Neutral Citation Number: [2023] EWCA Civ 1332

Case No: CA-2023-000851

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TRUST AND PROBATE LIST (ChD)
Mr Justice Zacaroli
[2022] EWHC 102 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
SIR LAUNCELOT HENDERSON

- -

Between :

Zedra Fiduciary Services (UK) Limited	**Appellant**
- and -	
H.M. Attorney General	**Respondent**

- -
- -

Robert Pearce KC and Daniel Burton (instructed by **Macfarlanes LLP**) for the **Appellant**
William Henderson (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 01-02/11/2023

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 15/11/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

The issue

1. The issue on this appeal is the appropriate application of funds held on charitable trusts under a cy-près scheme made by the court in the exercise of its power under section 67 of the Charities Act 2011.

2. Zacaroli J gave two judgments in this case. In the first judgment he set out the facts. He decided that although the trust funds were held on charitable trusts, the original charitable trusts were incapable of achievement, with the consequence that the funds held on those trusts should be applied cy-près. That judgment is at [2020] EWHC 2988 (Ch), [2020] WTLR 1287. In his second judgment he considered two rival cy-près schemes, one proposed by the Attorney-General and the other by the trustee. He held that the Attorney-General's proposal was the most appropriate application of the fund, having regard to the statutory criteria in section 67. That judgment is at [2022] EWHC 102 (Ch), [2022] WTLR 557.

3. The trustee now appeals against the second judgment.

The facts

4. I can take the facts largely from the judge's first judgment.

5. In 1927 Mr Gaspard Farrer, a recently retired partner of Barings, conceived the idea of establishing a fund which would, in due course, pay off the National Debt. At that stage he remained anonymous.

6. At the time when Mr Farrer had his idea, the National Debt (which had existed since 1694) had increased significantly, from £0.6 billion to over £7 billion as a result of the cost of the first world war. It was Government policy, in the years following the first world war, to put in place measures to reduce the National Debt. This was called the "English Method" of financing war expenditure, first presented to Parliament by Reginald McKenna, Chancellor of the Exchequer, in June 1915. The belief was that the cost of war should be borne by the current generation, rather than being passed on to future generations. The so-called "McKenna rule" committed the government to pay off the National Debt through a series of primary budget surpluses. The Government established a new sinking fund, to which annual contributions would be made for the purpose of retiring the National Debt.

7. The policy was reviewed in the Report of the Committee on National Debt and Taxation, published in 1927 under the chairmanship of Lord Colwyn. The majority report supported the policy of paying back the National Debt and proposed increasing contributions to the sinking fund to £75 million a year, rising to £100 million a year as soon as possible.

8. There was at that time (and still is) a separate account in the books of the National Debt Commissioners, established by section 8 of the National Debt Reduction Act 1823, which recorded bequests and donations for reducing the National Debt. The

interest or dividends on funds in that account were to be applied "to the purchase of annuities composing the national debt … and no other purpose whatsoever".

9. It was against that background that Mr Farrer decided to make his gift. An indication as to his motive for doing so is seen in a letter of 17 June 1926 from Sir Otto Niemeyer (a close friend of Mr Farrer and the Controller of Finance at the Treasury) to Winston Churchill (who was then the Chancellor of the Exchequer) which stated:

> "My friend's idea is, that if such a Trust existed and its accounts were published every year so that people saw a fund heaping up in this way for redemption of the Debt, other rich men would be induced to follow his example. He holds the view that the ocular demonstration of a growing fund would attract far more support than the mere announcement of contributions which had been applied immediately to the cancellation of the Debt."

10. As the judge explained, there were potential legal difficulties in establishing such a fund, which were eventually solved by legislation. In anticipation of the passing of the necessary legislation, Mr Farrer transferred the sum of £500,000 to Barings to be used to establish the trust fund. Lord Revelstoke (a partner in Barings) wrote to Sir Otto Niemeyer on 10 November 1927 recording the transfer. He said:

> "A correspondent has handed to Messrs Baring Brothers & Co. Limited a fund of cash and securities which at today's prices amounts to £500,000 … to be held in Trust for the Nation, provided certain proposed Legislation passes into law during the present Session in the form agreed between you and him: but the Fund to be re-transferred to our correspondent per the dates of transfer to us if the legislation in question is not so passed."

11. The relevant legislation is contained in section 9 (1) of the Superannuation and Other Trust Funds (Validation) Act 1927, which provides, so far as relevant:

> "Where by any instrument directions are given for any property being held upon trust and the income thereof being wholly accumulated (subject only to payment thereout of any costs, charges and expenses of the trustees and any remuneration to which they may be entitled) for any period to be determined under the provisions of the instrument, and for the property and accumulations being transferred at or before the expiration of that period to the National Debt Commissioners to be applied by them in reduction of the National Debt, then, …, notwithstanding any Act or rule of law to the contrary, the directions shall be valid and effective and no person shall be entitled to require the transfer of any part of the property, income or accumulations otherwise than in accordance with the provisions of the instrument."

12. Section 9 (2) required the trustees of any such trust to render accounts to the National Debt Commissioners.

13. The deed of trust was executed on 9 January 1928. The Deed identifies Barings as the "Original Trustees". The "National Fund" is defined as the investments and cash specified in the schedule to the Deed and all other property held on the trusts set out in the Deed, and the accumulations resulting therefrom. Clause 2 of the Deed provides:

> "The Trustees shall hold the National Fund Upon trust until the date of application to accumulate the net income and profits thereof in the way of compound interest by investing such income and profits and all resulting income and profits from time to time and on and from the date of application shall stand possessed of the National Fund including the accumulations Upon trust then to transfer and pay the same to the National Debt Commissioners to be applied by them in reduction of the National Debt."

14. The Trustees were defined in the Deed as the original trustee or its successors. Clause 3 (a) defined "the date of application" as being a date fixed by the trustee as being the date on which effect could be given to the founder's desire to discharge the National Debt; but it was subject to a proviso in the following terms:

> "Provided that if in the opinion of the Trustees at any time or times National exigencies shall require and the Trustees shall determine that some part of the National Fund should be forthwith applied in reduction of the National Debt the Trustees shall have power to give effect to that determination by transferring and paying that part to the National Debt Commissioners to be so applied by them…"

15. Clause 6 (a) of the deed required the trustee to submit accounts to the National Debt Commissioners from time to time as they might reasonably require.

16. On 26 January 1928 Barings wrote to Mr Churchill in a form approved by Mr Farrer. The letter said:

> "We have the honour to inform you that we have received from a correspondent, whose name we are not authorised to disclose, but from whose letter we are allowed to quote, the cash and securities to which reference is made below. Our correspondent writes:-
>
> "Gifts to the Nation of historic sites, buildings and works of art, are happily frequent; gifts to repay debt comparatively rare, this last being a dull objective but bringing with its accomplishment certain comforts of its own. To repay the National Debt may be thought to be beyond the reach of individual effort, but as a beginning towards this end I am placing at your disposal, as Trustees for the Nation, some £500,000 as the nucleus of a fund

> to accumulate in your hands, and to be applied eventually to this object. I am entrusting this fund to your house in order to secure the benefit of your long experience in finance: and in the hope that others may from time to time be prompted to add to it, or on similar lines to set up funds of their own, citizens and City uniting in an attempt to free their country from debt."

17. On 26 January 1928 Winston Churchill issued the following statement:

> "The nation has just received a benefaction of a character hitherto exceptional in the relations between the State and its Citizens. Within the last few days an anonymous donor has set aside the sum of £500,000 to be managed in trust for the nation. The capital is to accumulate at compound interest over a long period of years. Ultimately, with all its accrued proceeds swelling progressively with the passage of time, it is to be applied to the reduction of the National Debt. In order to facilitate this gift Parliament was invited last session to make an exception to the law forbidding Perpetuities and to declare long accumulations lawful when they had this especial object in view … It is the donor's hope that others may from time to time be prompted to add to the fund which he has inaugurated, or on similar lines to set up funds of their own. The Chancellor of the Exchequer states that action of this kind is inspired by clear-sighted patriotism and makes a practical contribution towards the ultimate – though yet distant – extinction of the Public Debt."

18. Mr Farrer's wish to inspire others to contribute to the National Fund had some, albeit limited, success. As the judge recorded, since 1928 there have been further contributions to the National Fund by other persons, the most significant of which was made by Lord Dalziel of Kirkcaldy, who died in 1935 having bequeathed his residuary estate (with a value in excess of £400,000) to the National Fund. There have been no contributions to the fund since 1982.

The trusts created by the Deed

19. There was a dispute (resolved by the judge in his first judgment) about the purpose of the trusts created by the Deed. The Attorney-General argued that the purpose of the Deed was to *reduce* the National Debt; but the other parties argued that its purpose was to *discharge* the National Debt.

20. The judge concluded at [52]:

> "I consider that the defendants' arguments are to be preferred. The requirement to hold the National Fund so as to accumulate income and profits until such time as it has grown to a size sufficient to discharge the National Debt is in my judgment more than a matter of timing or administration; it is an inherent requirement in order for the purpose of the gift to be achieved."

21. He added at [57]:

> "… I consider that the principal purpose of the trust constituted by the Deed was to benefit the nation by accumulating a fund that would in time be applied (either alone or with other funds then available) in discharge of the National Debt. I also consider that there was a subsidiary purpose, namely to benefit the nation by applying part of the National Fund in reduction of the National Debt, if the trustees determined that national exigencies required it."

22. It has been recognised since at least the beginning of the 19th century that a gift of personalty in exoneration of the National Debt is a charitable gift: *Newland v Attorney-General* (1809) 3 Mer 684. Such a gift remains a charitable purpose by virtue of section 3 (1) of the Charities Act 2011 which includes a long list of charitable purposes in section 3 (1) (a) to (l) but goes on to specify in section 3 (1) (m):

> "any other purposes—
>
> (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes … under the old law."

The National Debt then and now

23. The National Debt as at the date of the Deed was approximately £7.6 billion. The market value of the National Fund in 1928 had increased to £536,384, approximately 0.007% of the National Debt. As at 31 July 2020, the National Debt stood at £2,004 billion and the value of the National Fund was £512.2 million, approximately 0.026% of the National Debt. By the time of the judge's second judgment, the National Fund was worth in the region of £600 million, and the National Debt had risen to £2,277.6 billion. The relative values had altered somewhat by the time of the appeal.

24. The experts' second joint statement said:

> "Do the experts agree that at the time of the initial gift to form the National Fund there was (according to ordinary beliefs and knowledge of mankind at that time) a reasonable prospect that it would be practicable to apply the fund representing the initial gift on its own to discharge the National Debt at some future time?
>
> Yes."

25. That statement also said:

> "Do the experts agree that the current value of the National Fund means that its liquidation to pay off part of the National Debt would have a negligible effect on the government's primary budget position and hence on the UK economy?
>
> Yes."

26. This question and answer in the joint statement was based on a sentence in paragraph 17.10 of Professor Ellison's first report in which he added immediately after that sentence:

> "It would not be the "game-changer" in the way that the original benefaction was arguably envisaged."

27. The experts were also agreed that "retiring" the National Debt has become less of a priority for policymakers; and that recent developments in economic theory supported a "more relaxed approach" to paying down the National Debt. As Professor Ellison explained, the change in policymaker priorities coincides with the growth of state education, state health expenditures and social spending which have seen government spending increase from about 15% of GDP before the first world war to around 40% of GDP after the second world war.

28. Based on the agreed expert evidence the judge held in his first judgment:

    i) At the time of the initial gift to form the National Fund there was (according to ordinary beliefs and knowledge of mankind at the time) a reasonable prospect that it would be practicable to apply the fund representing the initial gift (both on its own and, a fortiori, together with other funds that might subsequently be made available) to discharge the National Debt at some future time;

    ii) As at September 2020 the likelihood of the National Fund ever being sufficiently large to discharge the National Debt at a future date was "vanishingly small."

The court's jurisdiction over charities

29. Having decided that the Deed created charitable trusts, the judge went on to consider whether circumstances had arisen which triggered the court's statutory power to alter the original purposes of such a trust. That power, as the judge said, is governed by section 62 of the Charities Act 2011. Section 62 (so far as relevant to this appeal) provides:

> "(1) Subject to subsection (3), the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près are—
>
> (a) where the original purposes, in whole or in part—
>
> (i) …
>
> (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift,
>
> …
>
> (e) where the original purposes, in whole or in part, have, since they were laid down—
>
> (i) …

> (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable, or
>
> (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations."

30. The "appropriate considerations" are defined in section 62 (2):

> "(a) (on the one hand) the spirit of the gift concerned, and
>
> (b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes"

31. The judge held that both section 62 (1)(a)(ii) and section 62 (1)(e)(iii) applied. As to section 62 (1)(a)(ii), he held that for all practical purposes there was no possibility of the National Fund ever being sufficient to discharge the National Debt. As to 62 (1)(e)(iii) he said at [137]:

> "Section 62(1)(e)(iii) is engaged because once regard is had to the spirit of the gift and social and economic circumstances currently prevailing, the original purposes have ceased to provide a suitable and effective method of using the property available by virtue of the gift. The current economic circumstances mean that adherence to the original main purpose would leave the National Fund in limbo indefinitely, with no benefit accruing to charity at all. In agreement with Mr Pearce [counsel for the trustee], that would not be a suitable and effective method of using the property."

32. Having thus decided that the court's jurisdiction to alter original purposes of a charitable gift had arisen, the judge left the precise contents of a cy-près scheme for further consideration. That was the subject-matter of his second judgment, which is the judgment under appeal.

The rival schemes

33. The scheme proposed by the Attorney-General is that the National Fund should be applied now in reduction of the National Debt.

34. The trustee's proposed scheme is that the National Fund should be applied for general charitable purposes in the United Kingdom. It involves the incorporation of a new company to which the National Fund would be transferred, to hold as trustee on the following trusts:

    i) to pay or apply the income thereof for such charitable purposes within the United Kingdom as the Trustee shall in its discretion from time to time think fit; and

ii) either to retain the capital thereof or to pay or apply the same for such charitable purposes within the United Kingdom as the Trustee shall in its discretion from time to time think fit.

35. The new trustee would be obliged, in executing the trusts, to aim to: (1) benefit the whole of the United Kingdom; (2) stimulate altruism in others; (3) benefit future generations as well as the present generation; and (4) collaborate with and support other charities. The third of these aims has now been dropped.

36. The trustee must appoint an advisory board of no less than six or more than twelve members, who, by virtue of their skills and experience, are able to advise and assist the trustee in connection with the payment or application of the fund.

37. The Attorney-General has not engaged with the details of the trustee's scheme; but the trustee is willing to take into account such detailed comments as she may have.

38. The trustee's proposal was supplemented by the expert report of Sir Stephen Bubb who has great experience in the charity sector. The judge summarised Sir Stephen's proposals at [18]:

> "Sir Stephen has suggested three possible models for the new trust. Option A is to make an immediate distribution of the National Fund for charitable purposes. Option B is to establish a new grant-making trust. Option C is to establish a new "wholesaler", making grants and loans through other existing charitable organisations. Sir Stephen favours Option C, as does the Trustee. The Trustee's scheme, however, proposes that it would be for the new trustee, taking such advice as is appropriate, to determine which option to follow."

The effect of the Attorney-General's scheme

39. In his second judgment, the judge considered the effect of the Attorney-General's scheme to apply the National Fund in reduction of the National Debt.

40. The judge summarised Professor Ellison's evidence at [64]:

> "Professor Ellison also provides illustrations of the (extremely limited) effect that using the National Fund to reduce the National Debt could have. Assuming (contrary to the current reality) that the National Debt was not increasing year on year, using the National Fund to retire part of it would result in a reduction in real terms of £5.6 million in the annual interest payments on the National Debt. The total budget for government spending for the financial year 2021/2022 was £934.5 billion, of which £5.6 million is 0.0006%. One practical illustration of the use of £5.6 million is that, if it were allocated entirely to the primary school budget, it would enable real spending per pupil to be raised by £1.19. Alternatively, based on government revenue for the same financial year, it would enable VAT to be reduced from 20% to 19.9997%. Overall, he

> concluded that liquidating the National Fund to reduce the National Debt would "…have a negligible effect on the government's primary spending budget position and hence the UK economy.""

41. The judge went on to say at [68] that:

> "… the National Fund is so small, in comparison to the National Debt, that it will have only a [minuscule] impact in terms of reducing the National Debt. It is also true that, in light of current Government policy and economic circumstances, the National Debt is set to increase by something in the region of £183 billion in this financial year, so that applying the National Fund towards repaying the National Debt would in reality have the effect merely of reducing, by a fractional amount, the extent to which the National Debt *increases* this year."

The statutory jurisdiction

42. Section 67 of the Charities Act 2011 relevantly provides:

> "(1) The power of the court or the [Charity] Commission to make schemes for the application of property cy-près must be exercised in accordance with this section.
>
> (2) Where any property given for charitable purposes is applicable cy-près, the court or the Commission may make a scheme providing for the property to be applied—
>
> (a) for such charitable purposes, and
>
> (b) (if the scheme provides for the property to be transferred to another charity) by or on trust for such other charity,
>
> as it considers appropriate, having regard to the matters set out in subsection (3).
>
> (3) The matters are—
>
> (a) the spirit of the original gift,
>
> (b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and
>
> (c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances."

The judge's conclusion

43. The judge concluded:

i) The spirit of the gift pointed towards the Attorney-General's scheme.

ii) The second factor also pointed towards the Attorney-General's scheme because applying the National Fund in reduction of the National Debt was close to applying it in discharge of the National Debt.

iii) The third factor, namely the need for "suitable and effective purposes," pointed towards the trustee's scheme, but not sufficiently to outweigh the other two matters.

The role of an appeal court

44. The question for the judge was what he considered to be the "appropriate" application of the National Fund, having regard to the three statutory criteria. Clearly, that is an evaluative judgment.

45. The approach of an appeal court to a decision of that kind is explained in the judgment of this court in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [76]:

> "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

A short history

46. Before coming to section 67 in any detail, I begin with a few historical remarks. The original doctrine of cy-près was developed by the Court of Chancery in succession to the ecclesiastical courts. It applied only in very few cases, namely where the original purposes of the charity failed at the outset; where the fulfilment of the original purposes of the trust became impossible to fulfil; or where the funds of a charity became surplus to its needs. In such circumstances the court asserted a power to apply the charitable funds cy-près. That phrase, deriving from Norman French, was interpreted as meaning "as close as possible" to the original purposes of the trust. For example, in the course of argument in *The Ironmongers' Co v Attorney-General* (1844) 10 Cl & F 908, 922 Lord Cottenham LC interjected during the course of argument to say:

> "No, cy-près means as near as possible to the object that has failed."

47. That observation was picked up and applied by Bacon V-C in *Re Prison Charities* (1873) LR 16 Eq 129, where the original purpose of the charity was to relieve debtors imprisoned for debt. The Vice-Chancellor refused to approve a scheme under which the charitable funds were to be applied in the establishment of a school for the children of convicted persons. One of his reasons was that there was "no trace" of an

intention to benefit children or to "encourage or assist education". The only object was (p 149):

> "… to relieve pressing, urgent, immediate want, by freeing the objects of the bounty from the thraldom and enforced idleness of a prison, and restoring them to that liberty which would enable them to gain their livelihoods by their labour."

48. In *Re Campden Charities* (1881) 18 Ch D 310 is an important case. The facts of the case are adequately summarised in the headnote:

> "A sum of money was given by a testatrix in 1643 to be laid out in the purchase of lands of the annual value of £10, one half to be applied towards the better relief of the most poor and needy people of good life and conversation in the parish of Kensington, to be paid to them half-yearly in the church or the porch thereof: and the other half to apprentice one poor boy or more of the parish. At that time Kensington was a small village, but it had now increased to a large and wealthy town, and the income of the charity estate had increased to more than £2,000.
>
> The Charity Commissioners settled a scheme by which they appropriated the income to the following objects: (a) The relief of poor deserving objects of the parish in case of sudden accident, sickness, or distress. (b) Subscriptions to dispensaries and hospitals in the parish. (c) Annuities for deserving and necessitous persons who had resided seven years in the parish. (d) The advancement of the education of children attending elementary schools. (e) Premiums for apprenticeship and outfits for poor boys of the parish. (f) Payments to encourage the continuance of scholars at public elementary schools above the age of eleven years. (g) Exhibitions at higher places of education. (h) Providing lectures and evening classes."

49. Some of the parishioners objected to the scheme on the ground that it diverted what had been an eleemosynary gift to educational purposes, where there was no lack of evidence of deserving objects of the charity ready to take under the old mode of applying the income. Sir George Jessel MR pointed out that the increase in the income from the property held on trust was "something enormous", and that Kensington had changed from being a small village into "a suburb of London, very thickly inhabited with many thousands of people, and containing a large number of houses of great magnitude and value, inhabited by wealthy people." He continued at 324:

> "Again, circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse which were prevalent at the times when these wills were made.

> The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the cy-près doctrine, if there is nothing to prevent its application."

50. James LJ said at 333:

> "The real mode in which the objection was addressed to us was this, "Ours is a more cy-près application than yours." That does not appear to me to be a valid objection; there is no such thing as more or less cy-près on the question of jurisdiction in dealing with what ought to be done with the fund under the change of circumstances. The trustees have been dealing with it according to their cy-près scheme, and it appears to me that the suggestion that their scheme is more cy-près than that which the Commissioners propose to make, at all events does not go to the jurisdiction of the Commissioners to determine what, according to their judgment, is the best mode of dealing with the fund. It appears to me, therefore, that the objection fails."

51. He added:

> "We are dealing with a fund so large that that itself would afford a very good and reasonable ground for applying it cy-près. But what strikes me as the strong thing is this, that to confine the application of that Charity in the present state of things, in the present state of feeling and the present state of the law, to those persons only among the poor of Kensington whose children would be willing to become apprentices to tradesmen or otherwise, and to exclude from the charity all that other mass of poor people who have got the same claim and who do not now find it beneficial for their children to be put out as apprentices, would be, in fact, to exclude from the charity the great majority of that class of poor who it is obvious to my mind Lady Campden contemplated as recipients of the benefit of the charity, and that in doing that we should be in truth defeating the spirit of Lady Campden's gift by following strictly the letter when that letter has become inapplicable."

52. This is one possible origin of the phrase "the spirit of the gift" which is now found in the legislation.

53. Lush LJ agreed with both judgments.

54. The circumstances in which the court could order charitable funds to be applied cy-près were broadened by section 13 of the Charities Act 1960. Critically, however, section 13 (1) specified "the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près." Thus, the concept of cy-près itself was retained. That phrasing was repeated in section 13 of the Charities Act 1993. As originally enacted section 13 (1) applied in a number of cases including that specified in section 13 (1) (e) (iii) namely where the original purposes have:

> "… ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift."

55. Thus, at that stage in considering whether the purposes had ceased to be effective and suitable, the court was required to have regard to the spirit of the gift, but not to anything else. That was changed by section 15 of the Charities Act 2006 which substituted the phrase "the appropriate considerations" for "the spirit of the gift". The spirit of the gift was one of the two appropriate considerations. The other was:

> "… the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes."

56. In addition, section 18 of that Act inserted a new section 14B into the Charities Act 1993 which corresponds to the current section 67. For the first time, therefore, Parliament specified the considerations which had to be taken into account in devising a cy-près scheme.

The task of the court

57. Under section 67 the court's power "must be exercised" in accordance with that section. The task of the court (or the Charity Commission) under section 67 is to decide what are the charitable purposes that "it considers appropriate" having regard to the three matters set out in section 67 (3). There is no necessary hierarchy as between those three matters. But the important point is that it is a value judgment for the court itself (or the Charity Commission) to make. At the same time, the three matters should not be considered in watertight compartments. They each cast light on the others.

58. In addition, the statutory requirement to have regard to the three matters means that the court does not have a free hand. The question is not what does the court think is the best use of £600 million; but what are appropriate alternative purposes for the funds held on these particular charitable trusts? It is not for the court to question the wisdom of the original gift provided that it was a gift for charitable purposes. Moreover, as between the various heads of charity, the law remains neutral.

The spirit of the gift

59. The "spirit of the gift" is a somewhat nebulous phrase. This court considered the meaning of the phrase in *Varsani v Jesani* [1999] Ch 219. The question in that case did not concern the form of a cy-près scheme, but whether the court had jurisdiction to direct that such a scheme be drawn up. Morritt LJ (with whom both Sir Stephen Brown P and Chadwick LJ agreed) said at [24]:

> "… the concept is clear enough, namely, the basic intention underlying the gift or the substance of the gift rather than the form of the words used to express it or conditions imposed to effect it. … The court is not bound to follow the spirit of the gift but it must pay regard to it when making the value judgments required by some of the provisions of section 13(1)."

60. Chadwick LJ said at 238:

> "The need to have regard to the spirit of the gift requires the court to look beyond the original purposes as defined by the objects specified in the declaration of trust and to seek to identify the spirit in which the donors gave property upon trust for those purposes. That can be done, as it seems to me, with the assistance of the document as a whole and any relevant evidence as to the circumstances in which the gift was made."

61. In *White v Williams* [2010] EWHC 940 (Ch), [2010] PTSR 1575 at [21] Briggs J held that the phrase bore the same meaning in what is now section 67 (3) (a) of the 2011 Act.

62. Mr Henderson, for the Attorney-General, argued that the spirit of the gift was the making of a gift to the Nation from Mr Farrer's private funds for the purpose of reducing the amount of public borrowing and of encouraging others to do the same. Mr Pearce KC, for the trustee, argued before the judge that the spirit of the gift had three elements: (1) a desire to benefit citizens in the whole of the UK; (2) a desire to benefit future generations, in preference to the generation in existence at the time of the gift; and (3) a desire, by setting an example, to stimulate altruism in others. The trustee does not pursue the second of these elements on this appeal.

63. One of the issues that fell for determination in the judge's first judgment was whether Mr Farrer had a general charitable intent. That was, in essence, a question of fact (albeit that the judge held that his findings in that respect were *obiter*). Although a general charitable intention may be conceptually different from the spirit of the gift, I do not think that Mr Farrer's state of mind can have changed according to the nature of the question asked. As to that the judge said at [116] of that judgment:

> "In addition:
>
> 1) [Mr Farrer] himself, in words which were made public in Barings' letter of 26 January 1928, described the gift as being placed in Barings' hands as "Trustees for the Nation", and positioned the gift within the same bracket as more frequent gifts "to the Nation" (such as historic sites, building and works of art), albeit one having a "dull objective"; and
>
> 2) The fact, as demonstrated in numerous pieces of correspondence, that part of [Mr Farrer's] desire was to encourage others to make similar gifts to the nation supports the view that he had a broader intention of benefitting the nation beyond the specific purpose of discharging (or in some circumstances reducing) the National Debt as identified in the Deed."

64. He added at [121]:

> "… looking at the terms of the Deed and the extrinsic evidence as a whole … [Mr Farrer] had a general charitable intention to

> benefit the nation beyond the specific purpose of discharging the National Debt (or reducing it in the specific circumstances of national exigencies)."

65. In his second judgment, however, the judge accepted the Attorney-General's much narrower formulation of the "spirit of the gift". Thus, he held at [46] that:

> "… the spirit in which this gift was given was to benefit the Nation, and all of its citizens, by attempting to free it from debt."

66. The judge gave a number of reasons in support of his conclusion. First, he considered section 9 (1) of the 1927 Act, which referred to funds being applied in *reduction* of the National Debt, as being a relevant factor. I would not usually consider that the terms of an Act passed by *Parliament* is of direct relevance to the spirit in which a *private individual* made his gift. Parliament may well have decided to encourage others to set up accumulation funds with more limited objectives than Mr Farrer had in mind. On the other hand, as appears from Lord Revelstoke's letter, the form of the legislation had been agreed by Mr Farrer before the Act became law and before he made his gift.

67. The judge's second reason was that "in order to be a valid charitable gift, a gift to the Nation had to be used in reduction of the National Debt." Here, I think, the judge was mistaken. A gift to the Nation is a charitable gift, even if it is not required to be applied in reduction of the National Debt. Two examples will suffice. In *Re Smith* [1932] 1 Ch 153 the testator gave his residuary estate "unto my country England to and for – own use and benefit absolutely." This court held that it was a valid charitable gift. Lord Hanworth MR considered a number of earlier cases, and said at 169:

> "The result is that I come to the conclusion that there is a definitive purpose - namely, that the bequest is to be for England. That is good in the same sense that, although general, when the sum bequeathed comes to be used it is to be applied to charitable purposes… There is no area or purpose of distribution suggested which is not charitable. Why not then give effect to the plain meaning that it is for the advantage, within the meaning of the rule as to the interpretation of the word "charitable," of the inhabitants of England?
>
> In my opinion, therefore, the Attorney-General succeeds upon his appeal. Under these circumstances the right course is to hand this money over to the person designated under the sign manual by the supreme head of the country for the advantage of the country, England. That supreme head, as Lord Eldon said, being the parens patriae, will cause it to be distributed in accordance with the law applicable to charitable moneys."

68. Lawrence LJ said at 171:

> "The effect of the decision in *Nightingale v Goulburn* is that a bequest to a trustee for the benefit of Great Britain is not simply a bequest to the trustee for public purposes generally, which would be void for uncertainty, but is a bequest for the benefit of a particular class, albeit a large class, coming within some definite limits and is, therefore, a bequest for a specified public purpose and, as such, a valid charitable bequest."

69. Romer LJ said at 174-5:

> "From the judgment of Lord Cottenham [in *Nightingale v Goulburn*], it is, in my opinion, reasonably plain that the effect of it was this: that a gift for the benefit of the country Great Britain was a good charitable gift and that, that being so, it did not cease to be a good charitable gift because the gift was to Great Britain through the Chancellor of the Exchequer."

70. In *Latimer v Commissioners of Inland Revenue* [2004] UKPC 13, [2004] 1 WLR 1466 Lord Millett, giving the opinion of the Privy Council, said at [38]:

> "It is sometimes possible to impress a gift in favour of a recipient which is not itself a charity with an implied trust which limits the application of the property comprised in the gift to charitable purposes. In *In re Smith* [1932] 1 Ch 153 , a gift "unto my country England" was construed as a gift for the benefit of the inhabitants of England and, by analogy with the cases on gifts to a parish, town or city, as impressed with a trust that it be applied for charitable purposes only. In *Thellusson v Woodford* (1799) 4 Ves 227 a gift over to the Crown was held to be impressed with a charitable trust for the relief of the national debt and so charitable: see also *Newland v Attorney General* (1809) 3 Mer 684, *Ashton v Lord Langdale* (1851) 4 De G & S 402 and *Nightingale v Goulbourn* (1847) 5 Hare 484; (1848) 2 Ph 594, where a testamentary gift to the Chancellor of the Exchequer was expressly impressed with a trust for Great Britain."

71. (We were told that, in practice, a gift to the nation without any specified purpose is in fact applied in reduction of the National Debt, although by what authority it is so applied, rather than being used for different charitable purposes, is obscure.) Nevertheless, although the judge was mistaken in supposing that the gift could not have been charitable if simply expressed to be for the benefit of the nation, the fact remains that Mr Farrer's immediate intention was to benefit the nation in a particular way, namely by discharging the National Debt; or by reducing it in the circumstances envisaged by the proviso to clause 3 (a) of the Deed.

72. The judge next considered the proviso to clause 3 of the Deed. He regarded that as describing a subsidiary purpose of the trust, namely, to reduce the National Debt if exigencies required it. Mr Pearce argued that this feature of the Deed supported the trustee's case because it showed that Mr Farrer was willing to permit the trustee to impair the National Fund's primary purpose. I do not agree. Although it is true that

Mr Farrer was willing to permit the trustee to impair the National Fund's primary purpose, he was only willing to do so in one particular way, namely by reducing the National Debt.

73. The judge's fourth reason was that "in the key correspondence emanating from Mr Farrer, or others on his behalf, references to a gift to the Nation were invariably qualified by reference to the repayment or redemption of the National Debt (either expressly, or by implication)." I agree, but that does not necessarily mean that a gift to the nation formed no part of the spirit of the gift. Mr Pearce relied on the letter of 26 January 1928 from Barings to Mr Churchill (which itself quoted from Mr Farrer). The relevant passage is:

> "Gifts to the Nation of historic sites, buildings and works of art, are happily frequent; gifts to repay debt comparatively rare, this last being a dull objective but bringing with its accomplishment certain comforts of its own."

74. Mr Pearce argued (both before the judge and before us) that Mr Farrer was equating his gift with other gifts to the nation. The judge responded:

> "I disagree with that reading of the letter. On the contrary, Mr Farrer was *contrasting* his gift "to repay debt" from those other types of gift to the Nation."

75. I do not share the judge's reading. To my mind, the contrast that Mr Farrer was drawing was between eye-catching gifts to the nation on the one hand, and dull gifts to the nation on the other.

76. The fifth reason was that:

> "given the relative value of the National Fund (at the time of the gift) – approximately 0.007% of the National Debt – it was not likely that it would ever be sufficient to do more than effect a partial reduction of the National Debt. It was of course hoped that the National Fund would increase because others were indeed prompted to add to it, but the purpose was more likely to be achieved because it would at some point be sufficient *together with other funds* (including the sinking fund the Government was committed to creating) to discharge the National Debt. While this does not detract from the *purpose* of the Deed being to discharge the National Debt (for reasons set out in the First Judgment), it does provide some support for the conclusion that the spirit of the gift was to *assist* in that end, rather than to achieve it by itself."

77. But this contrasts with his finding in the first judgment (based on the expert evidence) that at the time when the National Fund was created, there was a reasonable prospect that the National Fund *both on its own* and together with other funds might be sufficient to discharge the National Debt at some future time. He repeated that point at [104] of his first judgment:

> "In addition to the analysis carried out by the experts as to the likelihood of the National Fund, *as originally constituted*, growing to a sufficient size to discharge the National Debt on its own, there was also the reasonable possibility that others would be prompted by [Mr Farrer's] gift to make similar donations of their own in sufficient numbers and amounts to contribute to the discharge of the National Debt." (Emphasis added)

78. Indeed, that perception was an essential part of the judge's conclusion in his first judgment that this was not a case of initial impossibility. It is not easy to see why the judge departed from that perception in his second judgment.

79. It was (and is) common ground that part of Mr Farrer's intention in establishing the Deed was to encourage others to do something similar. But the judge did not find that "particularly illuminating". He gave two reasons for that view. As he put it at [47]:

> "Encouraging others to do something similar is not a charitable purpose to which the funds could be applied. The important issue is "similar to what?""

80. It is, I think, common ground that despite the fact that encouraging altruism is not itself a charitable purpose, it is at least capable of being a component of the spirit of the gift. It seems to me, therefore, that a desire to encourage altruism was at least an element of the spirit of the gift. But the judge's second reason has considerable force. Mr Farrer's immediate desire to encourage altruism in others was not a general desire, but a desire to encourage others to contribute towards the discharge of the National Debt. Weighed against that, however, is the judge's conclusion in his first judgment that Mr Farrer's general charitable intention was to benefit the nation *beyond* the specific purpose of discharging the National Debt (or reducing it in the specific circumstances of national exigencies).

81. Even accepting that the spirit of the gift included a desire to benefit the nation beyond the specific purpose of the Deed, I am unable to travel all the way to Mr Pearce's desired conclusion that the spirit of the gift was to benefit the nation and to encourage altruism without any restriction on the charitable purposes by which that could be done. It is not right, in my judgment, to pick out only one element (or two elements) of the spirit of the gift without regard to the remaining elements. The flaw in Mr Pearce's formulation is that it strips out entirely one important element of the gift. The purposes of the original gift at least colour the spirit of the gift. What we are concerned to identify is the spirit of "the gift"; that is to say the particular gift: not some alternative gift that the donor, actuated by the same or similar motives, could have made but did not in fact make. In *Varsani*, for example, the spirit of the gift was to provide facilities for a small but united community of followers of particular Hindu teachings; not a simple desire to advance religion. In *White* the spirit of the gift was that a building in Lewisham was to be used as the place of worship and witness of a particular congregation; and again, not simply for the advancement of religion. Even in *Campden's Charity*, the spirit of the gift stayed within the broad outline of the charitable purposes of the original gift.

82. I agree with Mr Pearce that in deciding whether a new purpose is "appropriate" the court is not necessarily constrained by the spirit of the gift. It is no more than a factor to which the court must "have regard". In some cases, the spirit of the gift may be co-extensive with the purpose of the gift, which *ex hypothesi* has failed. In such cases the court may well order a scheme for alternative purposes which are not within the spirit of the gift. But where, as in this case, the judge has found that the secondary purpose of the gift is still capable of fulfilment, there is no reason to travel outside the spirit of the gift.

83. Moreover, there is a good reason for a scheme to conform with the spirit of the gift (even if not its purpose). Morritt LJ adverted to this in *Varsani* at [29]:

> "In rejecting the submissions for the Attorney-General I do not seek to undermine or belittle in any way the concerns expressed by his counsel to which I have already referred. First, there is his concern that potential donors should not be deterred by a belief that their intentions will be overridden by a too ready use of the cy-près jurisdiction. I agree; but that problem has to be set beside the equal but opposite problem that in circumstances unforeseen by the donor his or her bounty may not achieve all that was intended or was reasonably feasible."

84. The same point applies in relation to an over-broad use of the cy-près jurisdiction once a cy-près event has occurred.

85. In short, even though I have some doubt about parts of the judge's reasoning, I agree with his ultimate formulation of "the spirit of the gift"; and I also agree that it points towards the Attorney-General's scheme.

Closeness of purpose

86. The second factor is "the desirability of securing that the property is applied for charitable purposes which are close to the original purposes". The original purposes mean the purposes for which, as a matter of interpretation, the original gift was made. They do not encompass the broader considerations which may be relevant in ascertaining "the spirit of the gift". In this case, therefore, the original purposes were the discharge of the National Debt, and its reduction in certain circumstances.

87. The judge-made law required that the application of charitable funds cy-près should be to purposes "as near as possible to the object that has failed". Section 67 clearly envisages some relaxation to that principle. Although in most cases it will be desirable to apply the funds to a purpose that is close to the original purpose, that is not necessarily so. Since a cy-près trigger may arise where the original purposes have become useless (or even harmful to the community) it would make little sense for the court to search for an alternative purpose which was close to the original purpose. Lord Simonds made this point in *National Anti-Vivisection Society v IRC* [1948] AC 31 at 74:

> "But this is not to say that a charitable trust, when it has once been established can ever fail. If by a change in social habits and needs, or, it may be, by a change in the law the purpose of

> an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in educational charities to the Minister of Education and ask that a cy-près scheme may be established and I can well conceive that there might be cases in which the Attorney-General would think it his duty to intervene to that end. A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed, with the result that (unless a general charitable intention could be found) a gift for that purpose would fail."

88. In addition, as the judge also held, the desirability of a close purpose is not (necessarily) a limiting factor, because the court need do no more than "have regard" to that factor. As Tudor on Charities (11th ed) puts it at paragraph 11-007:

> "However, because the consideration is merely as to "desirability" and is merely one matter to which the court and Commission are to have regard, (i) it is more flexible in its application than the old law and (ii) it removes the need for some of the mental gymnastics which were performed under the old law in attempts to remain within its constraints."

89. In this case the judge held in his first judgment that the purpose of the gift was to discharge (not reduce) the National Debt at some time in the future. It was, in Professor Ellison's phrase, intended to be a "game-changer". The application of the National Fund now in reduction of the National Debt, which would have a "minuscule" or "negligible" effect, would undoubtedly not fulfil that primary purpose. On the other hand, the Deed did envisage that the National Fund could be used to reduce the National Debt if exigencies so required. As Sir Launcelot Henderson said in argument, the effect of the Attorney-General's scheme is to promote the secondary purpose of the Deed into the primary purpose; and the monies in the National Fund will be used in the way that Mr Farrer intended, even though they will not have his desired "game-changing" effect.

90. The Attorney-General objects that Zedra's proposed scheme is not "close" to the original purpose of the National Fund. I agree. It will have no effect whatsoever on the National Debt. Nor will it necessarily benefit the nation as a whole or encourage altruism. Mr Pearce suggested that the trustees of the new fund might make grants to charity on the basis of matching funds, but there is no requirement for them to do so. He also said that the administrative provisions of the scheme were robust enough to permit the court (or the Charity Commission) to be confident that the trustees would exercise their discretion responsibly and in accordance with the aims set out in the scheme (which include both benefiting the nation and encouraging altruism). But that, to my mind, sets far too much store on the administrative structure of the new fund and downplays the width of its objects. Moreover, the making of grants to individual charities would not, of itself, benefit the nation as a whole.

91. The Attorney-General's scheme is undoubtedly closer to the original purpose than the trustee's scheme. But that is not necessarily the acid test as the judgment of James LJ in *Campden Charities* shows.

92. Where, as here, one proposed purpose is close to the original purpose; and the other is not, that is at least a factor to be taken into account as pointing towards the former. That is what the judge did; and I do not think that it can be said that he was wrong to do so.

Purposes which are suitable and effective

93. The third factor requires the court to have regard to "the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances". There are two parts of this factor which I think are worth stressing. First, for the charity to have suitable and effective purposes is more than a desire; it is a *need*. Second, there is the question: suitable and effective for what? Mr Pearce submitted that it meant suitable and effective for the purposes of providing charitable benefits; and I agree with him as far as that goes. But since reducing the National Debt *is* a charitable purpose, I do not consider that that takes us very far. The judge made this point at [73].

94. Mr Pearce also submitted that the question of suitability and effectiveness must be considered by reference to the new proposed purposes without regard to what has gone before. It is wrong to evaluate effectiveness by reference to the purpose of the original gift which, *ex hypothesi*, has failed. Factor (c) looks at the "here and now" and must be measured against the yardstick of current social and economic circumstances.

95. I agree with Mr Henderson, however, that what is "suitable" means what is suitable for *this* charity in relation to *these* funds held on *these* charitable trusts. These questions cannot be divorced from the spirit of the gift or its original purposes. This factor does not, in my view, empower the court to consider suitability in the abstract.

96. The question of "effectiveness" is more elusive. Mr Pearce submitted that the word "effective" is used in its primary dictionary sense, namely:

> "Powerful in effect; producing a notable effect; effectual."

97. A reduction in the National Debt which will have only a minuscule or (in the agreed experts' statement) a negligible effect cannot be described as effective. Indeed, since the experts agreed that the effect would be *negligible*, it is an effect which can for practical purposes be ignored; or as the Oxford English Dictionary puts it:

> "so small or insignificant as not to be worth considering."

98. As Mr Pearce powerfully submitted, adoption of the Attorney-General's scheme would make no practical difference. It would change nothing; and the National Fund would disappear except as a book entry. On the other hand, if the trustee's scheme were to be adopted the funds could be used to produce real good.

99. The judge recorded Mr Pearce's argument on this point at [57] and [58]:

> "[57] As Mr Pearce pointed out, the court is to have regard to the "need" for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances. That is to be contrasted with the "desirability" of securing that the property is applied for purposes close to the original purposes.
>
> [58] This is explained by the fact that one of the triggering events for an application of charitable property cy-près is if the original purposes have ceased to provide a suitable and effective method of using the property, having regard to the spirit of the gift and the prevailing social and economic circumstances. There would be no point in applying the property to new purposes, if those were similarly unsuitable and ineffective."

100. I am not entirely convinced that the judge's explanation for the word "need" is correct. I consider that it is a broader point than simply avoiding a new cy-près event. As the Charity Commission put it in their guidance on cy-près:

> "There is no point in trying to preserve a particular aspect of a charity's trusts if the new purposes would not, as a result, be suitable and effective in the light of current social and economic circumstances."

101. Nevertheless, the judge accepted the argument that the third factor, although pointing towards the trustee's scheme, did not trump the others. He said at [70]:

> "There is considerable force in Mr Pearce's argument that to apply the National Fund in discharge of the National Debt would make nothing but a [minuscule] dent in the overall volume of the National Debt. He submitted that far from being a suitable and effective use of the funds, application of the National Fund in accordance with the Attorney-General's scheme would be "a futile, symbolic gesture". I also have sympathy with the contention that a great deal of good could be done if the National Fund were applied to particular charitable causes. Mr Pearce anchored these points in the language of section 67(3)(c), which refers to purposes which are "suitable and effective"."

102. But, as mentioned, he said that this did not tip the balance in the trustee's favour. He explained his reasons as follows:

> "[73] It is common ground that *any* gift to the nation for the purposes of repaying the National Debt is a valid charitable gift, irrespective of the amount of National Debt that could be repaid by the gift. However small the amount by which the National Debt is reduced, the Nation (which is the debtor) benefits directly by that amount. While superficially attractive, I do not think that the utility of gifts to repay the National Debt

> is measured by the extent to which the citizens of the Nation receive any benefit themselves. In other words, it is not appropriate to measure the effectiveness of a gift to repay the National Debt to enquire what use could be made of that sum if hypothecated towards some particular item of public spending. The fact is that, in the eyes of Mr Farrer and others motivated to make charitable gifts in reduction of the National Debt, the National Debt is itself a burden on the Nation and to reduce that burden on the Nation is a worthy object."

103. The question of hypothecation was, in my judgment, a distraction. There is no suggestion that any sum paid into the National Debt from the National Fund will in fact be hypothecated. It is thus a purely hypothetical hypothecation designed only to emphasise the enormous gap between the National Debt and the National Fund. As Mr Henderson submitted, the point of discharging (or reducing) the National Debt is to leave it to the government of the day to decide what to do with the public expenditure thus relieved. To the extent that the National Fund reduces the National Debt (which is a charitable benefit) it is effective to provide charitable benefits.

104. If we were considering the question of "effectiveness" in the abstract, there would be much to be said for Mr Pearce's point. Even so, it must not be forgotten that the ultimate aim of the National Fund was that it *would* disappear except as a book entry, leaving it to the government of the day to decide what to do with the public expenditure thus relieved. It cannot be said that it was any part of Mr Farrer's intention to establish a permanent endowment fund for general charitable purposes. As Mr Henderson put it, once the National Fund is paid over to the National Debt Commissioners, the charitable purpose is fulfilled.

105. Whether Mr Farrer would have made the same gift today can be no more than a matter of speculation. The fact is that he made the gift that he did, and specified the purposes for which he made it. As I have said, it is not for us to question the wisdom of the gift.

Result

106. In my judgment, the judge's evaluative conclusion is one which he was entitled to reach. I would dismiss the appeal.

Lady Justice Asplin:

107. I agree.

Sir Launcelot Henderson:

108. I agree.