NEW SQUARE Chambers

Thursday 7 December 2023

CASE NOTE: ZEDRA FIDUCIARY SERVICES (UK) LTD V ATTORNEY GENERAL [2023] EWCA Civ 1332

Chloe Rixon

ZEDRA FIDUCIARY SERVICES (UK) LTD v ATTORNEY GENERAL

On 15 November 2023, the Court of Appeal clarified the approach to the making of a cy-près scheme by the Court (or the Charity Commission) when exercising its power under s.67 Charities Act 2011.

FACTS

On 9 January 1928, a deed of trust was executed to establish the National Fund, a charitable trust with the purpose of discharging the National Debt.

By the time of the proceedings in the High Court, the National Fund was worth in the region of £600 million, whereas the National Debt had risen to over £2,200 billion. In his first Judgment of November 2020, Zacaroli J found that the original purpose of the trust had failed, and that the funds should be applied cy-pres, with the scheme to be determined at a later hearing. By a Judgment of 21 January 2022, the Judge concluded that the cy-près scheme proposed by the Attorney-General, for the National Fund to be applied in reduction of the National Debt, was more appropriate than the rival scheme proposed by the trustee, for the National Fund to be applied for general charitable purposes in the United Kingdom.

The trustee appealed against the second judgment ([2022] EWHC 102 (Ch)).

CHARITIES ACT

As is relevant to making a cy-près scheme, s.67 of the Charities Act 2011 provides:

"(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 "relevant charity" means the charity by or on behalf of which the property is to be applied under the scheme."

DECISION

In determining whether the High Court judge was wrong, by some identifiable flaw in his evaluative judgment of what the appropriate application of the National Fund was, the Court of Appeal considered the three matters set out in s.67(3), above. It was noted, by way of context, at [57] that:

"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."

Taking each matter in turn:

a) The Attorney-General's much narrower interpretation of "spirit of the gift" was preferred, when considering the Trust deed, because it is not right to for the trustee to pick out one element of the spirit of the gift (benefit to the nation) without regard to the remaining elements. There was no reason to travel outside of the spirit of the gift where the secondary purpose of the gift (a reduction in the debt) is capable of fulfilment.

b) Determining the closeness of purpose encompasses narrower considerations than under the spirit of the gift. So it was not wrong to consider as a factor that the Attorney-General's proposed purpose was closer to the original purpose than that of the trustee's scheme, and the Attorney-General's scheme was undoubtedly closer. However, this was not necessarily the acid test for future cases.

c) It was noted that 'suitable' related to the particular charity and property, and was not an abstract concept. The hypothecation of the negligible 'effectiveness' of the National Fund reducing the National Debt in the abstract was a distraction. To the extent that the National Fund reduces the National Debt, which is a charitable benefit, it is effective to provide charitable benefits. In any event, this factor alone could not trump the other two matters

+44 (0)20 7419 8000
clerks@newsquarechambers.co.uk
newsquarechambers.co.uk

Chambers RANKED IN UK Bar 2024 New Square Chambers
The LEGAL 500 UNITED KINGDOM LEADING SET 2024

in favour of the trustee's scheme, even if it was more effective at producing a real good. It is not for the Court to question the wisdom of the gift.

For these reasons, the Court of Appeal agreed that the Attorney-General's scheme was preferred, so the trustee's appeal was dismissed.

TAKE AWAY POINTS

The application and interpretation of s.67(3) has been clarified through the in-depth analysis by the Court of Appeal. I highlight the following:

a) There is no 'trump card' in the three matters in s.67(3);

b) The court does not have a free hand to decide what it thinks the best use of the gift would be. As see above, even though the money could arguably have been put to better use under the trustee's scheme, the question is simply what are the appropriate alternative purposes for the funds held on these particular charitable trusts;

c) An appeal against the exercise of a Judge's evaluation, as to the appropriate application of property cy-pres, may be challenging. Here, although the Court of Appeal doubted parts of the reasoning of the High Court judge, particularly in relation to the spirit of the gift and the purpose being suitable and effective, this did not prevent it from agreeing that the Attorney-General's scheme was preferred.

CHLOE RIXON (pupil barrister)

chloe.rixon@newsquarechambers.co.uk

newsquarechambers.co.uk/barristers/chloe-rixon-pupil/

linkedin.com/in/chloe-rixon-42375b11a/