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Disputes over charitable trusts, and the role of the Attorney-General

Introduction

Two recent High Court decisions have focused on the role of the Attorney-General (the “AG”) in disputes over whether trusts are charitable or private. Together, they provide useful guidance on when, and to what extent, the AG needs to be involved, as well as what roles other parties may play.

Mayor and Burgesses of the Brent London Borough Council v Johnson [2020] All ER (D) 34 (May), [2020] EWHC 933 (Ch) (the “Brent Council Case”)

In the first decision, the *Brent Council Case*, the Council wished to sell land it owned. The defendants asserted that the land was held on trust, with one of the arguments advanced being that the trust in question being charitable. The Council commenced proceedings seeking a declaration that it owned the land legally and beneficially.

The AG was not a party to the claim, and Deputy Master Rhys directed that the AG be notified by way of service. The AG, in response, stated that she would not be joining the proceedings. The Council then sought an order that the charitable trust points be struck out on the basis that the defendants had no standing to pursue them, that only the AG could do so, and that it had declined that opportunity. Master Clark struck out the charity points as requested.

On appeal, Birss J noted at [17] that the AG’s correspondence was “*unspecific*”, since it neither stated that she did not consider the alleged trust was charitable nor did she state that she did. That was important because the judge drew the following principle from previous case law in the case of disputes over whether a trust was charitable or not where (1) the dispute was not “*charity proceedings*” within the meaning of the Charities



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Act 2011, and (2) those asserting that the trust was charitable had no standing to enforce the trust in question (at [33]):

“...the AG does indeed represent the beneficial interest in a charitable trust, in other words the objects of the charity. The proposition means that the AG is entitled to join a suitable case in the position of a claimant advancing a claim that a charitable trust exists ... It also means that if the AG decides that in his or her view the property is not held on charitable trusts then that decision is, in effect, binding.”

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In the *Brent Council Case*, then, the defendants could not continue to pursue their charity case if the AG decided that the land was not held on charitable trust, since her decision not to seek to enforce any such trust was an end to the matter; but if the AG took a neutral stance, or supported the existence of a charitable trust, it remained open to the defendants to continue to argue their case to that effect. Birss J therefore directed that “the AG is a necessary party, but that is different from saying that the case should be struck out in the present circumstances. It would not be right to strike out this case without knowing what the AG’s stance is” (at [42]).

Once the AG’s stance had been definitively discerned, “[i]f the AG wishes to maintain a neutral stance on the charitable trust argument then nothing further needs to happen. If the AG’s view is against the existence of the charitable trust, then she can say so and the point will then need to

be struck out” (at 44]).

Thus, the *Brent Council Case* shows that any party who is not a trustee or member of a potential charitable trust must join the AG to any proceedings in which that party asserts that the trust in question is charitable. If the AG disagrees, that is the end of the matter. If the AG supports the party contending for a charity, or is neutral, then the claim or argument that there is a charity can continue.

[Gibbons v Smith \[2020\] All ER \(D\) 38 \(Jul\), \[2020\] EWHC 1727 \(Ch\)](#)

The facts in the second decision, *Gibbons v Smith*, were importantly different. There, the claimants were the personal representative of the final surviving trustee of land held on trusts which may have been charitable, and a

member of the club or charity (depending on whether the trusts were indeed charitable). The sought directions including, *inter alia*, as to whether the trusts of the land were charitable.

Roth J held that they were not. However, before turning to deal with that substantive question, he noted that “[t]he Claimants’ solicitors duly wrote to the Attorney General and in response the Treasury Solicitor requested copies of various relevant documents, which were supplied ... Nothing further was heard from the Attorney General, who accordingly gave no indication that he wished to be heard on this matter” (at [33]). However, that was by no means fatal, or even problematic in the *Gibbons v Smith* case. That was for two reasons.

First, there was no question that the claimants had standing to seek directions

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from the court (at [29]). Second, they had taken every step to identify a third party to make the arguments in favour of and against the charitable nature of the trusts, and had not been able to find any person willing to do so. They had thus met the obligations of CPR PD 64B (at [35]), and had ensured at the hearing that they would comply with their duties to give full and frank disclosure, and that all arguments and legal points were presented fairly (at [36] to [39]). Roth J was content that that was enough to deal to give directions (at [35] and [40]).

Thus, *Gibbons v Smith* shows that, where the trustees of potentially charitable trusts are asking for directions, then the AG is not a necessary party, although she should be notified. However, the trustees should take all steps reasonably open to them to seek to find another party willing to make alternative arguments to those advanced by the trustees, failing which they should fully and fairly put those arguments before the court. In such circumstances the court will

be content to proceed even in the absence of contrary argument.

Conclusion

Taken together these cases provide a useful checklist for those involved in a dispute over whether trusts are charitable. Do those asserting that the trusts are charitable have standing? If not, the AG should be notified, and any decision of the AG against there being a charity is final. If so, however, then the court will hear the dispute, but the AG should be notified anyway, and those asserting that the trusts are charitable should ensure that they have done everything to bring contrary views to the court's attention.

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