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1967/23

1.

IN THE PRIVY COUNCIL

No. 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

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
18 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

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

A. B E T W E E N :

VERA CAROLINE LE CRAS (Defendant) Appellant

10 - and -

PERPETUAL TRUSTEE COMPANY LIMITED
(Plaintiff) Respondent

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 deBONO
BRIAN deBONO and
THE ATTORNEY GENERAL FOR NEW SOUTH WALES
(Defendants) Respondents

20

AND

B. 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

30

- and -

PERPETUAL TRUSTEE COMPANY LIMITED
(Plaintiff) Respondent

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 deBONO

10

BRIAN deBONO and
THE ATTORNEY GENERAL FOR NEW SOUTH WALES
(Defendants) Respondents

C A S E FOR THE RESPONDENTS TRUSTEES
OF THE SISTERS OF CHARITY OF AUSTRALIA
AND EDNA MAVIS SKEWES, ALICE NOLAN
ELPHICK AND FREDERICK McDONOUGH

Record

p.131 1.1

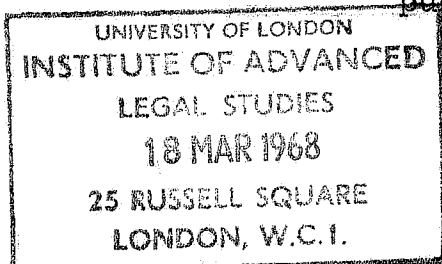
1. The Trustees of the Sisters of Charity of Australia are incorporated under that name by an Act of the Parliament of New South Wales, namely, the Roman Catholic Church Communities' Lands Act 1942-1948. The Respondents Edna Mavis Skewes, Alice Nolan Elphick and Frederick McDonough are the trustees of all land belonging to or used in connection with St. Vincent's Hospital.

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2. The only question which these Respondents propose to argue on this Appeal relates to the construction of that part of the Will of the late Edmund Richard Emil Resch which is contained in the following words:-

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"I DIRECT my said Trustee...to pay two-third parts of the net income of the said residue and 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."



3. The question raised by the Originating Summons herein concerning that provision is:-

Record

(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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4. Other questions in the Originating Summons were concerned with certain annuities given by the Testator in his Will and Codicils and with the scope of the words "other personal jewellery" in a gift of specific articles. These Respondents, upon the hearing of the Originating Summons did not, and upon the hearing of this Appeal will not, take part in arguments relating to those questions, although, if the appeals from the answers to these questions were to succeed, the residue would be increased.

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5. The Sisters of Charity are a congregation of religious women within the Roman Catholic Church. They first came to New South Wales in 1838. They established St. Vincent's Hospital in 1857. Nursing sisters of the Congregation under the direction of a Mother Rectress, as Matron, conducted, and still conduct, the Hospital. It is a separate institution under the Third Schedule of The Public Hospitals Act 1929 and receives grants from the Government of New South Wales through the Hospitals' Commission and in the case of certain patients from the Commonwealth Government. There are 538 beds in the general hospital and other buildings connected therewith; of these beds only twelve are for "intermediate patients", that is to say, for patients who are accommodated in such beds and who are willing to pay for such accommodation. The lands upon which St. Vincent's Hospital has been built are vested in Trustees under the provisions of St. Vincent's Hospital Act 1912 (a private Act of the Parliament of New South Wales) as also are lands acquired for hospital purposes since that Act came into operation.

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p.10 1.41
p.115 1.14
p.11 1.6

p.43 1.32
p.45 1.25

p.49 1.30
p.61 1.5

p.50 1.10

6. In 1909 a building known as the Hospice

p.33 1.22

<u>Record</u>	for the Dying, part of St. Vincent's Hospital became vacant, the Hospice being removed to a new site. In the building so vacated, St. Vincent's Private Hospital was established. The reasons for establishing the private hospital were to relieve the demands for admission into the general hospital, to provide accommodation with more privacy and comfort for patients who desired it and to provide opportunity for members of the honorary medical staff of the general hospital to treat their patients who were reluctant to enter the general hospital and who were able and willing to pay reasonable and proper charges for private hospital treatment.	10
p.35 1.1		
p.36 1.5.	It was intended that any surpluses accruing from charges made in the private hospital should be used firstly to support the general hospital and secondly to provide for other charitable works of the said Congregation.	
p.45 1.19	7. (a) St. Vincent's Private Hospital is under the superintendence of the Mother Rectress of St. Vincent's Hospital: it is staffed by Nursing Sisters of the Congregation and by sisters and nurses employed by the Congregation.	20
p.46 1.6		
p.46 1.16 p.47 1.24	(b) For certain forms of treatment and pharmacy requirements of its patients, St. Vincent's Private Hospital use facilities available only in the general hospital; the nursing staff is accommodated in the same quarters as the nursing staff of the general hospital, and clerical work and other services are shared with the general hospital, for which a contribution to the funds of the general hospital is made from the charges received by the private hospital.	30
p.45 1.19 p.47 1.8 p.48 1.11		
pp.58-60 and pp.123-127	(c) The daily charges made by St. Vincent's Private Hospital are comparable with charges made at St. Luke's Hospital (a Church of England establishment), Gloucester House (the private hospital section of the Royal Prince Alfred Hospital, a large public hospital) and Mater Misericordiae Private Hospital in connection with the Mater Misericordiae Hospital (conducted by another Congregation of the Roman Catholic Church). St. Luke's Hospital has been held to be a charitable institution - see <u>Perpetual Trustee</u>	40

Company (Ltd.) v. St. Luke's Hospital 39 S.R.
(N.S.W.) 408.

Record

- 10 (d) By contribution to the Medical Benefits Fund of Australia from 11/- to 14/- a week a person can, for himself his wife and his children under the age of sixteen years, obtain hospital benefits from £21. to £33.12.0. a week from the Fund towards meeting the charges made by a hospital. The charges made by St. Vincent's Private Hospital ranged from £31.10.0. to £44.9.0. a week in the year 1963. Such hospital benefits are payable for twelve weeks in any twelve consecutive months. Other medical benefits funds are available which provide similar benefits for similar contributions. In addition the Commonwealth of Australia then contributed in respect of each such member £7. a week for an unlimited period while in hospital. p.225
- 20 (e) The building in which the private hospital is conducted has a ground floor and a first and second floor, two operating theatres and 82 beds. p.45 1.30
- 30 (f) St. Vincent's Private Hospital, to the extent of its accommodation, is open to any sick person irrespective of his or her religion at the request of the patient's doctor. It is not confined to patients of the Honorary Medical Staff which numbers one hundred and forty one. During the period 1st September 1961 to 31st August 1963 (two years 4724 patients were admitted of whom 2751 were patients of 71 members of the Honorary Medical Staff: the remainder, 1973 patients, were patients of 159 doctors none of whom during that period was a member of the Honorary Medical Staff: during the year 1st September 1963 to 31st August 1964, 2385 patients were admitted, of whom 1510 were patients of 61 members of the Honorary Medical Staff and the remainder, 875 patients, were patients of 113 doctors none of whom during that year was a member of the Honorary Medical Staff. p.54 1.15
p.52 1.12 et seq.
- 40 8. To enable St. Vincent's Hospital to obtain the subsidies available through the Hospitals' Commission, the financial administration of St. Vincent's Private Hospital is kept separate from the financial administration of the general hospital. No provision is made in the accounts p.38 1.15)
p.39 11.3-10)
p.61 11.4-8)
p.62 11.9-20)

Record
pp.199-200,
202-203,
205-6, 207,
208e-208f,
208w-208o

kept in relation to the Private Hospital for depreciation of buildings or equipment. The amounts of surplus appearing in the accounts are cash surpluses. No debit is entered in the accounts for the value of the services of the Sisters of the Congregation who work in the Private Hospital. To that extent therefore the amount of surplus is enlarged by the free services of these Sisters. Past surplus amounts are stated at p.78 and the application of surplus is set forth at p.69, 72 and pp. 75, 76 and 77. 10

9. The Honourable Mr. Justice Jacobs, a Judge of the Supreme Court of New South Wales sitting in Equity, held that the gift 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" was a valid bequest. His Honour arrived at this conclusion for the following reasons :- 20

- "(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.
- (b) Such a gift may in a particular case not be a gift for charitable purposes if the hospital by reason of its constitution or rules, or by reason of the nature of its activities, reveals a lack of those elements of public purpose and of public benefit which are essential in the case of every valid charitable gift, e.g., if the hospital is carried on for the purpose of financial gain to individuals; or if the hospital is not open to the public, or is closed to a section of the public, so that its activity lacks the necessary element of benefit to the public. 30
- (c) Although patients in St. Vincent's Private Hospital are charged fees for accommodation, attention and services, resulting in a surplus of receipts over expenditure (taken over a period of years), such surpluses were and are used for the maintenance of St. Vincent's Hospital (a public general hospital) and for the support of other charitable activities of the Sisters of Charity; therefore the bequest 40

lost none of its prima facie charitable character. Such a view is perhaps as much implicit as explicit in His Honour's reasons for judgment.

- (d) That the fees charged did not, having regard to the hospital system of New South Wales, have the effect of excluding the poor from the benefits provided by the private hospital."

SUBMISSIONS

10 These Respondents submit that His Honour was correct in his findings of fact and in his conclusions of law.

1. The gift is a gift for purposes; it is not a gift to persons. A gift for the purposes of a hospital is prima facie a valid gift because it is a gift for the relief of the impotent, one of the purposes stated in the preamble to the Statute of Charitable Uses 1601 (43 Eliz 1 C.2). It has been established that the words "the relief of aged, 20 impotent and poor people" are to be construed disjunctively: Re Lewis (1955) 1 Ch. 104; In the Wills of Clarke (1957) V.R. 171; Taylor v. Taylor 10 C.L.R. 218; Kytherian Association v. Sklavos 101 C.L.R. 56 at 67 et seq., and cf. Commissioners for Special Purposes of Income Tax v. Pemsel (1891) A.C. 531 at 558 (Lord Watson), 571-2 (Lord Herschell) and 583-4 (Lord Macnaghten) and Re Smith's Will Trusts (1962) 2 All. E.R. 563; (1962) 1 W.L.R. 763.

30 A gift to be applied for the purposes of a hospital therefore is a gift for charitable purposes although the hospital may not be for the relief of the sick poor only.

2. It is conceded that a gift for the purposes of a hospital, though prima facie charitable, may not be a gift for charitable purposes if, on examination, it is found that the services of the hospital are not available to the public generally, but only to an aggregate of persons not 40 constituting a section of the community in the relevant sense. Such a conclusion may result from the terms of the rules or constitution of the hospital and from the actual manner in which it is, at the date of the gift, carried on. On the

Record

evidence, no such disqualification existed. St. Vincent's Private Hospital had and has no written constitution or rules. In the admission of patients there was and is no discrimination between persons or between patients of the Honorary Medical Staff and patients of other doctors. Such a disqualification may also exist if the particular hospital is carried on for the financial gain of individuals, but this disqualification did and does not exist.

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3. Further, it is submitted that St. Vincent's Private Hospital should not be regarded as an institution separate and isolated from St. Vincent's Hospital. The evidence establishes that it is rather a section of that hospital, and a section beneficial to that hospital. Consequently, it is submitted that the gift for the purposes of the private hospital is indirectly for the benefit of the general hospital and hence beneficial to the public.

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4. The fact that St. Vincent's Private Hospital charges fees for its services does not necessarily make its purposes non-charitable or predominantly non-charitable. The relief of the sick is a charitable purpose, though a charge is made for it, unless the hospital is carried on for commercial profit, and such profit passes to individuals as private gain. The evidence established that the charges made are hardly more than is necessary to meet the expenses involved. If a surplus resulted, the public hospital, before it had assistance from the State and Commonwealth Governments, had first use of that surplus. At the date of the Testator's death, such assistance had been available for some time and any surplus was then devoted to the furtherance of the other charitable activities of the Sisters of Charity - cf. The Abbey, Malvern Wells Limited v. Ministry of Local Government (1951) Ch. 728.

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5. It is submitted that an analogy may be found in schools and colleges which are charitable though fees are charged for the education there to be had. Like a public school the private hospital is open, to the extent of its accommodation, to all who wish to have the advantage of what it provides. The patients who avail themselves of its services

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are not a "fluctuating body of individuals" who qualify for admission because they are patients of doctors on the Honorary Medical Staff, or even because they hold a particular creed or come from a particular locality. They come from a section of the public not determined by any irrelevant discrimination but only by their need for hospital treatment.

10 6. If any of the purposes and activities of the Sisters of Charity should include non-charitable and invalid purposes, such surpluses of St. Vincent's Private Hospital would be applicable only to the charitable purposes of the Congregation. This, it is submitted, follows from the provisions of Section 37D of the Conveyancing Act 1919-1954 (N.S.W.).

The terms of that section are as follows :-

20 "37D (1) No trusts shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any parts thereof is by such trust directed or allowed.

30 (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

(3) This section shall not apply to any trust declared before or to the will of any testator dying before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938."

40 This section applies not only where a donor has expressly indicated alternative purposes, some charitable, others invalid but also where the gift is for purposes described in a compendious expression which may include both charitable and non-charitable purposes - see Leahy v. Attorney General of N.S.W. (1959) A.C. 457.

Record

7. If the relief of poverty is essential to qualify a hospital as a charitable institution, then it is submitted that the "poor", as that term is understood in the law of charities, are not excluded from St. Vincent's Private Hospital. There is no exclusion by way of rule or practice and none is implicit in the amount of the charges made. There is evidence that in some cases the fees charged are reduced and concessions given. But more importantly, the fees charged are within the resources of all but the very destitute in New South Wales, because Medical Benefit Funds are available to meet the far greater part of the charges payable by contributors to such funds. In such a social health scheme, provident persons of limited means cannot be said to be excluded from such a hospital - see Lemm v. Federal Commissioner of Taxation 66 C.L.R. 399 at 410. 10

8. If, contrary to the Respondents' submissions, the gift is not valid as a gift for charitable purposes, it is nonetheless a valid enforceable trust of income for a definite period of time. The annual income, once it reaches the hands of the Sisters of Charity is subject to a trust. That trust would not fail for want of a cestui que trust because it is enforceable by the Trustees of St. Vincent's Hospital. The trust does not offend against the rules relating to remoteness of vesting, because the right to receive the income is presently vested. The trust does not offend against the rules relating to inalienability of property, because the capital is not rendered inalienable for an indefinite or perpetual time. The trust is a trust of income for a definite period of time, that is to say, a period of two hundred years or an ascertainable shorter period of time. 20 30

9. Alternatively, there is a valid trust of income for a period of twenty-one years. What has been given is not the right to receive one payment spread over a period of two hundred years but a series of annual payments, two hundred or less in number. 40

10. We therefore submit that the appeal from the judgment and decretal order of the Supreme Court

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in respect of question 1 of the Originating
Summons should be dismissed.

A.B. KERRIGAN

M.H. BYERS

R.G. HENDERSON

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. 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 AND OTHERS
(Defendants) Respondents

- and -

B.
FAR WEST CHILDREN'S HEALTH SCHEME
AND OTHERS
(Defendants) Appellants

- and -

PERPETUAL TRUSTEE COMPANY LIMITED
(Plaintiff) Respondent

TRUSTEES OF THE SISTERS OF CHARITY
OF AUSTRALIA AND OTHERS
(Defendants) Respondents

C A S E FOR THE RESPONDENTS
TRUSTEES OF THE SISTERS OF
CHARITY OF AUSTRALIA AND EDNA
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