Turner v Coombe

High Court Hamilton CIV-2016-419-265; [2018] NZHC 315
23, 24 November 2017; 15 March 2018
Whata J

Wills — Testamentary trusts — Certainty of objects — Charitable trusts — Interpretation of wills — Use of external evidence in interpreting wills — Testamentary trust with both charitable and private objects — Non-delegation rule — Executory trust — Blue pencil rule — Attorney-General's power of compromise — Charitable Trusts Act 1957, s 61B; Wills Act 2007, ss 31 and 32.

Clause 9 of a testator's will left the residue of his estate to a trust to be formed during his lifetime or by his trustees upon his death for the benefit of the local and wider community, and needy persons (including his nieces and nephews) in the Hauraki Plains/Hauraki/Coromandel area (the Trust). Suitable successful applicants would receive money the Trust generated from investment of the capital. Clause 9 further stated the Trust may "also pay [the testator's] sister's care and hospital bills".

The testator's sister (Ms Turner) challenged clause 9 claiming it was (1) invalid for uncertainty and (2) delegated trustee powers in a way that was unlawful and invalid.

The challenge to clause 9's validity based on uncertainty alleged the following: (1) it evinces no general or paramount charitable purpose (at most it benefits individual members of the community); (2) it is impossible to ascertain the geographical ambit of the Trust; (3) the term "needy persons" in the Hauraki region is used in connection with the testator's nieces and nephews despite some of those people being neither needy nor living in the region; (4) the clause contains direct provision for the testator's sister, which is not charitable; (5) there are no criteria for the applicants to the Trust. Further challenges by other parties noted the lack of clarity as to certain other terms.

The challenge to clause 9's validity based on unlawful delegation of trustee's powers alleged that the testator had effectively given complete discretion to his trustees. It established a trust (not a gift) but had no ascertained or ascertainable powers or objects. This argument had a degree of overlap with the uncertainty argument; if clause 9 was uncertain in the way alleged then the trustees would have no guidance.

Finally, if the problems above could be overcome, there was argument as to how to characterise the trust. The Attorney-General submitted that the trust was either (1) a mixed trust which has a charitable purpose (under which distributions may be made to the nieces and nephews if they qualify) and an ascertainable beneficiary (the sister); or (2) a charitable trust with a charitable purpose and a non-charitable but invalid purpose (the sister's care). This would require a "blue pencil" deletion pursuant to s 61B of the Charitable Trusts Act 1957 to be valid.

Held (Upholding in part the validity of the testamentary trust)

1 The interpretation of wills is governed by ss 31–32 of the Wills Act 2007. These two sections are based on the pre-existing common law jurisprudence but s 32(3) permits evidence of the will-maker's testamentary intentions to be considered. Such evidence cannot be used to support the identification of uncertainty or ambiguity. It is admissible, rather as evidence to assist in interpreting a will already found to be uncertain or ambiguous.

Wilson v Davidson [2017] NZCA 468 applied.

2 Further relevant testamentary and equitable principles include that (1) if possible, a Court should construe a will to avoid intestacy; (2) where a clause is capable of both a valid charitable interpretation of an interpretation which would make a clause void, a presumption in favour of charity should be adopted; (3) for a trust to be valid it must be certain as to subject mater, object and intention; (4) the property in the trust must vest, unless it is a trust for charitable purposes.

Knight v Knight (1840) 3 Beav 148 (Ch D) followed.

Re Levy [1960] Ch 346 (CA) followed.

Re Collier [1998] 1 NZLR 81 (HC) followed.

3 The subject matter and intention of the testamentary trust are tolerably clear. Only the objects are in issue but they are conceptually certain being "local and wider community"; "needy persons"; "in the Hauraki Plains/Hauraki/Coromandel area" and "[the testator's] sister". The Hauraki region is administratively workable. The "local and wider community" and "needy persons" fall within recognised classes of charitable objects. The dominant purpose of clause 9 was to created a trust for charitable purposes.

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531 (HL) applied.

Attorney-General v National Provincial and Union Bank of England [1924] AC 262 (HL) applied.

Re Norton's Will Trusts; Lightfoot v Goldson [1948] 2 All ER 842 (Ch D) applied.

McPhail v Doulton [1971] AC 424, [1970] 2 WLR 1110 (HL) distinguished.

Latimer v Commissioner of Inland Revenue [2002] 3 NZLR 195 (CA) followed.

Re Harding; Gibbs v Harding [2007] EWHC 3 (Ch), [2008] Ch 235 applied.

Canterbury Development Corporation v Charities Commission [2010] 2 NZLR 707 (HC) distinguished.

4 Whether the testator's nieces and nephews were to be automatically treated as "needy persons", and whether they must live in the Hauraki region to qualify cannot be resolved applying orthodox interpretive techniques (with or without the benefit of external evidence).

Re Beckbessinger [1993] 2 NZLR 362 (HC) applied.

5 The provision for the sister's care was a clear, separate discretion conferred on the trustees and not part of the general charitable purpose. A purpose will only be charitable where the purpose is to relieve poverty amongst a defined class. The purpose will not be charitable if the intention is to make a gift to a specified person.

Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297, [1951] 1 All ER 31 (HL) applied.

Dingle v Turner [1972] AC 601, [1972] 2 WLR 523 (HL) applied.

New Zealand Society of Accountants v Commissioner of Inland Revenue [1986] 1 NZLR 147 (CA) applied.

6 The non-delegation rule is not engaged given the findings that the trust is within a class of valid executory trusts, where trust property is vested in the trustees, but the interest of the beneficiaries (of the charitable part of the trust) remain to be delimited in a subsequent instrument pursuant to a settlor's clear general intention. The Court declined to comment on whether the non-delegation rule is now redundant.

Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511, [1991] 2 All ER 563 (Ch) applied.

7 The testator intended a charitable trust together with some provision of his sister, nieces and nephews. In the sister's case, provision was intended irrespective of whether she qualified as a member of the charitable object ("needy persons"). Section 61B of the Charitable Trusts Act 1957 and the "blue pencil rule" may be used to delete the non-charitable parts of clause 9. The Attorney-General indicated that he would support a compromise whereby the sister and certain nieces and nephews would be provided for before their non-charitable objects were deleted from clause 9. Given that, the Court declined to exercise its powers under s 61B to allow the parties an opportunity to agree on a compromise.

Re Beckbessinger [1993] 2 NZLR 362 (HC) considered.

Cases referred to in judgment

Attorney-General v National Provincial and Union Bank of England [1924] AC 262 (HL).

Attorney-General v New Zealand Insurance Co Ltd [1937] NZLR 33 (PC).

Blair v Duncan [1902] AC 37 (HL).

Canterbury Development Corporation v Charities Commission [2010] 2 NZLR 707 (HC).

Chichester Diocesan Fund and Board of Finance (Incorporated) v Simpson [1944] AC 341, [1944] 2 All ER 60 (HL).

Commissioners of Income Tax v Pemsel [1891] AC 531 (HL).

Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511, [1991] 2 All ER 563 (Ch).

Dingle v Turner [1972] AC 601, [1972] 2 WLR 523 (HL).

In re McEwen (deceased), McEwen v Day [1955] NZLR 575 (SC).
Knight v Knight (1840) 3 Beav 148 (Ch D).
Latimer v Commissioner of Inland Revenue [2002] 3 NZLR 195 (CA).
McPhail v Doulton [1971] AC 424, [1970] 2 WLR 1110 (HL).
New Zealand Society of Accountants v Commissioner of Inland Revenue [1986] 1 NZLR 147 (CA).
Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297, [1951] 1 All ER 31 (HL).
Re Beatty's Will Trusts; Hinves v Brooke [1990] 1 WLR 1503, [1990] 3 All ER 844 (Ch).
Re Beckbessinger [1993] 2 NZLR 362 (HC).
Re Collier [1998] 1 NZLR 81 (HC).
Re Flavel's Will Trusts [1969] 1 WLR 444 (Ch D).
Re Harding; Gibbs v Harding [2007] EWHC 3 (Ch), [2008] Ch 235.
Re Levy [1960] Ch 346 (CA).
Re Norton's Will Trusts; Lightfoot v Goldson [1948] 2 All ER 842 (Ch D).
Salusbury v Denton (1857) 3 K & J 529.
Tatham v Huxtable (1950) 81 CLR 639.
Wilson v Davidson [2017] NZCA 468.

Text referred to in judgment
Andrew Butler (ed) "Equity and Trusts in New Zealand" (2nd ed, Brookers, Wellington, 2009) at [11.8.2].

Application
This was an application by a purported beneficiary of a testamentary charitable trust seeking declarations that an operative clause of a will was invalid for uncertainty and represented an unlawful delegation of trustee powers.

W Patterson and *L Dixon* for the plaintiff.
H McIntosh and *K Lawrence* for defendants.
V Bruton QC for parties served.
H Carrad for Attorney-General.

WHATA J. [1] Clause 9 of Ian Alexander McClean's Will (the Will) left the residue of his estate to "The Ian McClean Trust" (the Trust) to be formed during his lifetime or by his trustees upon his death for the benefit of the local and wider community, and needy persons (including his nieces and nephews) in the Hauraki Plains/Hauraki/Coromandel area. Clause 9 also says the Trust may "also pay [his] sister's care and hospital bills."
[2] However, his sister, Muriel, and two of her children, Gillaine and Darren, now challenge the Will, claiming cl 9 is inherently uncertain and/or unlawfully delegates responsibility for the establishment of the Trust to his executors.
[3] This judgment resolves this challenge.

Background
[4] Ian McClean (Ian) died on 4 April 2013, leaving a Will, dated 28 February 2013. Probate for the Will was granted in May 2013. Under the

Will, Ian made several specific legacies and bequests. The validity of those are not challenged.

[5] Clause 9 of the Will, however, is challenged. It states:

> I leave the residue of my estate both real and personal of whatever kind and wherever situated, after my testamentary and funeral expenses have been paid, unto my trustees upon trust to a Trust Fund called "The Ian McClean Trust" that will either be formed during my life or is to be formed by my trustees upon my death for the benefit of the local and wider community and needy persons (including my nieces and nephews) in the Hauraki Plains/Hauraki/Coromandel area. It shall have a Deed of Trust and be made up of a Board of Trustees. It may pay my sister's care and hospital bills. My two executors and my consultant John Dawson shall be founding Trust Board members and they may approach other appropriately qualified and/or experienced persons to become Trust Board members. They shall invest my estate's capital wisely and distribute each year's income to suitable successful applicants.

[6] Mr Anthony Coombe and Mr Murray McLean are the executors under the Will. The residue estate included a large farm held by Ian in his name and a second large farm owned by McClean's Pampas Grass Limited (MPGL). The shareholding in this company and Ian's farm land were transferred to Mr Coombe and Mr McLean under the Will. The farming properties are now both owned by MPGL. The net value of the residue estate is estimated at about $6.9 million.[1]

[7] The Trust has not yet been established. Messrs Coombe and McLean state that it has always been their intention to establish the Trust, but explain their primary focus to date has been to modernise the farming properties at a cost of about $2.74 million.

The circumstances of the execution of the Will

[8] There is scant evidence addressing the circumstances in which Ian's last Will was made. The solicitor who drafted the Will has passed away and did not leave any file notes that might assist. However, both executors, who were well known to Ian over many years, gave evidence that Ian wanted the farms to be used as a trainee farming operation for the benefit of young farmers in the Hauraki area. This is consistent with previous 2001 and 2012 editions of Ian's Will which specifically refer to this prospect. It appears the objects were widened at Mr Coombe's suggestion as an addition to, not a departure from the intention to apply the funds to farming training. Nevertheless, this specific object is not included in the Will[2] and there is some evidence Ian had turned his mind to his family's needs. Mr Coombe noted that in discussions about the Will during which he was present, "provision for his sister, nieces and nephews" as well as the "possibility of providing some help to Ian's sister ... came up in conversation." Mr McLean also says it was raised, but was

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1 The plaintiff in opening submissions put the residuary estate at $6.7 million. I have adopted the calculations of the executors which put the residuary estate at $6.9 million.

2 Ian executed a will on 25 February 2013. Like the last will, no mention is made of this specific object.

not aware of the detail. Muriel states that shortly before Ian's death, she noticed a marked, more sympathetic attitude towards her and her children.
[9] Brendan also enjoyed a close relationship with Ian and cared for him shortly before his passing. He remembers talking to Ian about the family, including their whereabouts, shortly before Ian's death. Darren was in Thames and his mother and Gillaine were in Auckland at that time.
[10] Beyond these general observations, the evidence of the circumstances of the drafting and execution of the Will was of little, if any, value. Indeed, some of it is speculative. To illustrate, Mr Coombe believed that Ian did not want to leave more substantial provision for Gillaine and Darren because they were adopted. In fact, Brendan, who received substantial benefits under the Will, was adopted, while Darren was Muriel's only biological child.

Other provisions under the Will
[11] Ian never married, but he had a long-time partner, Raewyn Ann McLiver. Her children are beneficiaries of specific bequests of $50,000 each. These are not challenged. Specific bequests are also made to Muriel's children, Gillaine, Darren and Brendan of $10,000 each. He also left his properties at Onemana together with his residential property to Brendan. There are also relatively small bequests to specified clubs, organisations, and other persons.

Muriel and her children
[12] Muriel, the plaintiff, is Ian's only sibling. She recalls Ian had become upset when she was left the family house by their mother. Recognising this she sold the home to him for a price fixed by him. She has several medical conditions including type 2 diabetes, chronic hepatitis C with cirrhosis of the liver, Paget's disease, hypertension and osteoarithtis. Brendan is a successful restaurateur, Darren is a lecturer in hospitality and Gillaine is a nurse.
[13] Darren and Gillaine, the parties served, like Brendan, have fond memories of Ian, including times spent with him on the family farm with their grandmother. They continued to see him at family occasions, but not as much as when their grandmother was alive.

Issues
[14] Muriel, Darren and Gillaine raise two key issues:

(a) Is cl 9 invalid for uncertainty?
(b) Is the delegation of trustee powers at cl 9 unlawful and invalid?

[15] Darren and Gillaine also sought costs in advance. I reserved my position on this issue, tentatively indicating that I considered the claim has some merit. I address this separately below at [62].
[16] The executors and the Attorney-General maintain the "non-delegation" principle is simply a subset of the inquiry into certainty. I agree, the two issues appear to be two sides of the same legal problem. I nevertheless propose to address both issues separately. The answers to these questions will then dictate the scope, if any, of intervention by this Court.

Rules of interpretation

[17] It is necessary first to identify the rules of interpretation in this context. Helpfully, the Court of Appeal in *Wilson v Davidson* recently identified the proper approach:[3]

> [10] Sections 31 and 32 of the Wills Act 2007 (the Act) now apply when there are interpretation issues with a will or a will does not reflect a will-maker's intentions. The jurisdiction to apply the sections is given to the High Court. These two sections are based on common law jurisprudence as to the interpretation and rectification of wills and earlier similar reforms in Australia and the United Kingdom. The legal position in New Zealand prior to the Act was summarised by Fisher J in his often quoted statement in Re Jensen:
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> > The overriding objective is to give effect to the intentions of the testator. All canons of construction must be subservient to that end. The testator's intentions are to be gleaned from an objective appraisal of the testamentary documents viewed as a whole but in cases of doubt the wording is to be interpreted in the context of those facts which must have been in the contemplation of the testator.
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> [11] As this passage indicates, prior to the passing of the Act, there was a willingness to interpret the provisions of a will against the factual context in which the will was drafted and executed. While the words of the will were central, evidence was admissible that could shed light on the view from the will-maker's "armchair". Consistent with this, the purpose of the reforms was to give primacy to the will-maker's intentions. This was explained by the Hon Clayton Cosgrove MP in moving that the Wills Bill 2006 be read for the first time:
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> > Wills are of practical day-to-day significance for all New Zealanders. A will is an instrument that expresses a person's wishes after he or she dies, and enables that person to take care of his or her loved ones and property and assets. The proposed reforms will improve the legal framework for will-making. They will make the law easier for people to understand, and reduce the risk of a will-maker's wishes being defeated by a badly drafted or incorrectly executed will, and will also allow better effect to be given to a will-maker's intentions.

[18] The Court also noted:

> [18] Section 32 imposes rules as to the admissibility of extrinsic evidence when construing wills. The armchair principle, now expressed in s 32, has been recognised as involving the same approach as that which applies when construing a contract. Under s 32 external evidence of background circumstances can be used to interpret words in the will that make the will or part of it meaningless, ambiguous or uncertain. But s 32 goes further than the rules applying to the interpretation of contracts. The ordinary principles of contractual construction prohibit the admission of evidence as to a contracting party's actual intentions, and prior to the Act, this was also the approach to wills. Section 32(3) explicitly goes further in permitting evidence of the will-maker's testamentary intentions to be considered. However, evidence of a will-maker's wish to benefit a person is not evidence

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3 *Wilson v Davidson* [2017] NZCA 468 at [10]–[11]. (footnotes omitted)

of surrounding circumstances for the purposes of identifying uncertainty or ambiguity under s 32(1)(d) and (e). It is admissible, rather, as evidence to assist in interpreting a will already found to be uncertain or ambiguous.

[19] There are further longstanding principles relevant to the present context, as noted by the Attorney-General:[4]

(a) if possible, the Court should construe a will to avoid intestacy; and
(b) where a clause is capable of both a valid charitable interpretation or an interpretation which would make a clause void, a presumption in favour of charity should be adopted.

[20] It is also common ground that:

(a) For a trust to be valid it must be certain as to subject matter, object and intention;[5]
(b) The property in the trust must vest, unless it is a trust is for charitable purposes;[6] and
(c) Rectification under s 31 is not available, given the absence of evidence of subjective testamentary intention.

Is clause 9 invalid for uncertainty?

[21] Mr Patterson, for Muriel, contends cl 9 is uncertain and the intended trust is not capable of being ascertained because:

(a) it evinces no general or paramount charitable purpose — and at most benefits individual members of the community;
(b) it is impossible to ascertain the geographical ambit of the Trust;
(c) it refers to "needy persons" in the Hauraki region in conjunction with Ian's nieces and nephews despite him knowing that only Darren was resident in the Hauraki;
(d) there is also provision for Muriel which is not charitable; and
(e) there are no criteria for "suitable successful applicants".

[22] Ms Bruton, for Darren and Gillaine, adds cl 9 is meaningless, ambiguous and uncertain on its face:

(a) Persons 'in' the Hauraki Plains/Hauraki/Coromandel area is uncertain, citing the following statement by Lord Wilberforce in *McPhail v Doulton*:[7]

> ...where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or in Lord Eldon's words one that cannot be executed... I hesitate to give examples for they may prejudice future cases, but perhaps "all the residents of Greater London" will serve.

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4 As per *Re Collier* [1998] 1 NZLR 81 (HC) at 95.
5 *Knight v Knight* (1840) 3 Beav 148 (Ch D) at 159–161.
6 See *Re Levy* [1960] Ch 346 (CA) at 363.
7 *McPhail v Doulton* [1971] AC 424, [1970] 2 WLR 1110 (HL) at 457, 1133.

(b) whether "nieces and nephews" automatically qualify as "needy persons" or must be shown to be needy and/or must be in the abovementioned area is unclear;
(c) the term of the trust is not clear;
(d) the powers of distribution are unclear;
(e) it is uncertain who is to receive the trust capital on the vesting date; and
(f) it is unclear whether Muriel must be in the Hauraki Plains/Hauraki/Coromandel area, as is the meaning of "my sisters care".

[23] Ms Bruton submits external evidence assists the interpretation noting:

(a) the contrast between Ian's previous Wills which specifically refer to "charitable" trust, without reference to family members;
(b) Mr Coombe noted Muriel and her children were mentioned in discussions at the time of drafting the Will;
(c) Brendan refers to discussion with Ian about where Darren, Brendan, Muriel and Gillaine resided shortly before his passing; and
(d) correspondence from the estate's solicitors shows that the executors were prepared to accept applications from Raewyn's children who do not live in the Hauraki.

Assessment

[24] There are problems with the drafting of clause 9. It is far from an exemplar. What is tolerably clear, however, is that Ian intended to establish a trust for the benefit of his community and for needy persons resident in the Hauraki region. It is also tolerably clear he wanted to provide for his sister's care. It is not, however, clear what he intended or assumed in relation to his nieces and nephews. On balance, I consider the trust is an imperfect trust amenable to s 61B correction as it relates to the nieces and nephews and Muriel. I will return to this below at [55]. I must first explain my interpretation more fully and deal with the issue of non-delegation.

[25] First, the natural and ordinary meaning of the words used to describe the subject matter and intention are tolerably clear. Only the objects came under serious testing by Muriel, Darren and Gillaine. But the primary objects of the trust are conceptually certain, namely:

(a) "local and wider community"
(b) "needy persons"
(c) "in the Hauraki Plains/Hauraki/Coromandel area"; and
(d) "my sister."

[26] The complaint that the geographical ambit is "impossible to ascertain" is not sustainable given common knowledge about the Hauraki Plains/ Hauraki/Coromandel area. For ease of reference I will refer to it as the Hauraki region. The reference to the "local and wider community," while broad, is also capable of common sense definition.

[27] Lord Wilberforce's comment about the "Greater London area" must be understood in the context of the issue before their Lordships in *McPhail v Doulton*. On the state of authority at that time, the decision as to validity turned on whether a complete list could be drawn up of all possible beneficiaries, and whether a trust to be valid had to be capable of execution by the court.[8] His Lordship rejected the first proposition, stating that "the trust is valid if it can be said with certainty that any given individual is or is not a member of the class."[9]

[28] His comment above at [22](a) was then obiter, and with respect, his observation about the residents of Greater London appears mildly antiquated. Given the modern technological capacity to identify and correspond with vast numbers of people instantaneously at a global scale, the trust for the benefit of the local and wider community of Hauraki region is not hopelessly wide at all. In fact, it seems rather small. It is administratively workable.

[29] Second, it follows, save in two respects – my third and fourth points – the charitable purpose of the Trust is equally clear; it is a trust for:

(a) The "local and wider community";
(b) "needy persons";
(c) "in the Hauraki Plains/Hauraki/Coromandel area".

[30] To elaborate, I agree with the executors that the phrase "local and wider community" means what it says. It is an all-embracing concept designed to ensure that all people (individuals, groups and institutions) within the Hauraki region are eligible to benefit. I also agree that purposes beneficial to "the local and wider community" and "needy persons" fall within the recognised classes of charitable objects.[10]

[31] In this regard, Mr Patterson appeared to concede in closing that Ian intended to make some provision for charitable purposes. I also consider there is clear contextual evidence of Ian's longstanding intention to establish a trust for the benefit of his community, particularly the farming community. While in previous drafts of his wills, the intention to establish a "charitable" trust was express, there is nothing else to suggest he intended to depart from creating a charitable trust; certainly, the evidence of those who knew him best attest to the fact that he had community interests in mind, particularly in terms of training young farmers, the farming community generally and people in need. Furthermore, Ian's charitable intentions became clearer by broadening the objects of the trust from previous wills to include the local and wider community and needy persons.

[32] I was initially attracted to Mr Patterson's submission that the mere reference to "local and wider community" did not clearly evince a public benefit requirement; that is, the Trustees were at liberty to confer essentially private benefits. As noted by the Court of Appeal in *Latimer v Commissioner of Inland Revenue*, the fact a trust relates to one of the four

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8 At 1124–1127.
9 At 1132.
10 *Attorney-General v National Provincial and Union Bank of England* [1924] AC 262 (HL) at 265; *Commissioners of Income Tax v Pemsel* [1891] AC 531 (HL) at 583–584.

categories of charitable purposes does not per se mean that the purpose of the trust is charitable. It remains to be determined whether the purposes of the trust are charitable purposes.[11]

[33] A paradigm example of the problem is afforded by the facts in *Canterbury Development Corporation v Charities Commission*.[12] In that case, Ronald Young J rejected the submission that an organisation whose central focus was to assist and increase profitability for businesses within the Canterbury community was charitable, even though this might create employment. The Judge found it was neither charitable, nor for the public benefit. The Judge observed:

> [60] ... The important point in this case is that the CDC's assistance to business is not collateral to its purposes but central to it. The purpose of the CDC's assistance to businesses is, as the constitution identifies, and the operation confirms, to make the businesses more profitable. The CDC believes this assistance will, in turn, result in benefit to the Canterbury community. The central focus, however, remains on increasing the profitability of businesses not public benefit.

[34] But there is longstanding authority for the proposition that a trust in a will for the benefit of a local community is charitable. As stated by Equity and Trusts in New Zealand, a trust will have a charitable purpose if it is for the benefit of a locality.[13] It cites as authority for this proposition *Re Norton's Will Trusts*.[14] That case concerned a gift made in a will to a church council, "for the benefit of the church and parish."[15] A key issue was whether a gift "for the benefit of the parish" could have a charitable purpose. The Court held that while a gift for "parish work" would not qualify, a gift for "the benefit of the parish" was to benefit the inhabitants of the parish area so did have a charitable purpose.

[35] A similar conclusion was reached in *Re Harding*[16] cited by the executors. There, a will left money to the Diocese of Westminster to hold on trust for "the black community of Hackney, Haringey, Islington, and Tower Hamlet."[17] Whether a provision could be made to "the black community" raised a separate issue not relevant for present purposes. Regarding the four boroughs, the Court said that a gift to a locality had a charitable purpose.[18] The Court also said that the law will construe such a gift as implicitly limited to charitable purposes (unless there is something in the gift that would exclude that implication).[19]

[36] Returning to the present case, a trust for the benefit of the local and wider community, shed of its requirement to benefit only trainee farmers, is analogous to the gifts in *Re Norton's Will Trusts* and in

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11 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [31]–[32].
12 *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC).
13 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [11.8.2].
14 *Re Norton's Will Trusts; Lightfoot v Goldson* [1948] 2 All ER 842 (Ch D)..
15 At 843.
16 *Re Harding; Gibbs v Harding* [2007] EWHC 3 (Ch), [2008] Ch 235.
17 At 238.
18 At 240.
19 At 240. A potential problem here given separate provision for Muriel, and arguably for Ian's nieces and nephews.

Re Harding. I also note that the rather strident position adopted by Mr Patterson in opening, appeared to soften by closing. The mixed trust concept (part charitable/part familial) mooted by the Attorney-General was supported, albeit in the alternative.

[37] Third, I accept however that the juxtaposition of "needy persons" and "(including my nieces and nephews)" and "in the Hauraki Plains/Hauraki/Coromandel area" raises significant conceptual difficulties. I am satisfied that Ian meant to provide for his nieces and nephews, that much is clear from the plain language. But, as Ms Bruton submits, it is not clear what Ian intended for them. It may be that it was assumed by Ian that they were needy, and therefore they should be automatically eligible – which would then raise difficulties for the trustees if in fact they were not needy at the time of any application to the trust. To treat them as if they were inherently needy, when they were not, would derogate from the charitable purpose. Brendan, who was not needy at the time of the execution of the Will, and certainly not after it, exemplifies the problem.

[38] Alternatively, it may mean, as the executors submit, they will be eligible "if they are needy" and resident in the Hauraki region. This accords with evidence that Ian was aware of Darren and Gillaine's difficult financial circumstances and that he had softened his stance toward his family at the time of execution, while remaining true to his overall broader charitable intentions, evinced over several years, to benefit the community and needy persons' resident in the Hauraki region. But this purposive/contextual construction effectively requires the words "including nieces and nephews" to be treated as surplusage or simply deleted, or have added to them the words "if they are needy".

[39] As Tipping J said in *Re Beckbessinger*:[20]

> Thus, conceptual certainty has to do with the precision or accuracy of the language used to define the class. It must be possible to determine with certainty the limits of the class, ie whether a particular person or body is or is not within the class.

[40] The real issue in this case is whether Ian intended his nieces and nephews to be treated as within the class of needy persons irrespective of their financial means, and I cannot sensibly resolve that issue applying orthodox interpretative technique, with or without the benefit of external evidence. The uncertainty inherent in the language used, together with the absence of direct or contemporaneous evidence of testamentary intention at the time of the execution of the Will, makes that exercise largely speculative.

[41] Fourth, while the dominant purpose of the Trust is charitable, there is specific, unqualified, provision for Muriel. On its face, cl 9 empowers the trustees to confer a private benefit to a close family member who is not required to be a member of the local or wider community, needy, or live in the Hauraki region. Indeed, Ian knew Muriel was not resident in the Hauraki region at the time of execution of the Will. There is also nothing in the broader context to suggest Ian meant to treat his

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20 *Re Beckbessinger* [1993] 2 NZLR 362 (HC) at 370.

sister's care as if it formed part of a wider charitable trust for a locality or relief of poverty. Rather, a clear separate discretion to "pay my sister's care and hospital bills" is conferred on the trustees. As the Attorney-General submitted, a purpose will only be charitable where the purpose is to relieve poverty amongst a defined class. The purpose will not be charitable if the intention is to make a gift to a specified person, even if it is a gift to alleviate poverty.[21] In my view, the provision for Muriel falls into this category.

[42] Fifth, for completeness, I am not otherwise troubled by the vesting issue or other administrative issues. As the executors submit, a charitable trust does not infringe the rule against perpetuities and provision for Muriel may be deemed to involve life, plus 21 years insofar as concerns any vesting to her. Other administrative issues flow from the executory nature of the trust, which can be addressed on the formalisation of the trust deed, with the assistance of the Court if necessary.[22]

[43] Given the foregoing, I consider the primary objects of the trust are ascertainable and Ian intended to establish a trust for charitable purposes. I am of the view, however, that provision for Muriel is not charitable and is uncertain in relation to Ian's nieces and nephews.

Nondelegation

[44] Mr Patterson contends cl 9 also infringes the principle against non-delegation and is therefore invalid. He says, in short, cl 9 is not an outright gift, and does not include ascertained or ascertainable powers or objects (charitable or otherwise). Rather, it effectively directs the executors or trustees to establish the trust for Ian, contrary to longstanding authority.[23] The gift in *Re Flavel's Will Trusts* is said to be illustrative. In that case, the will directed that a pension fund was "to be established and constituted in such a manner as my trustees shall in their absolute discretion think fit."[24] The Court concluded the trust was void for offending the axiom that a testator cannot leave it to his trustees to make a will, and for uncertainty.[25] Mr Coombe's inability to define what was meant by 'care' and his comment that the clause was confusing is said to exemplify the uncertainty in this case.

Assessment

[45] Drawing on English authority, Kitto J expressed the non-delegation rule in this way in *Tatham v Huntable*:[26]

> It is " cardinal rule" to which a power of selection among charitable objects is the sole exception, that " man may not delegate his testamentary power. To

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21 *Dingle v Turner* [1972] AC 601, [1972] 2 WLR 523 (HL) at 616, 534; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, [1951] 1 All ER 31 (HL) at 305–307, 32–35; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 152.

22 See *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511, [1991] 2 All ER 563 (Ch) at 588–589, 1537–1538.

23 *Attorney-General v New Zealand Insurance Co Ltd* [1937] NZLR 33 (PC) at 35; *Chichester Diocesan Fund and Board of Finance (Incorporated) v Simpson* [1944] AC 341, [1944] 2 All ER 60 (HL) at 349–350, 62–63; *Blair v Duncan* [1902] AC 37 (HL) at 46–47; *In re McEwen (deceased), McEwen v Day* [1955] NZLR 575 (SC). at 578.

24 *Re Flavel's Will Trusts* [1969] 1 WLR 444 (Ch D) at 445.

25 At 446–447.

26 *Tatham v Huxtable* (1950) 81 CLR 639 at 653.

> him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries" *Chichester Diocesan Fund v Simpson (2)*. It is therefore necessary in all cases (other than charity cases) that the persons or objects to benefit under the will shall be, by the will itself, ascertained or made ascertainable.

[46] The existence of this rule was however strongly doubted by Hoffman J (as he then was) in *Re Beatty's Will Trusts, Hinves v Brooke*. The Judge observed that all cases purporting to invoke such a rule were:[27]

> ... cases in which the testator had purported to give his executors a power of choice among objects expressed in language held to be too uncertain to be capable of enforcement. The statements made in those cases were in my view, likewise intended to go no further than to state the familiar rule which invalidates such gifts.

[47] I agree with this summary of the authorities under pinning the non-delegation rule.[28] Each of them involved uncertainty, usually of object. It might be said therefore that the extent of the rule is simply an expression of the settled principle that objects of a gift on trust must be ascertained or ascertainable. This approach would appear to accord with the leading statement on the point in this jurisdiction, made by Gresson J, in *Re McEwen*:[29]

> It would seem, therefore, that the anti-delegation principle is not flouted when either there is a power of selection from a class designated with certainty (and the whole world less one person has been held in *In re Park* to satisfy that requirement) or where there is power to dispose in favour of any person, including the donee for that, is (as stated in *Jarman on Wills*, 8th Ed, 500) "quivalent to property".

[48] In any event, subject to the issues I have identified above, this is not one of those cases where the objects are not ascertained or ascertainable, or where the formation of the trust is left entirely in the hands of the executors. Rather the present trust is within a class of valid executory trusts, where trust property is vested in trustees, but the interests of the beneficiaries remain to be delimited in a subsequent instrument pursuant to a settlor's clear general intention.[30] Relevantly, the trustees do not have absolute discretion as to how the trust will be constituted. Clause 9 sets out how the trust is to be formed, directing the creation of a Board of Trustees. It also provides direction as to how the trust will operate, specifying that the capital is to be invested, and income from that investment will be distributed. Given this, I agree with the executors that the non-delegation rule is not engaged.[31]

[49] The executors also contend, with some support from the Attorney-General, that the non-delegation rule is now redundant, referring

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27 *Re Beatty's Will Trusts; Hinves v Brooke* [1990] 1 WLR 1503, 1990] 3 All ER 844 (Ch) at 848, 1508.
28 See above at n 23.
29 *Re McEwen*, above n 23, at 582.
30 As per *Davis*, above n 22, at 572, 588–589.
31 Save in respect of the treatment of Muriel, the nieces and nephews, which can be addressed using the powers at s 61B.

especially to Hoffman J's judgment in *Re Beatty's Will Trusts* and Tipping J's decision in *Re Beckbessinger*. As it is unnecessary for me to form a view about this, that issue is better left to a case that fully engages the issues the rule was designed to address.

An Imperfect Trust

[50] The Attorney-General submits there are two forms the trust could take under cl 9:

(a) A mixed trust which has a charitable purpose (under which distributions may be made to the nieces and nephews if they qualify) and an ascertainable beneficiary, Muriel.
(b) A charitable trust with a charitable purpose and a non-charitable but invalid purpose. This requires a blue pencil deletion pursuant to s 61B to be valid.

[51] The Attorney-General further submits the choice between the two will depend on the Court's view of the testator's intention. If a dual purpose, then the former will be appropriate. If the latter, the Attorney-General is prepared to compromise so that Muriel and her children may receive a reasonable one-off payment to remedy injustice.

[52] Mr Patterson agrees with the Attorney-General that it is possible to create a valid mixed trust, but says that such trusts are always executed, not executory. He nevertheless says, the unexpressed terms of an executory trust may be settled by the Court. In the present case, he submits the evidence establishes Ian had two different intentions - to use income for charitable purposes and to provide for Muriel's care. On this scenario, it would be appropriate to direct a separate trust for Muriel's benefit. Ms Bruton urges the Court to provide for two trusts, one for charitable purposes and one for Muriel, Darren and Gillaine.

Assessment

[53] There is authority for the proposition that a trust for a clear charitable purpose and a private familial purpose may be a valid trust, enforceable by the Court.[32] *Salusbury v Denton* is the example cited by the Attorney-General.[33] In that case, the testator left a fund to be applied to "a charity school, or such other charitable endowment for the benefit of the poor ... and the remainder to be at the disposal among his relatives in such proportion as [his widow] may be pleased to direct."[34] The widow died without exercising the discretion. The Court enforced the trust, dividing the moiety equally between the charitable object and the relatives. There is also much sense in the executors' submission that provided the three certainties are met, the approach taken in *Salusbury v Denton* logically applies to an executory trust.

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32 For my part, it is difficult to reconcile this authority with longstanding authority requiring that for a trust to be a valid charitable trust it must have exclusively charitable purposes. But, given the conclusion I have reached, it has not been necessary for me to reconcile them.
33 *Salusbury v Denton* (1857) 3 K & J 529 at 539.
34 At 533.

[54] Problematically in this case, I am not satisfied Ian intended to create a two-pronged trust of this kind. In my view, it is more accurate to describe it as Trust for charitable purposes under which his nieces and nephews and Muriel are invalidly provided for. As I have explained, cl 9 is unhelpfully ambiguous on how they may or may not qualify for benefits under the Trust. What is clear, however, is that a charitable trust was intended, together with some provision for Muriel and the nieces and nephews. In Muriel's case, provision was intended irrespective of whether she qualifies as a member of a charitable object.

[55] Turning to s 61B of the Charitable Trusts Act 1957; having identified:

(a) the dominant intention was to create a trust for charitable purposes;
(b) an intention to provide separately for Muriel, though under the umbrella of a trust for charitable purposes; and
(c) an unclearly expressed intention to provide for his nieces and nephews,

I consider s 61B is engaged. That section states:

61B Inclusion of non-charitable and invalid purposes not to invalidate a trust

(1) In this section the term *imperfect trust provision* means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.
(2) No trust shall be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.
(3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the same manner in all respects as if—
  (a) the trust property could be used exclusively for charitable purposes; and
  (b) no holding or application of the trust property or 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.

[56] The application of this section was, helpfully, thoroughly canvassed by Tipping J in *Re Beckbessinger*. As the Judge noted, s 61B has two situations in mind. The first is where there are clearly included in the gift separate and distinct purposes which are charitable, and purposes which are not charitable. In those cases the non-charitable purposes can be struck out in terms of what is known as the blue pencil rule, leaving the charitable purposes extant and valid. The Judge also referred to the more difficult class, where a fund is to be applied in terms which are general so

as to include both charitable and non-charitable purposes. This requires modification to the words used. In any event, where the primary thrust of the gift has a clearly charitable purpose, it is the addition of a gift which has an invalid non-charitable purpose which brings the section into play.[35]

[57] It transpires we have both situations described by Tipping J, prefaced by a finding that the primary thrust of the gift in this case was for charitable purposes. As explained at [41], the provision for Muriel forms part of a trust for charitable purposes, yet cl 9 does not purport to circumscribe distribution to her by reference to those purposes. There is no requirement that she form part of the Hauraki community or that she be "needy".

[58] It remains necessary to determine the appropriate corrections needed. Some guidance in this regard is afforded by Hammond J in *Re Collier*.[36] In that case, a testatrix left the residue of her estate to promote several objectives, only one of which qualified as charitable. Hammond J applied the blue pen to the effect that whatever moneys were to have applied under the imperfect trust were arrogated exclusively for the paramount charitable purpose. But, as the Attorney-General apprehended, this result applied here would not give effect to Ian's evident intention to provide for his sister's care and to make at least some provision for his nieces and nephews. Helpfully, and responsibly in my view, the Attorney-General signalled a willingness to exercise his powers of compromise as the Court thinks fit to remedy any perceived departure from Ian's intentions, subject to the need to sufficiently acknowledge Ian's objective to establish a charitable trust.

[59] I do not wish to pre-empt the scope and content of the compromise, but objectivity should prevail over ambition. My tentative view is that the costs of Muriel's care, including medical costs, must be covered and some targeted provision made for Darren and Gillaine, having regard to their financial needs.

[60] As I have not heard from all the parties on the form this outcome might take, I therefore grant leave for the parties to file submissions on this aspect. I do not propose to fix a timetable at this stage. I want to afford the parties a proper opportunity to reach a compromise and submit it to the Attorney-General for approval. Any party may, however, seek the further assistance of the Court if it appears common sense will not prevail.

Actions of the executors

[61] Ms Bruton was critical of the actions and inaction of the executors in their administration of the estate. She submits they have acted outside of the ambit of their powers and their inaction in terms of establishing the trust was inappropriate. As these matters do not directly bear on the interpretation of the Will, I will not address them in any detail. I am concerned that the executors had the training farm objectives of the previous wills too firmly in mind in the early administration of the will, and their failure to take any steps to establish the trust was understandably

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35 *Re Beckbessinger*, above n 20, at 373–375.
36 *Re Collier*, above n 4, at 97–98.

a matter of valid concern to Muriel, Darren and Gillaine. However, the executors' focus on securing the viability of the farming operations was not outside their responsibilities as executors to the extent that this laid the foundation for the attainment of Trust's broader charitable objectives.

Costs

[62] Given the outcome, my signal to the parties that Darren and Gillaine should have their reasonable costs met out of the estate is confirmed. For completeness, I am satisfied that their involvement was appropriate given the key issue was one involving the proper scope of the Will and the Trust as it relates to them, Muriel and the charitable objects. In addition, the prospect of their exclusion altogether (as initially sought by the defendants)[37] was good reason for their active involvement.

Outcome

[63] Clause 9 seeks to establish an imperfect trust in three key respects:

(a) the dominant intention was to create a trust for charitable purposes but;
(b) Ian intended to provide separately for Muriel, though under the umbrella of a trust for charitable purposes; and
(c) unclearly expressed an intention to provide for his nieces and nephews.

[64] In these circumstances, I am satisfied my power under s 61B to validate the Trust for charitable purposes is engaged. I propose to make an order allocating the Trust gift to the charitable purposes only, subject to some provision being made for Muriel and the nieces and nephews. Leave is granted to file submissions if agreement cannot be reached. I do not propose to fix a timetable at this stage, preferring to leave it to the parties to come to some agreement. If, however, agreement cannot be reached, the assistance of the Court may be sought.

[65] The reasonable costs of the parties are to be paid out of the estate. If these cannot be agreed, the parties are to file memoranda of no more than three pages in length.

Reported by: Matthew Mortimer, *Barrister and Solicitor*

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37 The defendants counterclaimed seeking relief under s 61B. This counterclaim was later withdrawn on advice that the provision for Muriel was not invalid.