

1967/23

IN THE PRIVY COUNCIL

No. 18 of 1967

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
in its Equitable Jurisdiction

IN THE MATTER of the trusts of the Will of EDMUND RICHARD
EMIL RESCH deceased.

B E T W E E N:

VERA CAROLINE LE CRAS (Defendant)

Appellant

- and -

PERPETUAL TRUSTEE COMPANY LIMITED (Plaintiff)

TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA

EDNA MAVIS SKEWES

ALICE NOLAN ELPHICK

FREDERICK McDONOUGH

FAR WEST CHILDREN'S HEALTH SCHEME

THE SPASTIC CENTRE

ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND

BLIND CHILDREN

THE SALESIAN SOCIETY INCORPORATED

STEPHEN DE BONO

BRIAN DE BONO

THE ATTORNEY GENERAL FOR NEW SOUTH WALES

(Defendants) Respondents

- AND -

B E T W E E N:

FAR WEST CHILDREN'S HEALTH SCHEME

THE SPASTIC CENTRE

ROYAL NEW SOUTH WALES INSTITUTION FOR DEAF AND

BLIND CHILDREN

(Defendants) Appellants

- and -

PERPETUAL TRUSTEE COMPANY LIMITED (Plaintiff)

TRUSTEES OF THE SISTERS OF CHARITY OF AUSTRALIA

EDNA MAVIS SKEWES

ALICE NOLAN ELPHICK

FREDERICK McDONOUGH

THE SALESIAN SOCIETY INCORPORATED

VERA CAROLINE LE CRAS

STEPHEN DE BONO

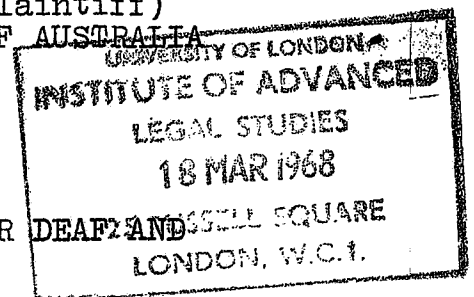
BRIAN DE BONO

THE ATTORNEY GENERAL FOR NEW SOUTH WALES

(Defendants) Respondents

C A S E

FOR THE RESPONDENT, THE ATTORNEY GENERAL FOR NEW SOUTH WALES



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Record

p. 180
pp. 145-179

1. These are two appeals, consolidated by order of Street, J. dated the 26th August 1966, from a judgment and order of the Supreme Court of New South Wales in Equity (Jacobs J.) dated the 27th July 1966, whereby it was declared that a certain bequest in the Will of Edmund Richard Emil Resch deceased (hereinafter called "the testator") in favour of the Second Respondents to these appeals was valid, and whereby certain other declarations relating to the Will of the testator were also made, and whereby it was ordered that the costs of all parties should be paid out of the estate.

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pp. 2-5

2. The proceedings were by way of amended originating summons on the application of the First Respondent, the executor of the Will of the testator, dated the 27th July 1966, whereby certain questions were raised for determination by the Supreme Court in Equity. The first two questions raised were:-

pp. 3-4

1. Whether upon the true construction of 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?

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2. If the answer to question (1) 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?

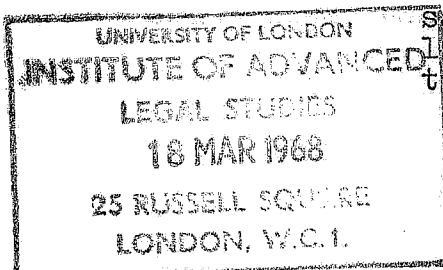
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Three further questions were also put forward for determination which related to particular bequests in which this Respondent has no interest, and in respect of which this Respondent desires to make no submissions.

pp. 6-11

3. Among the evidence filed was an affidavit sworn on the 12th March 1965 by John Sanders, an assistant manager of the First Respondent, the executor named in the Will of the testator. He said that the testator had died on the 2nd October 1963, leaving a Will dated the 5th October 1960, together with three codicils made in 1962 and 1963,

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of which probate had been granted by the Court on the 7th November 1963. After detailing steps already taken in the administration, the witness said that the net estate was worth considerably more than £4,000,000; the testator had been born on the 17th October 1879, was married in 1927, and had had no children; his only brother had had one child, the Appellant in the first Appeal herein. After dealing with matters raised by questions 3-5 in the originating summons, the witness said that the Sisters of Charity referred to in the testator's Will was a congregation within the Roman Catholic Church and he exhibited a copy of the constitution of the Congregation; the Second Respondent was now a body corporate; in 1857 the Sisters of Charity had founded St. Vincents Hospital in Sydney, and in 1909 St. Vincents Private Hospital had been founded. The third, fourth and fifth Respondents in these Appeals were trustees of St. Vincents Hospital.

4. There was annexed to Mr. Sander's affidavit the Will of the testator and the codicils thereto; the relevant part of the Will relating to the residuary bequests was as follows:-

pp. 12-31

"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-third 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. VINCENT'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 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

Record

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, 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 10
 any other charitable institution its share
 of income shall thenceforth be paid to the
 institution with or by which such 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 thence- 20
 forth 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 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 30
 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 proper 40
 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."

5. There was also filed on behalf of the second to fifth Respondents a considerable body of evidence relating to the origins of and the manner of conducting St. Vincent's Private Hospital; the material parts of such evidence, which was unchallenged, appear in the judgment of Jacobs, J.

6. The hearing of the originating summons took place in the Supreme Court of New South Wales in Equity (Jacobs, J.) between the 7th and the 15th December 1965 when judgment was reserved. pp. 140-143

7. On the 26th July 1966 Jacobs, J. gave judgment. He said that the most far-reaching question for his decision was that concerning the residuary bequests in the Will of the testator, which he quoted; the initial question was whether the gift of two thirds part of income to the Sisters of Charity for the general purposes of St. Vincent's Private Hospital was a valid gift. Since he had reached the conclusion that it was a valid charitable gift, the second question asked in the summons did not call for decision. pp. 145-171

The starting point for finding that the gift was valid was that a gift for the purposes of a hospital was prima facie a valid gift, because prima facie it was a gift for the relief of the impotent; it was thus prima facie charitable even though it was not limited to or primarily intended for the relief of poverty; authority both in England and in Australia had established that the words "aged impotent and poor" in the preamble to the Statute of Elizabeth should be read disjunctively. The learned Judge then pointed out that a prima facie valid charitable gift might in fact not be valid if the constitution or operation of the donee showed a lack of those elements of public purpose and of public benefit which were essential in the case of every charitable trust. It was therefore necessary to consider whether St. Vincent's Private Hospital was carried on otherwise than for private gain, and, further, whether it was open to the public or such a class of the public which provided a necessary degree of benefit to the public as a whole.

Record

8. The learned Judge then considered the evidence and found that although charges were made for the use of the hospital, it was not operated in order to make a profit; in some years surplus income had been applied for other purposes of the Congregation of the Sisters of Charity; the fact that such a profit had been made did not however destroy the prima facie view that there was a charitable purpose. The learned Judge then considered the persons for whom the hospital was available and concluded that, particularly in view of the existing social conditions and of the hospital system in New South Wales, they formed a sufficiently wide section of the public to justify holding that the purposes of St. Vincent's Private Hospital were public purposes; there was no limitation of the access by the public by reference to an irrelevant factor.

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The learned Judge accordingly held that Question 1 in the summons should be answered "Yes", and that Question 2 did not arise. He then considered Questions 3-5 and answered them in accordance with his judgment.

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9. Final leave to appeal to the Privy Council in both appeals was given by Street, J. on the 26th August 1966, limited in the case of the first appeal to the order made upon Question 1 in the summons, and unlimited save as to the order for costs in the case of the second appeal.

10. This Respondent respectfully submits that the judgment of Jacobs J. was correct and that both appeals should be dismissed. This Respondent adopts the reasoning in the judgment of Jacobs J. that the gift to the Sisters of Charity for the purposes of St. Vincent's Private Hospital was a valid charitable gift and was not void as being in breach of the rule against perpetuities. This Respondent will further rely upon such submissions as are put forward in support of the judgment of Jacobs J. on behalf of the second to fifth Respondents. If it becomes necessary to answer Question 2 in the originating summons this Respondent would submit that income otherwise undisposed of should either be applied cy-pres or should go immediately to the institutions intended to take at the end of 200 years.

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11. This Respondent does not desire to oppose the answers given by Jacobs, J. to Questions 3-5 in the originating summons and makes no submissions thereon.

10 12. This Respondent, therefore, respectfully submits that these appeals should be dismissed, that its costs should be paid by the Appellants or out of the estate and that the judgment of the Supreme Court of New South Wales in Equity should be affirmed, for the following, among other

R E A S O N S

1. BECAUSE the gift to the Sisters of Charity was a valid charitable gift.
2. BECAUSE St. Vincent's Private Hospital is not carried on for private profit.
3. BECAUSE St. Vincent's Private Hospital is open to the public.
- 20 4. BECAUSE the said gift is for the public benefit.
5. BECAUSE of the other reasons in the judgment of Jacobs J.

MERVYN HEALD

No. 18 of 1967

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME
COURT OF NEW SOUTH WALES
in its Equitable Jurisdiction

IN THE MATTER of the trusts of the
Will of EDMUND RICHARD EMIL
RESCH deceased.

A. BETWEEN:

VERA CAROLINE LE CRAS

- and -

PERPETUAL TRUSTEE COMPANY LIMITED
and OTHERS

- AND -

B. BETWEEN:

FAR WEST CHILDREN'S HEALTH SCHEME
and OTHERS

- and -

PERPETUAL TRUSTEE COMPANY LIMITED
and OTHERS

C A S E

FOR THE RESPONDENT, THE ATTORNEY
GENERAL FOR NEW SOUTH
WALES.

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