

9,1959

No. 28 of 1958.

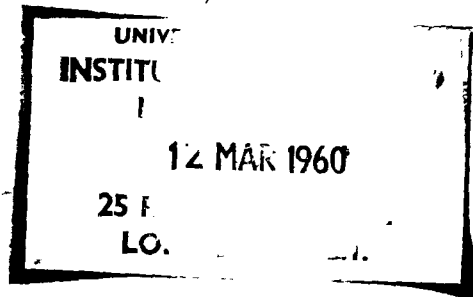
In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

IN THE MATTER of the TRUSTS of the WILL of FRANCIS GEORGE
LEAHY late of Harefield and Bungendore in the said State,
Grazier, deceased

BETWEEN

10 DORIS CAROLINE MARY LEAHY, FRANCIS
JOHN LEAHY, HENRY JOSEPH LEAHY,
DOROTHY MARGARET HALL, JAMES
PATRICK LEAHY, MICHAEL MAURICE
LEAHY, GEORGE BONAVENTURE LEAHY
and GENEVIEVE MARY REDDY . . .



Appellants

AND

55575

20 HER MAJESTY'S ATTORNEY-GENERAL IN
AND FOR THE STATE OF NEW SOUTH
WALES and JOHN FRANCIS DONNELLY,
CLEMENT OSBORNE WRIGHT and JOHN
BEDE MULLEN, Executors and Trustees of the
Will of the late FRANCIS GEORGE LEAHY . . .

Respondents.

Case for the Respondent

HER MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE STATE
OF NEW SOUTH WALES.

RECORD.

30 1. This is an Appeal brought by special leave granted on 19th May, 1958, from a Judgment and Order of the High Court of Australia dated the 11th March, 1958, by which the High Court allowed an appeal by the present Respondent the Attorney-General from part of a Judgment and Order and dismissed an appeal by the present Appellants from another part of the Judgment and Order of the Honourable Frederick George Myers, a Judge of the Supreme Court of New South Wales sitting in Equity dated the 11th April, 1957. The last mentioned Judgment and Order determined questions raised in an Originating Summons as to the construction and validity of certain dispositions made by the Will of one Francis George Leahy deceased.

pp. 96-98.

pp. 92-94.

pp. 34-44.

pp. 1, 2.

2. The dispositions of the Will, the construction and validity of which were in issue before the High Court, and which are in issue in this appeal, are those relating to the testator's property known and described as "Elmslea" and those relating to his residuary estate. These dispositions, which appear in Clauses 3 and 5 of the Will, are as follows :—

p. 7.

" 3. AS TO my property known as ' Elmslea ' situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon UPON TRUST for such Order of Nuns of the Catholic Church or the Christian Brothers as my said Executors and Trustees shall select and I again direct that the selection of the Order of Nuns or Brothers as the case may be to benefit under this clause of my Will shall be in the sole and absolute discretion of my Executors and Trustees."

p. 8.

" 5. AS TO all the rest and residue of my estate both real and personal of whatsoever kind or nature and wheresoever situated UPON TRUST to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such Convents as my said Executors and Trustees shall select either by way of building a new Convent where they think necessary or the alteration of or addition to existing buildings occupied as a Convent or in the provision of furnishings in any such Convent or Convents and I DECLARE that my said Executors and Trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the Order or Orders of Nuns who shall benefit under the terms of this clause the receipt of the Reverend Mother for the time being of that particular Order of Nuns or Convent shall be a sufficient discharge to my said Executors and Trustees for any payment under this clause."

pp. 12-14.

3. It was established by the evidence that, in a canonical sense, there was a distinction between Orders of Nuns and Congregations of Sisters, but that the distinction would not generally be known to the laity, of which the testator was one, and would be observed by Clergy only when the distinction was important. At other times even Clergy would use " Order," " Congregation," " Nun," " Sister " without regard to this distinction. Of Orders of Nuns most were active orders but some few being contemplative Orders were not charitable in the legal sense. There were also Congregations of Sisters which were not Orders in the view of the Canon Law. There existed in Rome a complete list of all Orders of Nuns and Congregations of Sisters throughout the world. The Christian Brothers was a Congregation of religious men carrying on educational work, and therefore charitable in a legal sense.

p. 36.

4. As to the disposition relating to " Elmslea," Mr. Justice Myers held it to be valid. His Honour took the view that the phrase " Order of Nuns " referred to associations of women properly described, according to the Canon Law of the Roman Catholic Church, as Orders of Nuns and that there was no restriction as to place in the Will and nothing in it which would require restriction to Orders in New South Wales or Australia.

p. 35.

pp. 35, 36.

He further held that once the recipient, whether an Order of Nuns or the Christian Brothers, had been selected, the gift was absolute and there being no uncertainty or perpetuity, the disposition was valid. p. 36.

5. In the High Court of Australia the members unanimously, but for different reasons, held the disposition of "Elmslea" was valid. The members of the Court were unanimous in holding that the phrase "Order of Nuns" was not used in its canonical sense but included both Orders of Nuns and Congregations of Sisters. Mr. Justice Williams, Mr. Justice Webb and Mr. Justice Kitto held it valid as being a gift, once selection took place, to the selected institution for its general purposes or to the members for the time being, and therefore as involving no element which would require, for the validity of the disposition, that it be for purposes or institutions charitable in the legal sense. These members of the Court, therefore, held the disposition valid without regard to its charitable content, though there was some difference in that Mr. Justice Williams and Mr. Justice Webb (*contra* Mr. Justice Kitto) expressed the view that the Orders referred to were only Orders or Congregations established and carrying on activities in New South Wales at the date of the testator's death. pp. 53, 81, 87. pp. 53, 82, 87. pp. 81, 87. p. 82.

The Chief Justice (Sir Owen Dixon) and Mr. Justice McTiernan held that the disposition did not amount to an absolute gift to the members for the time being of the selected institution, or to a gift to such institution free to be dealt with for the general purposes thereof, but did amount to an endowment of such institution and, therefore, involved, if it were to be upheld as valid, that only institutions charitable in the legal sense could be selected. These members of the Court then held that Section 37D of the Conveyancing Act, 1919-1954, was applicable to the phrase "Order of Nuns," and restricted it to such Orders of Nuns or Congregations of Sisters as were charitable in the legal sense. p. 58.

6. As to residue, it was held by Mr. Justice Myers that neither the use of the word "amenities" nor the use of the phrase "Order of Nuns," in the circumstances, caused uncertainty and that there had not been any unlawful delegation of testamentary power. He held, however, that the trusts were such that unless the Orders were restricted to those which were charitable, the trusts would be invalid, since they involved the devotion of the property to purposes not necessarily charitable for a period not restricted to that permissible under or by analogy to the rule against perpetuities. His Honour considered Section 37D of the Conveyancing Act, and held that it did not apply so as to save the disposition of residue, which accordingly failed. pp. 37, 38. pp. 39-42.

7. In the High Court the Chief Justice and Mr. Justice McTiernan were of the view that neither the use of the word "amenities" nor the possible meanings of the word "Order"—that is Order or Congregation and local or world wide—created uncertainty. The convents which might be selected to benefit were those of Orders or Congregations, and no territorial limitation was to be placed upon the class of persons intended to benefit by the trust. It was then held that, as the other submissions of the present appellants, namely, that the trust failed for uncertainty because it was for purposes not exclusively charitable, and because it

p. 61. was an unlawful delegation of testamentary power and because it tended to a perpetuity, would be excluded if the trusts were for purposes wholly charitable, to uphold any of these submissions would be to do so for the reason forbidden by Section 37D. The question was whether this was a case when some non-charitable and invalid purpose is or could be deemed to be included in any of the purposes. They took the view that it was and that Section 37D applied so as to restrict the trust to the charitable purpose.

p. 63.

pp. 70, 71. Mr. Justice Williams and Mr. Justice Webb held that there was no unlawful delegation of testamentary power, because the class of amenities and the Order of Nuns to benefit (which they again construed as covering both Orders and Congregations, but limited to those carrying on work in New South Wales) were both sufficiently defined and that what the testator had done was to give his Trustees what was in effect a special power of appointment amongst them. Their Honours, however, held that the trusts of residue tended to a perpetuity and not being exclusively charitable would, on this ground, fail unless Section 37D applied. They held the Section did apply. 10

p. 81.

pp. 84, 85. Mr. Justice Kitto held that the prime enquiry as to any attempted exercise of testamentary power, was whether it was in favour of indicated individuals or bodies in terms such that the gift would be taken beneficially and absolutely, or whether, on the other hand, it was in favour of purposes. If the latter, it would be invalid for uncertainty of objects unless the purposes were wholly charitable. If such purposes were non-charitable, the gift failed as an exercise of testamentary power and one never reached the question of perpetuity. If charitable, the exercise was valid and, since it was in favour of charity, again one was not troubled by any question of perpetuity. Since the gift of residue was for purposes not exclusively charitable, it would, in this case, fail for uncertainty of objects unless Section 37D saved it, as he held it did. 20

p. 86.

p. 88.

p. 91. 30

pp. 41, 42. 8. As to the application of Section 37D, Mr. Justice Myers declined to apply it, taking the view that it only applied where there was a distinct and severable expression of charitable intent, so that it appeared necessarily from the Will that the testator had contemplated charity. He held that this did not necessarily appear in the present case. In the High Court of Australia, the Chief Justice and Mr. Justice McTiernan held that the Section, while not applying where a range of objects or purposes was wholly subjective, did apply where there was indicated an intention to authorise application to what was a charitable purpose, even though the description was so wide that it might go beyond charity. They thought the present description was, *prima facie*, charitable in the sense that it was known that most Convents would be objects of charity in a legal sense. 40

p. 61.

p. 63.

p. 81. Mr. Justice Williams and Mr. Justice Webb held that the section would apply wherever a word or phrase was used descriptive of the purposes amongst which selection was to be made, and that word or phrase not merely included charitable purposes but also did, or could be deemed to, include non-charitable purposes.

Mr. Justice Kitto held the section applicable whenever there was a description of permissible purposes and the description comprehended, but was not confined to, purposes legally charitable. p. 91.

9. The Respondent respectfully submits, as to the disposition of residue—

10 (A) That there is no uncertainty destructive of the disposition in the meaning of the phrase "Order or Orders of Nuns" arising from restriction to a particular locality. The testator has given no indication that these words are to be restricted to Orders carrying on, at his death or at any later time, in New South Wales or in Australia. It is true that the Will is that of a New South Welsh man, and deals with his property in that State. However, it is only natural that he should appoint New South Welsh persons as Executors and Trustees. It is also true that in several other places in the Will he has conferred benefits upon named religious bodies which were operating in New South Wales. But this cannot control the meaning of the disposition of the residue. Nor can the fact that the trusts of residue are active trusts control it, particularly since the Trustees are given authority to accept the receipt of the Reverend Mother for the time being of the Order of Nuns or Convent selected for the moneys, thus freeing them of responsibility to see to, or satisfy themselves as to, the expenditure.

20 (B) That there is no uncertainty destructive of the disposition in the meaning of the phrase "Order or Orders of Nuns"—as to whether it applies to Orders strictly so called, or to Orders and Congregations. The evidence shows that although there is a canonical distinction between Orders of Nuns and Congregations of Sisters, the distinction is not generally known to the laity (of which the testator was a member) and except where canonical precision is required is not generally observed even among the Clergy. There is no uncertainty as to what are the Orders of Nuns or Congregations of Sisters, both being listed in Rome.

30 (C) That there is no uncertainty destructive of the disposition in the meaning of the word "amenities." The testator has in Clause 5 of his Will specified the only permissible types of amenity.

(D) That even if the Will be regarded as ambiguous in the respects referred to in paragraphs (A) (B) and (C) above, it is ambiguity to be resolved by construction and not uncertainty amounting to failure to exercise the testamentary power.

40 (E) That it is a trust to use the income as well as the capital to arise from any sale of residue in the discretion of the Trustees for certain purposes specified by the testator. Only those purposes are certain which can be enforced and only charitable purposes can be enforced. The disposition therefore, unless exclusively for charitable purposes, would, apart from the operation of Section 37D, be invalid as a failure to exercise the testamentary power.

(F) That whether the disposition were to fail because being for purposes some of which were not charitable it was not an exercise of testamentary power, or because, though a proper exercise of testamentary power, it tended to a perpetuity, in each case the failure would be dependant upon the fact that the disposition was not for exclusively charitable purposes.

(G) Section 37D does not assign any reason for the invalidity which it is designed to overcome. It merely describes a type of disposition. If such a disposition is, for any reason attributable to its described type, invalid, then the section operates to cure the 10 invalidity to the extent provided in the section. Section 37D is not qualified by any indication that it was intended to deal with cases of trusts of imperfect obligation: cf. Charitable Trusts (Validation) Act, 1954 (2 & 3 Eliz. II, c. 58).

(H) That the mischief which Section 37D was designed to cure appears from the remarks of Lord Davey in *Hunter v. Attorney-General* [1899] A.C. 309 at page 323, where His Lordship says:—

“ On the one hand, there is a long series of cases extending from *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 321; decided by Sir William Grant and Lord Eldon, to *In re Macduff* 20 [1896] 2 Ch. 451, decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as ‘ charitable or benevolent,’ or ‘ charitable or philanthropic,’ or ‘ charitable or pious ’ purposes), or where the description includes purposes which may or may not be charitable (such as ‘ undertakings of public utility ’), and a discretion is vested in the trustees, the whole gift fails for uncertainty.” 30

There is nothing in the terms of Section 37D to restrict its application as the appellant seeks to do, to the first type of disposition referred to by His Lordship where charitable purposes expressly stated are coupled with other non-charitable purposes.

(I) The section does not stipulate that a charitable purpose be stated. It is sufficient if the charitable purpose as well as the non-charitable purpose is, or could be deemed to be, included in any of the purposes directed or allowed. It is, therefore, proper to apply the section to a description (not wholly subjective) which, in one word or phrase, comprehends both charitable and non- 40 charitable purposes. The section applies not merely where a charitable purpose is stated and also a non-charitable purpose is stated. It applies where a charitable and non-charitable purpose can both be deemed to be included. There is nothing to indicate that the two may not be deemed to be included from the use of one word or phrase. In the present case, the words of the disposition in their ordinary application include charitable as well as non-charitable purposes.

(J) Alternatively to paragraph (I), the section will at least apply to a case where there is a description (not wholly subjective) in a single word or phrase, which describes purposes, *prima facie*, but not exclusively, charitable. In the present case, whether the word or phrase to be so examined be "Convent" or "Order or Orders of Nuns," it is, *prima facie*, but not exclusively charitable in a legal sense.

10 (K) That no assistance can be derived, as to the scope of Section 37D, from the provisions of the Charitable Trusts (Validation) Act, 1954. That Act is differently framed. The references to "imperfect trust provision" would suggest that that Act was only intended to save dispositions invalid as exercises of testamentary power but otherwise valid. A point in common between that Act and Section 37D is that neither could be applied to cases where there was no description or declaration of the nature of the purposes, where, that is to say, the test was wholly subjective. However, there is no provision in that Act requiring its application to a case where the charitable purpose as well as the non-charitable purpose may be merely deemed to be included.

20 (L) That the disposition should, apart from the operation of Section 37D, be read as a gift for the benefit of such Convents or Orders of Nuns or Congregations of Sisters as are charitable, the gift being analogous to those for the benefit of religious societies or religious purposes which, unless a contrary intention appears, are read as gifts for the benefit of such religious societies or such religious purposes as are charitable.

10. The Respondent respectfully submits as to the disposition of "Elmslea" :—

30 (A) That there is no uncertainty destructive of the disposition in the meaning of the phrase "Order of Nuns" : see paragraph 9 (A) of the Respondent's case, noting, however, that in the case of "Elmslea" the selection is to be made once for all and does not, even to the extent applicable to residue, place active and continuing duties on the Trustees. See also paragraph 9 (B) of the Respondent's case.

40 (B) That there is no indication that the disposition was other than to the selected organisation absolutely and free to be used or otherwise disposed of as the rules of the organisation might permit. Once the organisation was selected and the disposition assented to, it operated as a specific devise and bequest and the power of sale and management and leasing pending sale appropriate if assent could not be given to the disposition, and advisable lest there might be some delay in selection, would all cease to be effective. The disposition is, therefore, equivalent to a special power of appointment from amongst an ascertainable class, the beneficiaries selected taking absolute interests. As such, there is no uncertainty of objects which would prevent the disposition from being a lawful exercise of testamentary power, and there is no element of perpetuity.

(c) Alternatively to (B) above, if the disposition is not to the organisations absolutely, free to be dealt with as the rules permit, but is a disposition to be retained and applied for purposes, Section 37D applies for the reasons set forth in relation to residue, with this additional feature, that here there is the express choice between "Orders of Nuns" (some charitable and some not) or "The Christian Brothers" (charitable). Therefore, even if the other questions were resolved in favour of the Appellants, this disposition could not wholly fail on the ground that Section 37D only applied where the charitable and non-charitable purposes were separately stated—at least the section would operate to restrict the disposition to the Christian Brothers. 10

11. The Respondent respectfully submits that this appeal should be dismissed with costs for the following amongst other

REASONS

- (A) BECAUSE, as to "Elmslea," the disposition is not uncertain and is a valid exercise of testamentary power without regard to the charitable element of the organisations indicated, or, alternatively, is by operation of Section 37D to be restricted to a disposition in favour of such Orders of Nuns or Congregations of Sisters as are charitable, or the Christian Brothers, as the Trustees may select, or, in the ultimate, to a disposition in favour of the Christian Brothers. 20
- (B) BECAUSE, as to the residue, Section 37D applies and requires that the trust be construed and given effect to in the same manner in all respects as if no application of the income or capital of residue or any part thereof in favour of any such Convent or Order of Nuns or Congregation of Sisters as was not charitable were directed or allowed. 30
- (C) BECAUSE, as to residue, apart from the application of Section 37D, the disposition directs or allows the application of the income or capital of residue only in favour of such Convents or Orders of Nuns or Congregations of Sisters as are charitable.
- (D) BECAUSE the Judgments of the High Court of Australia were right and ought to be affirmed.

NIGEL BOWEN.

*Counsel for the Respondent,
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the State of New South Wales.*

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IN THE MATTER of the TRUSTS of the WILL of
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Respondents.

Case for the Respondent

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