.27-31

30

(h) From time to time patients have been  
treated in the private hospital  
either free of charge or at reduced  
fees. For example between 1957 and  
1965 24 patients (of whom 12 were  
members of the Congregation) were  
treated free of charge and 30 patients  
were treated at reduced fees. Between,  
the 1st September 1961 and 31st August  
1964 7,109 patients were admitted to  
St. Vincent's Private Hospital.

p.57 LL.20-26  
Exhibit 10,  
p.226

p.57 LL.20-29

p.52 LL.27-29  
p.53 LL.7-9

40

(i) The scale of fees charged by the

pp.58-60

Record

pp.123-127

Hospital has varied from year to year. In 1964 it ranged from £4.15.0. per day to £7.6.0. per day. These fees were similar to those charged by other private hospitals within the Metropolitan district of Sydney such as St. Lukes Hospital, Royal Prince Alfred Hospital (Gloucester House) and the Mater Misericordiae Private Hospital.

10

p.46 LL.2-5

- (j) The Private Hospital contains 82 "beds" consisting of 36 single rooms, 3 double rooms, 6 three-bed wards, 3 six-bed wards and 4 balcony beds.

8. Hospitals in New South Wales commonly fall within one of the three descriptions following:-

- (a) Public or general hospitals similar in character to the "public hospital" known as "St. Vincent's Hospital".

20

- (b) Private hospitals or nursing homes conducted by private individuals for private profit.

- (c) Hospitals which may or may not be described as "private hospitals" in which substantial fees are charged for accommodation and nursing services but which are conducted by organisations usually of a religious character and not for the private gain of private individuals. These hospitals are conducted generally in a similar way to St. Vincent's Private Hospital, although the extent to which a particular hospital of this description may admit persons for treatment without charge or at reduced charges may vary considerably.

30

9. There are in operation in New South Wales a number of "hospital benefit schemes" the

40

Record

conduct of which is supervised under the provisions of Part VI of the National Health Act, 1953-65 of the Commonwealth of Australia. Organisations conducting such schemes are registered under the provisions of that Act. Such schemes provide, in return for periodic contributions made by person who elect to become members, for payment of an amount of not less than \$1.60 (plus the Commonwealth subsidy of \$2 per day hereinafter described) for each day on which that member receives hospital treatment in an "approved hospital" within the meaning of those words in the National Health Act, 1953-1965. (All "public hospitals" as described in paragraph 8(a) of this Case are approved hospitals as also is St. Vincent's Private Hospital). Benefits of greater amounts may be obtained by members in consideration of varying rates of periodic contributions. Registered hospital benefits organisations receive a maximum hospital benefit payable by the Government of the Commonwealth of Australia of \$2.00 for each day of hospital treatment in an approved hospital of a member of that registered organisation. The maximum benefits payable to members of such organisations are determined by reference to the scale of contribution which the member has elected to adopt. They are not limited to the amount of the actual hospital charges incurred by the member.

p.48 LL.30-32

Exhibit 8,  
p.225

Exhibit 8

10. At the hearing the first-named Appellant submitted:-

- (i) that the undisputed evidence established that the general purposes of St. Vincent's Private Hospital were and had always been:
  - (a) to provide hospital facilities for those persons who are capable of paying the reasonable and proper charges made from time to time therefor; and
  - (b) to conduct a hospital as an undertaking which would produce

40

Record

profits or surplus moneys which might be used by the Sisters of Charity for whatever purposes they might from time to time determine.

- (ii) That, accordingly, the general purposes of the hospital are such as to exclude the poor (including in that expression persons of "limited" or "moderate" means) from the class of persons intended to benefit from the conduct of the hospital and thus that the purposes are not charitable. 10
- (iii) That the class of persons intended to benefit from the conduct of St. Vincent's Private Hospital is expressly selected by reference to the financial capacity of patients to pay such charges as the Sisters of Charity may from time to time fix; that such selection of the class of potential beneficiaries is made upon an irrelevant consideration, and, thus, that the general purposes of the hospital are not charitable. 20
- (iv) That, alternatively, a purpose or intention to benefit by the provision of hospital facilities the comfortable or the reasonably well-to-do or the rich (even if confined to circumstances in which they may be assisted by philanthropy) is not charitable, if as part of the relevant intention or purpose, it is the intention or purpose to exclude the poor from benefit from the conduct of the relevant activity. 30
- (v) That since "the poor" were and are intended not to be included in the class of potential recipients of benefit the purposes of St. Vincent's Private Hospital are not charitable as 40

falling within the first class of charitable purposes as described by Lord Macnaghton ("the relief of pverty") and could only (if at all) be charitable as falling within the fourth class ("other purposes beneficial to the community").

10 (vi) That for the purposes of determining whether the relevant purposes are charitable within the fourth class ("other purposes beneficial to the community") one cannot properly  
 20 commence with the presumption that the relevant hospital or any hospital is charitable. Rather, one must examine the particular hospital activity and determine whether that activity is charitable; that so examined the general purposes of St. Vincent's Private Hospital are not charitable purposes.

30 (vii) Alternatively, that since one of the general purposes of the hospital is to provide surplus moneys for use in other works of the Sisters of Charity and since the Sisters of Charity are not bound to (nor do, in fact,) apply surplus moneys arising from the conduct of St. Vincent's Private Hospital exclusively for the  
 40 purposes of such hospital or at all for the purposes of St. Vincent's Hospital (the public hospital) or for the purpose of other charitable works, but are free to determine for themselves for what purpose or in what way such surplus moneys may be used, the gift in the present case is not charitable.

40 11. Jacobs J. by his judgment delivered on 27th day of July 1966 held that the gift to St. Vincent's Private Hospital was a valid gift for charitable purposes. In reaching this conclusion His Honour held as follows:-

Record

- (a) A gift for the purposes of a hospital is prima facie a valid gift because prima facie it is a gift for the relief of the impotent; and it matters not that it is not limited to or primarily intended for the relief of poverty.
- (b) The words "aged impotent and poor" in the preamble to the State of Elizabeth are used disjunctively. 10
- (c) Such a gift for the purposes of a hospital may in any particular case lose its prima facie charitable character "because of something in the nature of its constitution or operation which reveals a lack of those elements of public purpose and of public benefit which are essential in the case of every charitable trust".
- (d) The elements which would, thus, destroy the charitable character of such a gift are 20
- (i) that the hospital is carried on for purposes of private gain; or
- (ii) that the hospital is not "open to the public or such a class of the public as is of its nature sufficient to invest the activity with the necessary element of benefit to the public". 30
- (e) That the facts that the Sisters of Charity have assumed no obligation to use surplus moneys or profits arising from the conduct of St. Vincent's Private Hospital nor have used such moneys only for the purposes of St. Vincent's Private Hospital or the public hospital known as St. Vincent's Hospital do not destroy the prima facie charitable nature of the activity 40

consisting of the conduct of St. Vincent's Private Hospital since the profit or surplus accrues to an otherwise charitable body.

- (f) That in the circumstances presently existing in New South Wales and having regard to the scale of fees charged in St. Vincent's Private Hospital no class of persons is excluded.
- 10 (g) That the class of persons intended to benefit from the conduct of St. Vincent's Private Hospital is not defined by financial capacity and thus is not selected by reference to an irrelevant consideration. Rather the class is limited only by the practical fact that some persons may not be able to pay the fees charged but this is merely part of the nature of the purpose - a hospital which charges fees.
- 20 (h) Accordingly, the gift is a valid gift for charitable purposes.

#### THE FIRST QUESTION

12. The first-named appellant respectfully submits that it is well established that there exist only four principal divisions of charity described as such by Lord Macnaghten in Commissioners for Special Purposes of Income Tax v. Pemsel (1891) A.C. 531 at 583 as follows:-

30

" '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."

It is erroneous to regard Lord Macnaghten's

Record

classification "trusts for the relief of poverty" as being no more than an alternative description of the concept described by the words "the relief of the aged impotent and poor people" contained in the preamble to the Statute of Elizabeth. Rather, His Lordship's first classification stems from the reference in that phrase to "the relief of poor people" and the subsequent references contained in the preamble to specific methods of relief of poor persons and to specific classes of poor persons. Thus, the first classification embraces only cases in which the relevant activity or purpose is directed to "the relief of poverty" in the sense in which those words have been judicially interpreted; but the "relief of poverty" in the financial sense is, in the first-named appellant's submission, an essential element of trusts or purposes which are capable of classification within Lord Macnaghten's division "trusts for the relief of poverty". cf. Inland Revenue Commissioners v. Baddeley (1955) A.C. 572, per Lord Reid at 607-8.

10

20

13. Whilst particular trusts or purposes for the relief of the impotent or aged per se may (without any element of relief of poverty attached to them) be charitable, they can only be so if the particular purpose under consideration is found upon examination to fulfil the established requirements for classification under Lord Macnaghten's fourth division - "trusts for other purposes beneficial to the community". The requirements for validity of such a trust are far more exacting than those for validity of a purpose falling within the division - "trusts for the relief of poverty". That this should be so arises from the fact that the law would appear to regard the relief of poverty, by whatever means, as a public purpose or as beneficial to the community as a whole though the class of potential beneficiaries be expressly limited by narrow considerations of personal connection such as common employment or merely blood relationship. Limitation of benefit to a private class by reference to such

30

40



considerations, however, will prevent a trust from satisfying the necessary requirements for classification under the head "other purposes beneficial to the community", and, even, as a trust for advancement of education:

Oppenheim v. Tobacco Securities Trust Co. Limited (1951) A.C. 297

10           It is in failing to perceive this  
 distinction that, in more recent times, some  
 confusion has arisen from observations made  
 judicially that the words in the preamble to  
 the Statute of Elizabeth - for the "relief of  
 aged impotent and poor persons" - are to be  
 read "disjunctively". It has been said that  
 trusts for the relief of poor persons are not  
 required to be limited to "the aged poor" or to  
 20 "the impotent poor". This is, nod doubt, true  
 but has resulted in a tendency to treat Lord  
 Macnaghten's division of "trusts for the relief  
 of poverty" as if it embraced not only trusts  
 for that purpose but also trusts for "the  
 relief of the aged", and trusts for "the  
 relief of the impotent". Accordingly, such  
 trusts have been said to be, as Jacobs J. in  
 the present case has said, "prima facie  
 charitable" or "charitable per se", and have  
 been treated as not being required to satisfy  
 30 the stringent requirements for validity which  
 have been established for trusts claimed to be  
 "for other purposes beneficial to the community".  
 Jacobs J. has, in the first-named appellant's  
 respectful submission, fallen into the same  
 error, which in the present case has enabled  
 him to say that it is part of the nature of the  
 purpose of the present activity that it is a  
 hospital which charges substantial fees. Thus,  
 Jacobs J. proceeds upon the assumption that the  
 40 fact of the inability of a potential patient to  
 pay the relevant charges for admission to and  
 treatment in the hospital is to be regarded as  
 no more than a practical consequence of the  
 very nature of the charitable purpose which  
 itself limits its enjoyment to those able to  
 pay. Accordingly, His Honour appears to have

Record

assumed that the trust does not have to pass the test for validity under the fourth division which otherwise, in accordance with Inland Revenue Commissioners v. Baddeley (1955) A.C.590, it seems His Honour would have held not to have been satisfied. In the appellant's respectful submissions Jacobs J. should have held that the limitation of the persons capable of being benefited by the relevant activity was not the mere practical consequence of the charitable purpose - namely, the relief or assistance of the sick - but was the consequence of the express and intended limitation of a class of the community as potential beneficiaries selected upon an irrelevant consideration - that is, financial capacity. 10

It is the first-named appellant's respectful submission that, insofar as there are to be found observations supporting the approach made by Jacobs J. in the present case in In re Hillier (1944) 1 All E.R. 480; In re Chaplin (1933) Ch. 115 and In re Lewis (1955) Ch. 104, those observations were unnecessary to the respective decisions or are incorrect. Moreover, it is the appellant's respectful submission that there is nothing in the judgment or decision of the High Court of Australia in Kytherian Association v. Slavos 101 C.L.R. 56 or in the decision of the Court of Appeal In re Smith's Will Trusts (1962) 2 A.E.R. 563 which supports the approach taken by Jacobs J. and the use made by him of the observations and decisions abovementioned. 20 30

14. It is the first named appellant's respectful submission that the general purposes of St. Vincent's Private Hospital cannot be held to be purposes "for the relief of poverty" since -

- (a) the primary purpose and intention with which the hospital is carried on is that the class of persons intended to benefit is confined to persons capable of paying the substantial fee which it charges. 40

(In 1964 such fees ranged from \$66.50 per week to \$102.2- per week or £26.12.0 sterling to £40.17.6 (approx) sterling whilst the basic wage in New South Wales was approximately \$11.50 per week or £12.12.0. sterling)

- 10 (b) the very purpose, intention and nature of the activity is to exclude the poor from benefit - not only the poor in the sense of the very poor or destitute, but a large section of the community which must necessarily be unable to afford such charges with or without the assistance it may purchase by subscriptions to hospital benefit organisations: In re Macduff (1896) 2 Ch. 451 at 464; Oppenheim v. Tobacco Securities Trust Co. Limited (1951) A.C. 297.
- 20 (c) the conclusion of Jacobs J. that "since the hospital serves people of average means, its scale of fees being within the range of persons of moderate means who are mainly members of approved hospital contribution funds under the National Health Act, 1953-1962" no "class of persons is excluded so that it may be said that the public nature of the activity is lost" and "the poor are not excluded" is in the firstnamed
- 30 appellant's respectful submission erroneous and inconsistent with the undisputed evidence. The fact that the hospital serves people of average means (if that be correct) is, it is submitted, inconsistent itself with the conclusion of the learned Judge that the poor are not excluded. The class
- 40 of the public properly described as "the poor" is surely different from that class of persons which is properly described as "persons of average means".
- (d) Alternatively, the mere provision of facilities of this character and

Record

description at the fee for which they are provided for those who could not otherwise afford them, goes far beyond the relief of poverty. Cf. Inland Revenue Commissioners v. Baddeley (1955) A.C. 572 at 604 per Lord Reid.

15. It is the first named appellant's respectful submission that the "general purposes of St. Vincent's Private Hospital" cannot be held to satisfy the description "other purposes beneficial to the community" since 10
- (a) the primary purpose and intention with which the hospital is carried on is that the class of persons intended to benefit is confined to persons capable of paying the substantial fees which it charges. Thus, the class of potential beneficiaries is not left open to the rich and poor alike. The enjoyment of the benefit is expressly withdrawn not merely from the very poor but from that whole section of the public which upon any view constitutes "the poor" and clearly, as well, from all who are of "average means" who are not members of the voluntary hospital insurance funds. 20
  - (b) the very purpose, intention and nature of the activity is to exclude the poor from benefit. 30
  - (c) No trust has, in the first-named appellant's submission, ever been held charitable within the description "other purposes beneficial to the community" from the enjoyment of the benefit of which the poor or any section of the poor is expressly excluded or intended to be excluded because of its poverty.
16. Alternatively, the first-named appellant respectfully submits that the gift made for "the general purposes of St. Vincent's Private 40

Hospital" cannot be held to be a gift for charitable purposes only since:-

- 10 (a) One of the primary purposes of the conduct of the hospital deposed to by the Sisters of Charity is to obtain from the operation of the hospital surplus moneys or profits for application to other activities of the Sisters of Charity. The purposes for which the hospital is conducted are, thus, not simply the assistance of persons in need or desirous of hospital treatment; but also to obtain funds for application to whatever purposes of the Sisters of Charity they may from time to time desire.
- 20 (b) Upon construction the gift made by the testator is not made "for the general purposes of the Sisters of Charity" - even assuming that their general purposes at the present time are charitable purposes - rather it is made plain by the words of the testator that the gift is for the purposes not of the charitable institution "St. Vincent's Hospital" but of "St. Vincent's Private Hospital";
- 30 that is, the undertaking conducted partly in order to produce surplus moneys not intended to be used for "hospital" purposes. The gift is limited to cease upon the Sisters of Charity ceasing to conduct the relevant hospital. Thus, the testator demonstrates that his intention is not to benefit the general works or purposes of the Sisters of Charity. It cannot
- 40 therefore be said that he intended to authorise the use of the income for the purposes of the Public Hospital or the other works of the Sisters of

Record

Charity. Yet that is the inevitable consequence of the present gift (if valid) unless the purposes for which the Private Hospital is conducted are altered. The fact that surpluses are earmarked for the benefit of other and distinct works, even if charitable, cannot give the character of a charitable purpose.

- (c) There is no legal obligation binding upon or recognised by the Sisters of Charity to devote surpluses arising from the private hospital to charitable purposes. In fact although such surpluses were originally intended to be applied primarily in aid of the public hospital that policy was discontinued in 1936 when it was found that if such moneys were thereafter so applied the only benefit arising therefrom would be the relief of the State by reduction of the Government subsidies to the public hospital. The Constitutions of the Sisters of Charity are clearly not intended to bind them in contract nor can one perceive therein any intention to create trusts of property.

The only sanction for the Sisters is to be found in their spiritual vows and, presumably in the canon law of the Roman Catholic Church. Any concept of trust in respect of their property is inconsistent not only with the Constitution and the nature of the Constitution itself, but in particular, with the recognition of the possibility of the return. to a Sister upon leaving the Congregation of property brought by her to the Congregation upon entry. c.f. per Latham C.J. in The Little Company of Mary (S.A. Incorporated v. Commonwealth 66 C.L.R. 368 at 377, 379-380. The absence of any trust precluding the use of the property of the Sisters from time to time for other than the

particular activities carried on by them at any particular point of time, coupled with the fact that the testator did not make his gift for the general purposes of the Sisters, makes it impossible to read the gift as being for the purposes of the charitable activities in fact carried on by the Sisters of Charity at the date of the testator's death. It may possibly be (but is unnecessary to decide) that if there were trusts created by the Constitutions which precluded the use of its property for other than charitable purposes the difficulty might be soluble. But there are no such trusts - indeed, the Congregation reserves to itself the right to alter its Constitutions from time to time and regards itself as bound, by canon law, to alter them as the canon law may from time to time require.

As well, it appears that the Congregation regards itself as bound to alter its Constitutions and to carry on its activities only in accordance with the canon law of the Church. It regards itself as bound not only to submit proposed alterations to the approval of the proper authorities under the canon law but, in fact, to make alterations if they become necessary by reason of alterations of the canon law which is not recognised in New South Wales as having any legal force.

Exhibit 4,  
p.196

p.97 LL.3-13

It is not unrealistic to recognise the possibility that at any time the canon law might require the application of a part of the income or property of such a Congregation to "Church purposes" which may or may not be charitable purposes. Since there are no trusts, charitable or otherwise, controlling the Sisters in the application of their general property to existing charitable activities, neither the Attorney-General nor any other person has any right to control the application of moneys which have become part of the general property of the Congregation. Thus there can be no charitable trust.

Record

The simple position is that the Sisters of Charity are not bound as trustees to use the surplus income arising in consequence of the general purposes for which they conduct St. Vincent's Private Hospital for any charitable purpose.

Moreover, since they are not so bound as trustees in respect of their general property their present activities (excluding those concerned with the conduct of St. Vincent's Private Hospital) cannot constitute a "legal charity" even if otherwise capable of qualification as such .

10

THE SECOND QUESTION

17. The second question requires an answer only if the first question is answered in the negative.

The answer to the second question for which the first-named appellant contends is that the two-thirds share of residue in respect of which the gift of the income thereof was expressed to be made for the "general purposes of St. Vincent's Private Hospital" passes to her as on intestacy. Alternatively, the first-named appellant contends that she is, as next-of-kin, entitled to two-thirds of the income of the residuary estate for the period of 200 years or until the Sisters of Charity cease to conduct St. Vincent's Private Hospital.

20

18. It is the first-named appellant's contention that the relevant income cannot be applied cy-pres since no general charitable intent on the part of the testator relating to the relevant share of the income of his residuary estate appears. No such general charitable intent can be inferred in the present case since the relevant provision in the will in respect of which that intent is sought to be inferred is established not to be nor ever to have been for charitable purposes: In re Jenkins' Will Trusts (1966) Ch. 249. The gift here is merely for the purposes which are not charitable. There is no

30

40



failure of any mode indicated as the means for carrying out charitable purposes.

19. It is the first-named appellant's submission that the gift over to the respondent charities is void for the following reasons:-

- 10
- (a) The gift over of income is so limited as not to vest within the perpetuity period and thus fails for that reason.
- 20
- (b) Upon construction the direction to pay the two-thirds part of the net income of the testator's residuary estate to the respondent charities upon the expiration of 200 years or upon the Sisters of Charity prior to that time ceasing to conduct the private hospital demonstrates that the gift over of income is intended only to take effect in favour of such of the four designated respondent charities as survive the termination of the prior gift.
- (c) The events upon which the prior gift of income for the purposes of the private hospital is to terminate may not take place within the perpetuity period.
- 30
- (d) As the gift over of income to each of the respondent charities if then in existence is dependent upon the termination of the prior limitation for the purposes of the private hospital, it does not vest in interest (or in possession) until that event occurs, which being outside the perpetuity period renders the gift void.
- 40
- (e) Even if the gift to the respondent charities vests in interest within

Record

the perpetuity period, it is settled law that any ulterior limitation dependent or expectant upon a prior limitation which is void for perpetuity is itself void; Moneypenny v. Dearing (1852) 2 D.M. & G. 145 at 181-182; In re Abbott (1893) 1 Ch. 54 at 57; In re Hubbard's Will Trusts (1963) 1 Ch. 275; In re Buckton's Settled Trusts (1964) 1 Ch. 497.

10

- (f) The gift to the respondent charities is, as a matter of construction, ulterior to and dependent upon the gift for the purposes of the hospital in that it is framed to take effect in possession by reference to the very contingency upon which the gift to the Sisters of Charity is to terminate. It is thus intended to operate upon and rely upon the prior exhaustion or determination of the antecedent interest of the Sisters. The prior limitation being void, it follows that the ultimate limitation in favour of the respondent charities is void.

20

20. Alternatively, if the gift over to the respondent charities is valid it is the first-named appellant's contention that

- (a) Upon construction, the gift over does not and was not intended by the testator to take effect in possession until the expiration of a period of 200 years or any earlier date upon which the Sisters of Charity cease to conduct St. Vincent's Private Hospital. In other words, upon construction, there is no room for an inference that acceleration was intended by the testator if the prior gift of income should for any reason fail to take effect or determine at an earlier time than that in fact designated by the testator. To accelerate the gift over

30

40

10 simply because of the invalidity of the antecedent gift would be to disregard the express words used by the testator and the intention which those words disclose. Even if the words used by the testator mark out the order of succession of the various interests the gift to the respondent charities is not expectant upon the determination of the antecedent interest by whatever means that determination may be brought about (as was the case in Tompkins v. Simmons 44 C.L.R. 546) but is expectant upon the exhaustion or determination of the prior gift by the particular means designated and no other. The application of the doctrine of acceleration of gifts 20 over is subject to any contrary intention found in the provisions of the will itself and does not permit the court to misconstrue the will in order to give effect to the doctrine: R.S.P.C.A. v. The Benevolent Society of New South Wales 102 C.L.R. 629 at 645 per Dixon C.J.

30 21. The first-named Appellant submits that the decision of the Supreme Court given by Jacobs J. upon the first and second questions is erroneous and ought to be reversed and that the first question should be answered "No" and the second question should be answered - "Upon trust as to two-thirds parts thereof for the appellant Vera Caroline Le Cras", for the following (amongst other)

#### R E A S O N S

- 40 1. BECAUSE the gift of two-thirds of the income of the testator's residuary estate "for the general purposes of St. Vincent's Private Hospital" is not a gift for charitable purposes and is invalid.

Record

2. BECAUSE two-thirds of the income of the testator's residuary estate is undisposed of by the testator and passes to his next-of-kin Vera Caroline Le Cras.

D.A. STAFF Q.C.

M.H. TOBIAS.

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH  
WALES in its Equitable Jurisdiction  
in Suit instituted by Originating  
Summons No. 754 of 1964

---

IN THE MATTER of the Trusts of the Will  
of EDMUND RICHARD EMIL RESCH deceased

- A. VERA CAROLINE LE CRAS Appellant  
PERPETUAL TRUSTEE CO. & ORD. Respondents
- B. FAR WEST CHILDREN'S HEALTH SCHEME  
& ORS. Appellants  
PERPETUAL TRUSTEE CO. & ORS. Respondents
- 

C . A S E

FOR VERA CAROLINE LE CRAS THE  
APPELLANT TO THE FIRST APPEAL AND  
THE SEVENTH RESPONDENT TO THE  
SECOND APPEAL

---

BELL BRODRICK & GRAY,  
29 Martin Lane,  
Cannon Street,  
London, E.C.4.

Solicitors for the Appellant  
Vera Caroline Le Cras.