How to spend it: what to do with £600 million held on a failed charitable trust – *H.M. Attorney General v Zedra Fiduciary Services (UK) Limited* [2022] EWHC 102 (Ch)

Introduction

H.M. Attorney General v Zedra Fiduciary Services (UK) Limited* [2022] EWHC 102 (Ch)** ("Zedra II***") was the second substantive instalment in the recent 'National Fund' litigation. It both serves as a useful practical example of the Court's approach to the adoption of *cy-près* schemes, and, perhaps more importantly, highlights the potential tension between theory and pragmatism inherent in balancing the matters set out in s.67(3) Charities Act 2011 (the "***Act***").

In his earlier decision in ***H.M. Attorney General v Zedra Fiduciary Services (UK) Limited & Ors* [2020] EWHC 2988 (Ch)** ("***Zedra I***"), Zacaroli J had determined that a valid charitable trust for the discharge of the National Debt had been created over a fund that had come to be worth c.£600 million (the "***Fund***"), but that such charitable trust had since failed.

Zedra II addressed the logically subsequent issue of whether the Court should make a scheme for the transfer of the Fund to the National Debt Commissioners for the reduction of the National Debt or for some other, and if so what, charitable purpose.

The Claimant Attorney General argued in favour of the comparatively "*straightforward*" (at [12]) debt reduction scheme.

Conversely, the Defendant charitable trustee suggested that a new company be incorporated to which the Fund would then be transferred. The new company would then hold the Fund on trust to:

1) pay or apply the income thereof for such charitable purposes within the United Kingdom as it should in its discretion determine from time to time; and

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

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Zacaroli J determined that the Attorney General's proposed scheme was to be preferred.

Background

The National Fund was established by deed of trust dated 9 January 1928 (the "***Deed***"). The settlors were Baring Brothers & Co Limited ("***Barings***") – the now-defunct merchant bank – acting on behalf of an initially anonymous donor who, after

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92 years, was revealed as being one Gaspard Farrer – a partner of that same bank. Barings was also to act as trustee.
The principal terms of the trust were to be found at clauses 2 and 3(a) of the Deed.

Clause 2 stated as follows:

"*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.***" (emphasis added)

(2) the Deed had effected an immediate and unconditional gift to charity...

The "*date of application*" was defined in clause 3(a) as:

"*the date fixed as such by the Trustees as being the date upon and after which effect can be given to the desire of the founder of this trust that the National Fund shall be retained and accumulated* ***until either alone or with other Funds then presently available for the purpose it is sufficient to discharge the National Debt...***" (emphasis added)

The above was, however, subject to a proviso. If the trustees deemed that "*national exigencies*" required it, an insubstantial portion of the Fund could also be paid to the National Debt Commissioners for the purposes of reducing the National Debt prior to the date of application.

As touched on briefly above, Zacaroli J had made the following determinations in ***Zedra I*** in relation to the Deed:

(1) the Deed had created a valid charitable trust whose purpose was, first, to benefit the Nation by discharge of the National Debt and, secondarily, to benefit the Nation by earlier application of part of the National Fund in reduction of the National Debt if the trustees determined that national exigencies so required;

(2) the Deed had effected an immediate and unconditional gift to charity. There was no condition precedent to the coming into existence of the charitable trust;

(3) the Court had jurisdiction to make a scheme for the application of the Fund *cy-près* on the grounds that:

(a) in light of the National Debt having reached £2004 billion at 31 July 2020 and the current social and economic climate respectively (see ***Zedra I*** at [36] to [39]), the original purposes of the National Fund (i) could not be carried out (s.62(1)(a)(ii) of the Act), and (ii) had ceased to provide a suitable and effective method of using the Fund (s.62(1)(e)(iii) of the Act); and

(b) there had been a subsequent, as opposed to an initial, failure of the purposes for which the National Fund had been established (such that no general charitable intention needed to be found

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for the purposes of making a *cy-près* scheme – see [129] of ***Zedra I***).

Nature of the litigation and legal principles

In those circumstances, ***Zedra II*** concerned an application for the exercise of the Court's jurisdiction to order a scheme pursuant to ss.62 and 67 of the Act, the detail of any potential *cy-près* scheme having been hived off to be determined separately from the issues considered in ***Zedra I***.

S.62(1) of the Act lists the various circumstances in which the original purposes of a charitable gift can be altered for the gifted property, or part of it, to be applied *cy-près*.

As noted above, the circumstances relevant in ***Zedra II*** were those set out at ss.62(1)(a)(ii) and 62(1)(e)(iii).

S.67(1) of the Act, however, makes clear that the power of the Court to make schemes for the application of property *cy-près* must also be exercised in accordance with that section. According to s.67(2), where any property gifted for charitable purposes is applicable *cy-près*, the Court may make a scheme for such charitable purposes having regard to the maters set out in s.67(3), namely:

(1) the spirit of the original gift (s.67(3)(a));

(2) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes (s.67(3)(b)); and

(3) the need for the relevant charity to have purposes which are suitable and effective in light of current social and economic circumstances (s.67(3)(c)).

It is trite law that the "*spirit of the gift*" means "*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*" (***Varsani v Jesani* [1999] 2 Ch 219**, per Morritt LJ, at [24], as applied by Briggs J in ***White v Williams* [2010] EWHC 940 (Ch)**, at [21]).

The arguments

The dispute between the parties in ***Zedra II*** focused on the application of the s.67 matters to the parties' competing schemes.

The spirit of the gift

The spirit of the gift was considered from [21] to [52] of Zacaroli J's judgment. The parties were agreed that the principal evidence as to the spirit of the gift was to be found in the Deed itself and the documents surrounding its execution. As a result, a number of letters dated from 26 March 1927 to 2 February 1928 and a government statement to the press dated 6 February 1928 were considered by the Judge in some detail.

The letters were communications between a combination of Sir Otto Niemeyer, a close friend of Mr Farrer, Winston Churchill, the then Chancellor of the Exchequer, Lord Revelstoke, a partner at Barings, a Mr Hopkins of HM Treasury and a Mr Grigg, the parliamentary private secretary to Winston Churchill.

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The Attorney General argued that the spirit of the gift itself was to benefit the Nation by seeking to achieve the end of reducing the National Debt. Such reduction would be beneficial for the Nation in that it would then give rise to a concomitant increase in the sums available for expenditure on public endeavours. Moreover, the fact of a long accumulation period did not detract from the fact that the gift was intended to be of immediate benefit to the Nation. It could be factored into government policy from the moment of its existence.

That spirit was said to be evidenced most clearly in the Deed itself, a letter dated 26 January 1928 and the public statement. The 26 January letter had passed on to Churchill a message from the anonymous Mr Farrer in the following terms:

"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.'" (at [29])

The public statement read as follows:

"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…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."

Conversely, the Defendant trustee contended that the spirit of the gift was threefold:

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The first element was said to be evidenced by the fact that Mr Farrer had described the gift as being on trust for "*the Nation*" and likened it to "*[g]ifts to the Nation of historic sites, buildings and works of art.*" The second element was said to be inherent in the mechanism to be adopted for the accumulation of income and retention of capital over what would clearly be a long period of time. The third element was said to be clear from the fact that Mr Farrer wished to remain anonymous as well as from numerous mentions of such aim in the correspondence that had been put before the Court.

It was also submitted, on behalf of the Defendant trustee, that the Attorney General's proposal could not be appropriate as it simply restated the formulation of the purpose of the Deed that had been rejected in ***Zedra I***.

The desirability of securing that the property is applied for charitable purposes which are close to the original purposes

This next matter was considered from [53] to [56] of Zacaroli J's judgment, the parties disagreeing as to the way it should be interpreted. According to the Attorney General, s.67(3)(b) assumed the desirability of applying property for charitable purposes which are as close as possible to the original purpose. By contrast, the Defendant trustee argued that it required the Court to engage in an assessment of the extent to which it would be desirable that the relevant property be so applied.

The need for the relevant charity to have purposes which are suitable and effective in light of current social and economic circumstances

This final matter was considered from [57] to [64] of Zacaroli J's judgment. The Defendant trustee pointed to a number of reports filed on its behalf in support of the following:

(1) that, in light of the current social and economic climate, the reduction of the National Debt was neither a suitable nor an effective charitable purpose; and

(2) that it would be futile for the Fund to be used to reduce such a large sum (the National Debt having increased to £2277.6 billion by the 31 October 2021) given the negligible proportion of the consequent reduction.

The principal argument advanced by the Attorney General was that such a matter did not necessarily trump any of the others. It was but one factor to be weighed in the balance.

The Court's reasoning

In preferring the scheme proposed by the Attorney General, the Judge made the following comments in relation to each of the matters set out in s.67(3) of the Act.

The spirit of the gift

This was the element of the dispute that received the most extensive treatment in ***Zedra II***. According to the Judge, although formulating the spirit of the gift by reference to the gift's purpose might be confusing, one could not simply dismiss the Attorney General's proposed spirit

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First, the spirit was necessarily broader than the purpose – applied to these facts, reduction is a broader term than, and encompasses, discharge.

Secondly, a gift to the Nation is not charitable. A gift to benefit the Nation by way of reduction of the National Debt was a somewhat anomalous exception to that general rule. The fact that such a specific end was required in order for a gift to be characterised as charitable supported the view that spirit of the gift was the, at least partial, relief from the Nation's debt.

Thirdly, the Attorney General's proposed scheme closely matched the subsidiary purpose expressed in the Deed.

Fourthly, the weight of the evidence favoured the Attorney General's scheme. The argument that there was an equation between the gift of the Fund and gifts of historic sites, buildings or works of art was rejected. The point being made in the 26 January 1928 letter was that the gift of the Fund was to be contrasted to such other forms of gift.

Fifthly, given the fact that the Fund represented 0.007% of the National Debt at the time of the gift, it was unlikely that it would ever be able to achieve more than its partial reduction. The fact that there was to be a potential combination with other funds only went further to suggest that the spirit of the gift was to assist in the purpose.

Conversely, the spirit proposed by the Defendant trustee suffered from numerous deficiencies. The first limb was too broad in light of the analysis above; the second limb could not be said to be implicit in the gift – not only did it all depend on how quickly the overall aim was achieved, but the effects of such a gift might be built into governmental policy so as to benefit the immediate generation; and the third limb begged the question "*altruistic how?*" – the answer being "*by virtue of reducing the National Debt*" again in light of the analysis above.

In fact, even if the National Fund's proposed spirit was to be interpreted as being simply to benefit the Nation and no more, there might still be some distance between the spirit and the scheme as carried out in practice – insofar as the new trustee could decide to benefit one particular charitable cause or make a grant to one particular charity whose purpose was limited to helping only a proportion of UK citizens, only those individuals would be benefitted.

The desirability of securing that the property is applied for charitable purposes which are close to the original purposes

The Attorney General's argument was preferred here. It had not been Parliament's intention to adopt a different approach to that which had been accepted as the essence of the *cy-près* doctrine for a considerable period of time.

The need for the relevant charity to have purposes which are suitable and effective in light of current social and economic circumstances

Clearly the Defendant trustee was right to point out that the Attorney General's scheme

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might be seen as a "*futile, symbolic gesture*" (at [70]). However, this factor was not, in itself, sufficient to persuade the Judge that the Attorney General's scheme should not be adopted.

In particular, while it was accepted that the Fund could do a great deal of good were it to be applied to any one particular charitable cause, that would be a false analogy in view of the spirit of the gift even on the Defendant trustee's case, namely to benefit the Nation as a whole. The better comparison was between the value of the Fund as a miniscule proportion of the National Debt and the value of the Fund as a less but still miniscule proportion of total funds held for continuing charitable purposes. Either way, the c.£600 million figure would be a fraction of a percent of the total sum.

Comment

Zacaroli J's decision is to be applauded in terms of its application of the law. He was clearly correct in his orthodox interpretation of both the first and second matters set out in s.67(3) of the Act. As regards the third, he was, with respect, stuck between a rock and hard place. It is foreseeable that there might be situations in future where pragmatism really is introduced by virtue of s.67(3)(c) so as to outweigh any of the other more legal considerations set out in ss.67(3)(a) and (b). However, as the Judge rightly pointed out, this was not that case. The practical effect of sharing the Fund between every existing charity in the UK would have been almost as negligible as any reduction of the National Debt. On that basis, the s.67(3)(c) consideration could not have been sufficient to override the Judge's leanings towards the scheme proposed by the Attorney General.

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