



Neutral Citation Number: [2020] EWHC 2988 (Ch)

Case No: PT-2018-000391

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TRUST AND PROBATE LIST (ChD)

Rolls Building
7 Fetter Lane
London, EC4A 1NL

Date: 9 November 2020

Before :

MR JUSTICE ZACAROLI

Between :

H.M. ATTORNEY GENERAL
- and -
(1) ZEDRA FIDUCIARY SERVICES (UK)
LIMITED
(2) DIANA IONA BRUCE
(3) JOHN DAMIAN NICHOLAS
STIDWORTHY

Claimant

Defendants

William Henderson (instructed by **Government Legal Department**) for the **Claimant**
Robert Pearce QC and Daniel Burton (instructed by **Macfarlanes LLP**) for the **First Defendant**
John McDonnell QC and Sebastian Kokelaar (instructed by **Richard Slade and Company Ltd**) for the **Second Defendant**
Nicola Rushton QC (instructed by **Capital Law Limited**) for the **Third Defendant**

Hearing dates: 8, 9 12 and 13 October 2020

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.00 a.m. on Monday 9th November 2020.

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MR JUSTICE ZACAROL

Mr Justice Zacaroli:

Introduction

1. By a deed of trust dated 9 January 1928 (the “Deed”) Baring Brothers & Co Limited (“Barings”) settled an amount of cash and securities initially valued at almost £500,000, referred to as the “National Fund”, to be held by Barings as trustees to accumulate income and profits until the date fixed by the trustees as being the date when, either alone or together with other funds then available for the purpose, it was sufficient to discharge the National Debt. When that point was reached, the National Fund was to be transferred to the National Debt Commissioners to be applied by them in reduction of the National Debt.
2. The donor wished to remain anonymous. His anonymity was respected for 92 years. In light of the claims made by the second and third defendants in these proceedings, to the effect that as a result of the invalidity or failure of the trust, the National Fund is subject to a resulting trust in favour of the donor’s estate (and those of later contributors to the National Fund), his identity has been revealed as Mr Gaspard Farrer (“GF”), a partner in Barings until his retirement in 1925.
3. 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.
4. The claimant is the Attorney General, acting pursuant to her functions and duties in relation to charities. The first defendant, Zedra Fiduciary Services (UK) Limited, is the current trustee of the trust. The second defendant, Diana Iona Bruce, is a descendant of one of GF’s sisters and is appointed to represent all those who are or may become entitled to share in the residuary estates of GF or Lord Dalziel, apart from those represented by the third defendant. The third defendant, John Damian Nicholas Stidworthy, is a descendant of another sister of GF, and is appointed to represent nine others, being certain descendants of either that sister or members of Lord Dalziel’s family.

The Issues

5. The claimant contends that the Deed created a valid charitable trust and that the National Fund can and should be applied now to the reduction of the National Debt. The second and third defendants dispute the validity of the Deed and contend that the National Fund is held on resulting trusts for the donors or their estates. The first defendant supports the claimant’s contention that the trust is a valid charitable trust, but disputes that the court can (alternatively should at this stage) order that the National Fund is applied to the reduction of the National Debt.

6. The claimant and first defendant agreed a list of 14 issues, although some of them were common ground, and in relation to others it was agreed that consideration of them was best postponed until after judgment on the principal issues. The issues naturally fall under two heads: those relating to the alleged invalidity of the trust (the “Invalidity Issues”) and those relating to the measures to be taken to wind up the trust if it is valid (the “Winding-up Issues”).

Invalidity Issues

7. The second and third defendants contend that the trust is invalid on one or other of two bases: (1) because the coming into existence of the charitable trust is subject to a condition precedent which has not occurred, and is now incapable of occurring; (2) because the charitable purpose (which they contend is the discharge of the National Debt) has failed for impossibility and GF had no general or paramount charitable intention.
8. The claimant and the first defendant deny that the trust is invalid on either ground, but contend that even if otherwise invalid, it is validated by s.9(1) of the Superannuation and other Trust Funds (Validation) Act 1927 (the “1927 Act”), which I describe in more detail below.

Winding-up Issues

9. If the trust is valid, the following issues arise (as between the claimant and the first defendant):
 - 1) Whether the court has jurisdiction to make a scheme altering the trust under its administrative jurisdiction relating to charities.
 - 2) Whether the court has jurisdiction to make a scheme altering the trust under its cy-près jurisdiction.
 - 3) If the court has jurisdiction to make a scheme altering the trust under either its administrative or its cy-près jurisdiction, which jurisdiction should the court exercise.
 - 4) If the court has jurisdiction to make a scheme altering the trust under either its administrative or cy-près jurisdiction, whether it should (a) make a scheme for the property held on trust to be transferred to the National Debt Commissioners for the reduction of the National Debt, or (b) some other scheme. Pursuant to the Order of Chief Master Marsh dated 22 January 2019, the arguments at this hearing were limited to the issue of whether a scheme other than one which would result in the National Fund being applied in reduction of the National Debt should be made. Accordingly, I have received no evidence or submissions as to the content of any alternative scheme.
 - 5) If the court does not have jurisdiction to make a scheme altering the trust under either its administrative or cy-près jurisdiction, whether the Charity Commission has jurisdiction on the application of the Attorney

General to settle a scheme which could take effect under s.73 of the Charities Act 2011 (the “2011 Act”) altering the trusts declared by the Deed to provide for the property held on the trust to be transferred to the National Debt Commissioners or to be applied for some other purpose or purposes.

10. Underlying many of the issues is the question whether the purpose of the trust is the discharge, or merely the reduction, of the National Debt. The defendants contend it was the former; the claimant that it was the latter.
11. It is common ground between all parties that whether the purpose is the discharge or the reduction of the National Debt, both are valid charitable purposes: *Latimer v Inland Revenue Commissioners* [2004] 1 WLR 1466 (PC), per Lord Millett at [38]. In *Newland v Attorney-General* (1809) 3 Mer 684 there was a bequest of stock “to His Majesty’s government in exoneration of the national debt”. Lord Eldon directed that the stock be transferred to such person as the King, under his “sign manual”, should appoint. Implicit in this direction was the conclusion that the bequest was charitable, as the sign manual jurisdiction arises if the gift is charitable, but there is no trust (see Tudor on Charities, 10th ed., para 13-007).

The background to the execution of the Deed

12. I draw the following summary of the background circumstances at the time of the execution of the Deed largely from the expert reports of Professor Martin Ellison of Oxford University and Professor Jonathan Portes of King’s College London.
13. As a result of the heavy borrowing incurred by the British Government during the first world war, the National Debt increased significantly from a pre-war level of approximately £0.6 billion to an amount in excess of £7 billion.
14. It was Government policy, in the years following the first world war, to put in place measures to reduce the National Debt. Professor Ellison attributes this to 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.
15. 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. In 1928, £65 million was contributed by the Government to the sinking fund.
16. 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 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.

17. It was against this background that GF determined to make a gift of £500,000. An indication as to his motive for doing so is seen in a note dated 26 March 1927 from Sir Otto Niemeyer (a close friend of GF and the Controller of Finance at the Treasury) to Winston Churchill (who was then the Chancellor of the Exchequer):

“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.”

18. The proposal to place funds in trust for the purpose of accumulating income and profits so that at some, potentially distant, point in the future the trust fund could be applied in discharge of the National Debt gave rise to both legal and practical concerns.
19. The legal concerns included that such a trust would contravene the rule against remoteness of vesting (which, put simply, provides that any future interest in property is void from the outset if it may possibly vest after the perpetuity period has expired) or the rule against excessive accumulations. Another was the risk that the National Debt Commissioners could call for the trust fund, notwithstanding any provision delaying its transfer to them for a period of time for accumulation, under the rule in *Saunders v Vautier* (1841) Cr & Ph 240.
20. The practical concerns related to the perceived risk to the nation, in particular the distorting effect on financial markets, of such a large sum being invested by private trustees.
21. The legal concern was addressed by legislation, specifically s.9 of the 1927 Act. This provided as follows:

“9. Validation of trust funds for the reduction of National Debt.

(1) 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 thereof 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, unless the Treasury within three months after they receive notice of the taking effect of the instrument disclaim the interest of the National Debt Commissioners under the said directions, 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.

(2) It shall be the duty of the trustees of any such trust as aforesaid to render to the National Debt Commissioners such accounts and information relating to the trust as may reasonably be required by the Commissioners.”

22. While the bill was passing through parliament there was considerable discussion (with which GF and his advisors were involved) as to the possibility of limiting the permitted period of accumulation, for example, to a period of 100 years. This was ultimately rejected, however, in favour of the provision that appears in s.9(1) of the 1927 Act permitting the Treasury to disclaim the interest of the National Debt Commissioners within three months of receiving notice that a particular instrument has taken effect.
23. It is common ground that GF was involved in the discussions relating to the drafting of s.9 and that the Deed was intended to benefit from the new legislation. This appears most clearly from the fact that the funds which GF had transferred to Barings in November 1927 in anticipation of the execution of the Deed were to be repaid to GF if the legislation was not passed, as explained in a letter from Lord Revelstoke (a partner in Barings) to Sir Otto Niemeyer of 10 November 1927:

“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.”

24. The 1927 Act received the Royal Assent on 22 December 1927, and the Deed was executed on 9 January 1928. In a letter dated 26 January 1928 from Barings to Winston Churchill, in a form approved by GF, it was stated as follows:

“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.”

25. Winston Churchill issued the following statement on 26 January 1928:

“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.”

Terms of the Deed

26. 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.
27. Clause 2 of the Deed provides 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.”

28. The “date of application” is defined as “the date fixed as such in accordance with the provisions of these presents”. By clause 3(a):

“The date of application shall be 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...”

29. This is, however, subject to the proviso that if the trustees determine that “national exigencies” require some part of the National Fund to be applied forthwith “in reduction of the National Debt”, the trustees are empowered to give effect to that determination by transferring and paying that part to the National Debt Commissioners to be so applied, subject to the following proviso:

“Provided further that it shall be the duty of the Trustees to keep in hand until the date of application a substantial part of the National Fund to the intent that effect shall ultimately be given to the desire of the founder of this trust as herein expressed.”

30. If the trustees make a determination under clause 3(a), they may nevertheless cancel that determination at any point prior to the date of application.
31. The Deed contains extremely wide powers of investment and permits the trustees to retain brokerage and other commissions in lieu of remuneration (although since 1986 the trustees’ fee has been calculated as a percentage of the market value of the fund). It permits the trustees to accept other property to be held on the trusts declared in the Deed.

The prospects of discharging the National Debt, in 1928 and in 2020

32. There is extensive consideration in the experts’ reports as to the prospect of the National Fund (either alone or with other funds) growing to such a value that it could be used to discharge the National Debt.
33. 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.
34. The experts are in agreement on two key points:
- (1) 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;

- (2) As at the date of their supplemental joint report (September 2020) the likelihood of the National Fund ever being sufficiently large to discharge the National Debt at a future date is “vanishingly small.”
35. At first sight, since the National Fund is today a slightly higher proportion of the National Debt than it was in 1928, it might be thought that if it was reasonable to believe, in 1928, that the National Fund might one day be sufficiently large to discharge the National Debt, then the same must be true today. That, however, fails to take into account the very different economic and political landscape today.
36. The likelihood of the National Fund (on its own) being sufficient to repay the National Debt at some point in the future depends upon both (1) the anticipated return on investments in the future and (2) the anticipated future borrowing costs and the extent to which future primary budget balances would require the government either to increase or decrease the National Debt.
37. As to the former, the historical data available in 1928 would have suggested a higher future return on investments than either in fact happened in subsequent years or would be anticipated today. As to the latter, the policy immediately after the Great War of repaying the National Debt has long been abandoned, and the events of the subsequent decades (in particular another world war only 11 years later) led to substantial increases in the National Debt. The last time the primary budget surplus was large enough to cover interest payments and retire some of the National Debt was in the financial year 2001/2002.
38. Recent developments in economic theory have supported a more relaxed approach towards paying down the National Debt, building upon the suggestion made by John Maynard Keynes that the burden on taxpayers of repayment in the future is likely to be less than if the burden is placed on the present generation. While Keynes had expressed this view in 1927 (in a commentary upon the Colwyn report), it was then very much a minority view.
39. Additionally, the likelihood of the National Fund growing to a sufficient size due to the contributions from others depends on the likelihood of that happening in the future. The hope that others might be encouraged to provide similar funds to contribute to repayment of the National Debt did not materialise to any significant extent. It is highly remote from today’s perspective.

The purpose of the trust

40. The first issue, logically, is the purpose of the trust, as it underlies much of the subsequent issues. As I have noted, the claimant contends that the purpose of the trust is to reduce the National Debt, whereas each of the defendants contends that its purpose is to discharge the National Debt.

41. As a preliminary point, there was agreement among the parties that the term “the National Debt” must mean the National Debt as it stood from time to time, as opposed to the National Debt in the sum of approximately £7.6 billion as at the date of the Deed. That agreed position is supported by the fact that although government policy at the time was to pay down the National Debt, the National Fund was intended to accumulate for a long time during which it must have been appreciated that it might fluctuate in value, upwards as well as downwards.
42. The purpose of a charitable trust is ordinarily to be equated with “those charitable objects on which the property given is to be applied”: *Re J.W. Laing Trust* [1984] Ch 143, per Peter Gibson J at p.149G-H. In that case, the settlor made a gift of 15,000 shares in a company to trustees to hold on trust pursuant to a memorandum under seal which stated that the shares and dividends were to be devoted to charitable purposes and the capital and income were to be wholly distributed within the settlor’s lifetime or within 10 years of his death. It was held that the purpose of the trust was the general charitable purposes stated in the memorandum, and that the stipulation as to distribution of capital was merely an “administrative” provision. Peter Gibson J said, at p.149H: “It is not meaningful to talk of the requirement as to distribution being either charitable or non-charitable.”
43. All parties are agreed that this is a question to be determined by reference to the terms of the Deed construed in accordance with the usual principles of interpretation of a written instrument. It was also common ground that the construction of the Deed is to be approached in the manner which the court approaches the construction of all instruments: see *Marley v Rawlings* [2015] AC 129, at [17] to [23]. Lord Neuberger summarised the task as follow (at [19]):

“...the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party’s intentions.”
44. It is a unitary exercise involving an iterative process “by which each suggested interpretation is checked against the provisions of the [instrument] and its commercial consequences are investigated”: *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.
45. In support of his contention that the charitable purpose of the trust was the *reduction* of the National Debt, Mr Henderson pointed to the following factors.
46. First, the operative provision of the Deed, clause 2, states in terms that the National Fund is to be held (on and from the date of application) for the purpose of being applied “in reduction” of the National Debt.

47. Second, he pointed to the fact that the definition of the ‘date of application’ in clause 3(a) refers to the donor’s “desire”, which he suggests was intended to denote something different from, and less than, the purpose of the trust, which was to be derived from clause 2.
48. Third, the Deed expressly envisages that the National Fund may in some circumstances be used to reduce the National Debt, first where it is used in conjunction with other funds (when, by definition, the National Fund would itself only be reducing the National Debt) and, second, in the case of national exigencies as set out in clause 3(a). Also, even if the trustees determined that the fund was sufficient to discharge the National Debt, the value of the fund and/or the National Debt might change before the fund could be so applied, so that the Deed necessarily contemplated less than precise discharge of the National Debt.
49. Fourth, since the Deed was executed with the intention that it would comply with s.9(1) and because s.9(1) applies only to instruments which contain directions that accumulated funds be applied “in reduction” of the National Debt, it follows that the purpose of the trust must be the reduction, and not the discharge, of the National Debt.
50. Fifth, Mr Henderson contended that the position in this case is practically indistinguishable from that in *Re Laing*, where Peter Gibson J considered it an abuse of language to describe the requirement as to distribution (within the settlor’s life or within ten years of his death) as a purpose of the gift.
51. All of the defendants contend that the purpose of the trust is the discharge of the National Debt, and not merely its reduction. Mr McDonnell QC, supported by Ms Rushton QC and Mr Pearce QC, submitted that this is plain from the provision that the National Fund is to be transferred to the National Debt Commissioners only on and from the date of application, which is only reached when the fund is sufficient (alone or with other funds) to discharge the National Debt. The proviso to clause 3(a), permitting part of the National Fund to be transferred to the National Debt Commissioners before the date of application in case of national exigencies, reinforces that conclusion because the transfer of part of the fund prior to the date of application is itself subject to the proviso that a “substantial part” must be retained for the purpose of discharging the National Debt.
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. It is clearly distinguishable, in this regard, from the provision as to timing of distribution in *Re Laing*.
53. This is subject, however, to three points of qualification:
 - 1) In view of clause 3(a), the purpose cannot have been *solely* the discharge of the National Debt. While I consider that to have been the

principal purpose, there was a subsidiary purpose to use some part only of the National Fund to reduce the National Debt in case of national exigencies.

- 2) The charitable purpose is not fully encapsulated by reference simply to the discharge or reduction of the National Debt. The object of the charitable gift was not, for example, the people or entities to whom repayment of the National Debt would be made (i.e. those who had acquired the gilts and other investments via which the nation had borrowed funds). Instead, the object was to benefit the nation, by the specific means of discharging (or, in certain events, reducing) the National Debt.
 - 3) It follows, from my conclusion that the ‘date of application’ is about more than mere timing, that the accumulation of the fund over time was integral to the main purpose of the gift (and what distinguished it from, for example, a donation to be applied immediately in reduction of the National Debt).
54. All parties recognised that the word “reduction” in clause 2 can be explained by the fact that the Deed was intended to comply with s.9(1). Contrary to Mr Henderson’s argument, however, that does not necessarily point towards the purpose of the trust being the reduction of the National Debt. The wording in the statute is capable of encompassing both a gift to be used to reduce the National Debt, and one to be used in its complete discharge (because “reduction” encompasses discharge, although not vice versa). Once it is understood that the choice of wording in the Deed was to ensure that it fell within the protection of s.9(1), the force of the word “reduction” is much reduced. The better indication of the meaning of the word, as used in clause 2, is that the National Fund is only to be applied in reduction of the National Debt when it is of a size sufficient to discharge it.
55. As to the use of the word “desire” in clause 3(a), I consider that this express reference to the state of mind of the founder reinforces, rather than detracts from, the conclusion that the principal purpose of the trust is the discharge of the National Debt. The context in which it is used, essentially explaining the reasoning behind the definition of the date of application, does not suggest to me that it was intended to be differentiated from the “purpose” of the gift.
56. Finally, as I have already noted, I reject the analogy with *Re Laing*. In that case, the “requirement as to distribution” related to the time within which distributions should be made in favour of general charitable purposes. There was a clear distinction between the charitable objects to which the gift was to be applied (general charity) and the time within which distributions should be made. Whether the distributions were made within that time, or not, did not alter the charitable objects. In contrast, the provision in the Deed requiring the accumulation of the National Fund until the date of application is not a matter of mere timing or machinery, but is fundamental to enabling the National Fund to grow sufficiently so as to be able to discharge the National Debt.

57. Accordingly, in answer to the first issue, 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.

The Invalidity Issues

(1) Condition Precedent

58. The second and third defendants contend that no charitable trust has ever come into existence pursuant to the Deed, because the coming into being of the trust was contingent on the occurrence of the date of application, that is, upon the occurrence of a determination by the trustees that the National Fund was sufficient, either alone or with other funds then available for the purpose, to discharge the National Debt. The claimant and the first defendant contend that there was an unconditional gift of the National Fund to charity, albeit that the application of the fund was deferred.
59. It is agreed that this question is to be resolved as a matter of construction of the Deed.
60. The argument of the second and third defendants can be shortly stated:
- 1) Clause 2 consists of two limbs: the first limb requires the National Fund to be held by the trustees on trust to accumulate the income and profits until the date of application; the second limb requires the trustees to stand possessed of the National Fund on and from the date of application to be transferred to the National Debt Commissioners to be applied by them in discharge of the National Debt.
 - 2) The first limb, in itself, is not a charitable trust at all. It is only because of the second limb that a charitable trust could come into existence. The trust under the second limb, however, does not come into existence unless and until the date of application is reached. Since that has not yet happened and it is now not possible for it ever to happen, the contingency has not occurred and never will occur, such that there is no charitable trust at all.
61. As a preliminary point, it is not suggested that clause 2 of the Deed creates two separate trusts. Ms Rushton expressly accepted this, and I did not understand Mr McDonnell to dissent from her position.
62. Ms Rushton placed particular emphasis, however, on the different wording of the first limb (the trustees shall “hold” the National Fund on trust) and the second limb (the trustees shall “stand possessed” of the National Fund on trust). She contended that because the trustees will not “stand possessed” of the National Fund until a future event, the trust for the purposes of discharging

the National Debt cannot come into existence unless and until that future event occurs.

63. She cited, in support of that proposition, paragraph 8-001 of Megarry & Wade on the Law of Real Property (9th ed). This passage explains the difference between vested and contingent interests, and between vested interests that are “vested in interest” or “vested in possession”. The following example is given: the transfer of land to trustees to hold “for A for life, remainder to B for life, remainder to C in fee simple if she survives B”; A’s interest is vested in possession; B’s interest is vested in interest; C’s interest is contingent.
64. That passage, however, is concerned solely with the interests of the beneficiaries of the trust. It provides no support for the argument that the phrase “stands possessed ... on trust” (when referring to the trustee) has a different legal meaning and effect to the phrase “holds ... on trust”. No other authority was cited for the proposition that “stand possessed” has any special meaning in law.
65. In my judgment, the difference in language is merely a reflection of the fact that under the first limb the trustees are to hold the fund over time (as opposed to distributing it) whereas on and from the date of application they are required to transfer the fund to the National Debt Commissioners. While the phrase “hold on trust” is apt to describe the former, the phrase “stand possessed” better describes the trustees’ relationship to the fund on and from the point in time when it is to be paid away.
66. In support of his submission that the Deed effected an immediate and unconditional gift of the National Fund to the trustees, Mr Henderson submitted that the Deed provided comprehensively for all capital and income to be applied for the stated purpose, with no alternatives, conditional or otherwise provided for. He pointed to the fact that clause 2 of the Deed uses the words “until”, “from” and “then”, which is language of timing, not conditionality (to be compared with, for example, the word “if”). Accordingly, he submitted that there was an immediate vesting of the National Fund in the trustees for the stated purpose (namely, as I have found, the discharge of the National Debt) but with the application of that purpose being delayed.
67. Mr Pearce also emphasised that the Deed does not use language of conditionality or contingency. Instead, the language used is (as from the date of application) that of transfer and payment, being consistent with the execution of a pre-existing trust. He also emphasised the absence of any alternative provision, such as a gift over, in case the contingency did not occur. He made the point that the National Debt Commissioners are not the beneficiaries of the trust, but are merely part of the machinery by which the purposes of the trust are to be achieved. Those purposes applied as much to the accumulation of the fund, prior to the date of application, as to the application of the fund, after that date: there was no change in purpose for which the accumulations were held when the date of application arrived. Finally, he pointed to the fact that the proviso in clause 3(a) envisaged the National Fund being applied towards the (subsidiary) purpose of reducing the

National Debt in advance of the date of application, which reinforced the conclusion that the interest of charity vested from the outset.

68. Since this is a question of construction of the Deed, reference to other authorities concerned with differently worded instruments is of limited use. Nevertheless, some assistance is to be gained from the explanation to be found in other cases of the distinction between an unconditional gift subject to delayed application and a conditional gift.
69. All parties referred me, in this connection, to *Chamberlayne v Brockett* (1872) LR 8 Ch App 206. The testatrix stated in her will that she had no confidence that her relatives would spend her money in the way she would approve but believed they would spend it on “the vanities of the world”, and that she felt she was “doing right in returning it in charity to God who gave it”. She bequeathed her residuary personal estate to trustees, directing that it be used, as soon as land should at any time be given for constructing almshouses, to build almshouses on the land, with any surplus being appropriated to making allowances for inmates.
70. Lord Romilly MR held at first instance that the gift of residue was void as being a perpetuity, because an indefinite period might elapse before land was given for the purpose of building almshouses.
71. That decision was reversed on appeal on the ground that the constitution of the trust was immediate, and not subject to any condition. At p.210, Lord Selborne L.C. framed the question as:
- “...whether, upon the true construction of the will, a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the directions as to the alms-houses and alms-people was conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon.”
72. At p.211 he said that “when personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness” and that the rules against perpetuities “do not prevent pure personal estate from being given in perpetuity to charity”. If, however:
- “...the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.”

73. The question was to be determined “... like all questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will.”
74. At p.212 Lord Selborne L.C. gave, as an example of a gift which he considered would probably have been void on the grounds determined by Lord Romilly, a case where the testatrix left her residuary estate to devolve on her next of kin, subject to a contingent gift to trustees, “when and so soon as land shall at any time hereafter be given for the purpose”, for the erection of almshouses. On the contrary, however, on the facts in *Chamberlayne*, the testatrix had declared an intention to return her whole residuary estate “in charity to God” and “therefore” bequeathed it immediately upon her death to trustees for the purposes set out in her will. Accordingly:
- “The intention in favour of charity is absolute, the gift and the constitution of the trust is immediate; the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied.”
75. I accept, as Mr McDonnell submitted, that the facts in *Chamberlayne* are distinguishable, because the will there contained express words indicating a general desire to benefit God. The absence of such express language, however, is far from fatal.
76. In *Re Swain* [1905] 1 Ch 669, for example, the Court of Appeal reached a similar conclusion (that the charitable gift was not subject to a condition precedent) without the presence of equivalent language. In that case, the testator left his residuary estate to a trustee upon trust to form a “reserve fund”, to pay the income to his niece during her life and, after her death, to pay the income to three annuitants who should be poor inhabitants of Maidstone. Those annuities were not to become payable, however, until the reserve fund amounted to £400. The question arose whether the charitable gift for paying the three annuities failed because it was subject to a contingency which may occur beyond the perpetuity period. Stirling LJ summarised the relevant law, laid down in *Chamberlayne*, as follows (at p.676):
- “An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all, except on the occurrence of events in their essence contingent and uncertain: while, on the other hand, a gift in trust for a charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent.”
77. The Court of Appeal concluded that the gift fell within the first branch of the rule there set out, because the residuary estate was, subject to the life interest of the niece, “devoted to charity from the testator’s death, and the direction to postpone the payment of the annuities until the reserve fund reached 400/ was

not a condition precedent to the charitable gift coming into effect, but was a direction as to the particular application of the charitable fund, and was intended to secure the working of the charity in the most beneficial manner.”

78. Mr McDonnell referred to a number of other cases (relevant to both of the alleged grounds of invalidity) which went the other way, i.e. where the court found either that the charitable gift failed as a result of a contingency not occurring or because it was impossible *ab initio* and there was no general charitable intention.
79. For example, in *Re Lord Stratheden and Campbell* [1894] 3 Ch 265, the testator bequeathed an annuity of £100 to be provided to a volunteer corps, the Central London Rangers, “on the appointment of the next lieutenant-colonel”. It was contended by the defendant (the sole residuary legatee under the will) that the gift failed because (in addition to being uncertain) it offended against the rule against perpetuities. Romer J agreed. Applying the rule in *Chamberlayne*, he concluded that the gift was conditional: “the annuity is not to be paid except on the appointment of the next lieutenant-colonel”. That condition might not arise within the perpetuity period. Accordingly, the gift failed as being “a gift conditional upon an event which transgresses the limit of time prescribed by the rules of law against perpetuities.”
80. By way of further example, in *Re Mander* [1950] Ch 547 Vaisey J reached a similar conclusion in relation to a bequest of a sum “sufficient to train a candidate for the priesthood until such time as a candidate comes forward from St Saviour’s Church, St Alban’s...” The gift could only be valid if (assuming it was charitable in the first place) “the appropriation of the sum to the indicated purpose is immediate and final. I do not think that the testatrix had any such thought, and I should rather suppose that she would have meant the interim income to fall into residue.”
81. As I have already noted, since the question in each case is dependent on the true construction of the relevant trust instrument, limited if any assistance is gained from a comparison with the conclusions reached by judges on the facts of other cases. The critical question, to which I now turn, is the meaning of the words used in the Deed. For the reasons which follow (largely in agreement with the submissions advanced by Mr Henderson and Mr Pearce) in my judgment the Deed effected an immediate and unconditional gift to charity, notwithstanding that the particular application of the National Fund in accordance with the primary charitable purpose would not take effect until it was of a size sufficient (alone or with other funds) to discharge the National Debt. In other words, the gift under the Deed falls under the first branch of the rule set out in *Chamberlayne*.
82. First, I consider that this conclusion follows logically from the primary purpose of the trust as I have found above: namely to benefit the nation by the accumulation of a fund so that it was eventually sufficient to discharge the National Debt. I agree with Mr Pearce that there is no difference, so far as the main charitable purpose of the trust is concerned, before and after the date of application. There is no doubt that the trustees’ obligation to hold the fund so as to accumulate income and profit arose upon execution of the Deed.

83. Second, the subsidiary purpose of the trust pursuant to the proviso in clause 3(a) arises, by definition, prior to the date of application. Clause 3(a) necessarily imposes a duty on the trustees to consider from time to time whether national exigencies require the application of part of the National Fund in reduction of the National Debt. I see no reason why that duty is not imposed from the outset. This is inconsistent with the trust only coming into existence if and when the date of application is reached.
84. Third, while the point is not determinative, I consider that the absence of any language of conditionality in the Deed (particularly in clause 2) is a factor that points away from the gift being a conditional one. I accept that the language used in clause 2 is that of timing, rather than conditionality (e.g. “until”, “from and after” and “then”) and that this is more consistent with the machinery for execution of a pre-existing trust than with creating a condition precedent to the very existence of the trust.
85. Fourth, while again not determinative, I consider that the absence of any alternative provision, such as a gift over, in the event of failure of the primary purpose, points away from a conditional gift. If a donor intended that no trust should come into existence at all until the happening of an event which may not occur until long after their death (and therefore long after it lay within their power to decide what to do with the funds), it may be expected that they would have made express provision for an alternative use of the funds if that event did not occur.
86. All parties submitted that the question of construction was to be resolved in their (respective) favour by reference to the terms of the Deed alone. Since, however, they also submitted that the admissible contemporaneous evidence reinforced their respective (contradictory) submissions, it is necessary to consider that evidence.
87. Much of the documentation that I was taken to, in particular internal communications within government and commentaries on the 1927 Act and the Deed after the event, is inadmissible and irrelevant to the question of construction. There was some dispute as to whether, in order to be relevant to construction, the relevant background information was that reasonably known to Barings (as the only party to the Deed) or to GF. Given that the relevant documents appear to have been reasonably known to both, this is not a matter that I need to resolve. It seems to me, however, that since Barings were a party to the Deed only so as to preserve the anonymity of GF, and that they were for practical purposes acting on his behalf, it is GF’s knowledge that is material.
88. The most relevant evidence is the statements made by GF (via Barings) and by Winston Churchill broadly contemporaneously with the execution of the Deed. I have set these out at [24] to [25] above. GF was quoted in Barings’ letter of 26 January 1928 as stating that he was placing the fund at “your disposal, as Trustees for the Nation”. Winston Churchill’s announcement similarly referred to “the nation” having received a gift which was to be held “in trust for the nation”. The same description was used in earlier correspondence (for example, Lord Revelstoke’s letter of 10 November 1927, at the time of the

initial transfer of the funds to Barings). This language is not apt to describe a gift that was intended to provide the nation with a mere contingent benefit, particularly one that was potentially extremely remote. Similarly, GF's statement in his letter that the fund was to be applied "eventually" to the object of repaying the National Debt is not language of conditionality.

89. There are also numerous references to it being GF's hope that he would, by making this gift, encourage others to do so as well: see, for example, his own letter, quoted in Barings' letter of 26 January 1928, and a letter from parliamentary counsel dated 14 November 1927 reporting on a meeting with GF's solicitor (and relative), Harold Farrer, referring to GF's expectation that the National Fund would be considerably more than £500,000 having regard to further sums which he anticipates will be settled by other people. I consider that it was the hope of encouraging others that most likely explains GF's decision to frame the gift as an accumulating fund, rather than making an immediate payment to reduce the National Debt. This was indeed explicitly stated as being GF's idea, in the letter from Sir Otto Niemeyer to Winston Churchill (quoted above at [17]). This provides strong support for the conclusion that the Deed effected an immediate and unconditional gift to charity, partly because it reduces the significance (for the purposes of the argument as to conditionality) of the restriction in transferring the National Fund until the date of application and partly because the incentive for others to make similar gifts might have been reduced if GF's own gift were conditional.
90. Mr McDonnell suggested that GF's motivation may have been to benefit Barings, by giving them powers of management, with the right to earn substantial commissions, in relation to a vast fund for many decades. I address this suggestion (and the detailed points of evidence relied on in support of it) in connection with the question whether GF had a 'general charitable intention': see below at [118] to [121]. For the reasons there set out, I reject it. So far as the alleged condition precedent is concerned, even if it were the case that GF was motivated even in part to benefit Barings, I do not think this detracts from the conclusion that the Deed effected an unconditional gift to charity.

(2) Failure of the gift on the grounds of initial impossibility

91. As an alternative to the contention that the existence of the trust was subject to a condition precedent, the second defendant contends that the trust fails on the grounds of initial impossibility and lack of general charitable intention. As Mr McDonnell accepted, where a charitable trust has failed for initial impossibility, the court or the Charity Commission can still make a scheme for the application of property subject to a trust if a "general charitable intention" can be attributed to the original donor. He submitted, however, that no general charitable intention was present in this case.
92. Ms Rushton on behalf of the third defendant contended that the question whether a gift is impossible *ab initio* is to be assessed as at the time that the gift takes effect and that, since the gift under the Deed would take effect only upon the occurrence of the condition precedent, the correct question (it being

common ground that the date of application has not so far occurred) is whether there is now any reasonable prospect of the date of application ever occurring.

93. Given that I have rejected the existence of a condition precedent, it necessarily follows that I reject this form of the argument. The second and third defendants nevertheless maintain that the trust fails for initial impossibility even if their contention as to a condition precedent to the existence of the trust is wrong.

94. It is correct that the question of initial impossibility has to be assessed as at the date the gift takes effect: see, for example, *Re Tacon* [1958] Ch 447, at p.453. Lord Evershed first set out the “well established” position in the case of a gift to charity where no general charitable intention is present, that:

“(1) if the charity has ceased to exist before the will comes into operation the gift lapses; but (2) if the charity is still in existence at the date mentioned, it is effective as a gift to the extent that the interests of the next-of-kin (or of whoever else take in default of the charitable interest taking effect) are for ever excluded, notwithstanding the later dissolution or disappearance of the charity: see *In re Slevin*. In these respects the “charity” is assimilated to an ordinary individual legatee.”

95. He then held that the same principles apply to a gift for some charitable purposes, where there is (again) no general charitable intention:

“Such a gift will wholly fail if the purpose is either so vague or uncertain or so impracticable that the court cannot execute it. But the test of vagueness or uncertainty or impracticability is to be applied at the date of the testator's death.”

96. In view of my conclusion that there was an immediate and unconditional gift to charity upon the execution of the Deed, the relevant date is 9 January 1928.

97. Lord Evershed M.R. then dealt with the nature of the enquiry to be undertaken where the charitable gift is expressed to take effect on the happening of a future event. (It is important to note that he was not concerned with a strictly conditional gift, since it was conceded that the gift was an absolute or “vested” remainder, albeit liable to be defeated on the happening of a specific event.) The test to be applied, as at the date the gift takes effect, was expressed in the following terms by Lord Evershed M.R. at p.455, as follows:

“whether, at the date of the testator's death, there was any reasonable prospect (according to the ordinary beliefs and knowledge of mankind in 1922) that at some future date this scheme would be “practicable.””

98. There was some debate before me as to whether the test to be applied was in this form, or whether the words “according to the ordinary beliefs and knowledge of mankind” as at the relevant time should be excluded. It was

pointed out that those words were missing from other formulations of the test, for example per Upjohn J in *Re White's Will Trusts* [1955] Ch 188, at p.193:

“whether at the date of the death of the testatrix it was practicable to carry the intentions of the testatrix into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so, at some future time.”

99. I do not need to resolve this debate since, although the joint report of the experts expresses the test in the form set out in *Re Tacon* (by reference to the ordinary beliefs and knowledge of mankind as at the date of the Deed), on a proper analysis of the experts' conclusions, there was a reasonable prospect, in 1928, that at some future date the National Fund would be sufficient, certainly with other funds that might be available, to discharge the National Debt whether the test to be applied is that set out in *Re Tacon* or in *Re White's Will Trusts*.
100. That is because looking at the position as at 1928, wearing for all purposes 1928 spectacles as Lord Evershed M.R. put it in *Re Tacon*, the possibility that the National Fund might one day be sufficient to discharge the National Debt was dependent on future events.
101. As Professor Ellison explained at paragraph 13.2 and 13.3 of his first report:
- “13.2 The National Fund would become sufficient to discharge the National Debt if its market value sometime in the future equals or exceeds the market value of the National Debt. The likelihood of the National Fund being sufficient to discharge the National Debt on some future date hence depends on what is expected to happen to the market values of the National Fund and the National Debt.
- 13.3 The National Fund is invested in a diversified portfolio of equities, so its expected future market value is completely determined by expectations of the future returns to equity. The expected future market value of the National Debt is correspondingly completely determined by expectations of future government borrowing costs and the extent to which future primary budget balances will require the government to either increase or decrease the National Debt.”
102. Professor Ellison then carried out an analysis of the likelihood of the amount contributed to the National Fund at the outset being sufficient one day to repay the whole of the National Debt, on the assumption that the National Debt remained at £7.6 billion. He did so by constructing 10,000 projections of the future on the basis that people in 1928 believed the future would resemble but not exactly match the past. He repeated the process by reference to different historical periods to reflect possible variations in belief as to which historical data was likely to be more representative of what would happen. In all reasonable cases he concluded that the National Debt would eventually be discharged.

103. Future factors which impacted on the likelihood of this occurring, and within what timescale (aside from the future performance of equity and other investment markets), included such matters as the British Government's future policy in relation to the National Debt and the occurrence of major events which might lead to unexpected increases in the National Debt. As to the former, a lot depended on whether the McKenna rule (involving substantial contributions to a sinking fund to retire the National Debt) continued to influence government policy. As to the latter, it could not have been known, in 1928, that in just over a decade the world would be thrown into another major conflict which caused Britain's National Debt to soar.
104. 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 GF's gift to make similar donations of their own in sufficient numbers and amounts to contribute to the discharge of the National Debt.
105. Where, at a particular point of time in the past, the likelihood of something happening depended on subsequent events, it cannot be said, in my judgment, that because those later events have rendered the thing happening impossible, it was therefore always impossible (at least in the context of the legal distinction between initial and subsequent failure of charitable trusts).
106. Accordingly, I reject the second and third defendants' submission that because there is now no reasonable prospect of the National Fund ever being sufficient to discharge the National Debt it means that, with hindsight, it has turned out that there was never any reasonable prospect of the National Fund one day discharging the National Debt.
107. I therefore reject the contention that the main charitable purpose of the trust effected by the Deed (to discharge the National Debt) was impossible from the outset.
108. In these circumstances it is unnecessary to consider whether the Deed manifests a general charitable intention. Since the point was fully argued, however, and in case the matter goes further, I will deal with that issue on the assumption that the fact that it has now transpired that the National Fund never has been, and never will be, sufficient (whether alone or with other funds) to discharge the National Debt means that the purpose was impossible from the outset.
109. The presence or absence of a general charitable intention is determined upon the true construction of the instrument effecting the gift: *Re Wilson* [1913] 1 Ch 314, per Parker J at p.321. As colourfully pointed out by Vinelott J in *Re Woodhams* [1981] 1 WLR 493 at p.502-3, to search for a charitable intention by reading the document by which the gift is made "...is in many cases to follow a will-o'-the-wisp". It is rare that the testator or settlor states a particular object but makes it clear that that this is only a means of achieving a more general end, so "[i]n most cases the charitable intention can only be inferred from the particular scheme directed by the testator or settlor".

Vinelott J cited with approval the following passage from the judgment of Dixon J and Evatt J in the High Court of Australia in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (1940) 63 CLR 209, 227:

“...the construction of the language in which the trust is expressed seldom contributes much towards a solution. More is to be gained by an examination of the nature of the charitable trust itself and what is involved in the author's plan or project.”

110. In *Re Woodhams* (above), Vinelott J, at pp.500-503 considered the meaning of “general charitable intention”, citing a number of previous authorities, including:

- 1) *Re Lysaght* [1966] Ch 191, in which Buckley J said that general charitable intention is not general “in the sense of being unqualified in any way or as being confined only to some general head of charity”, but that it was “general in contrast with the particular charitable intention” which would have been shown by the terms of the gift;
- 2) *Re Rymer* [1895] 1 Ch 19, per Lindley LJ at p.35: “...you have to consider whether the mode of attaining the object is only machinery, or whether the mode is not the substance of the gift”;
- 3) *Re Willis* [1921] 1 Ch 44, where Younger LJ stated the principle as: “If on the proper construction of the will the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity but are obliged to say that the pre-scribed mode of doing the charitable act is the only one the testator intended or at all contemplated, then the court cannot, if that mode fails, apply the money cy-près”; and
- 4) *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (above), at p.225, where Dixon J and Evatt J drew a distinction:

“between, on the one hand, cases in which every element in the description of the trust is indispensable to the validity and operation of the disposition and, on the other hand, cases where a further and more general purpose is disclosed as the true and substantial object of the trust, which may therefore be carried into effect at the expense of some part of the particular directions given by the trust instrument.”

111. Vinelott J commented, at p.502G that these were all different ways of expressing the same distinction and, at p.503C-D, said:

“As I see it, one way of approaching the question whether a prescribed scheme or project which has proved impracticable is the only way of furthering a charitable purpose that the testator or settlor contemplated or intended, is to ask whether a modification of that scheme or project, which would enable it to be carried into effect at the relevant time, is one which would

frustrate the intention of the testator or settlor as disclosed by the will or trust instrument interpreted in the light of any admissible (sic) evidence of surrounding circumstances.”

112. Mr McDonnell referred me to *Re Spence* [1979] Ch 483, in which the testatrix left her estate to trustees and directed them to “pay and divide the residue thereof equally between The Blind Home Scott Street Keighley and the Old Folks Home at Hillworth Lodge Keighley for the benefit of the patients.” The Old Folks Home at Hillworth Lodge had ceased to exist by the date of the testatrix’s death.

113. Megarry V.-C. was unable to find a general charitable intention. At p.492F, he said:

“...it is very difficult to find a general charitable intention where the testator has selected a particular charity, taking some care to identify it, and the charity then ceases to exist before the testator's death. This contrasts with cases where the charity described in the will has never existed, when it is much easier to find a general charitable intention.”

114. He went on to consider whether a similar distinction applied “between, on the one hand, a case in which the testator has selected a particular charitable purpose, taking some care to identify it, and before the testator dies that purpose has become impracticable or impossible of accomplishment and on the other hand a case where the charitable purpose has never been possible or practicable”. Having noted that little or nothing was said in argument on this point, he said (at p.493A-C) that “as at present advised” he would answer yes to that question:

“It is difficult to envisage a testator as being suffused with a general glow of broad charity when he is labouring, and labouring successfully, to identify some particular specified institution or purpose as the object of his bounty. The specific displaces the general. It is otherwise where the testator has been unable to specify any particular charitable institution or practicable purpose, and so, although his intention of charity can be seen, he has failed to provide any way of giving effect to it. There, the absence of the specific leaves the general undisturbed.”

115. I note that, consistent with Megarry V.-C.’s comment that little or nothing was said in argument on the point, and in contrast to the detailed analysis of prior authority in *Re Woodhams*, none of *Re Lysaght*, *Re Willis* and *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* were cited to Megarry V.-C in *Re Spence*. Insofar as there is a difference of emphasis, therefore, between *Re Spence* on the one hand and *Re Woodhams* on the other, I prefer the latter approach. The essential question is whether – notwithstanding the fact that the Deed has identified a particular charitable purpose, or purposes (as I have found) – the particular purposes identified are

indispensable to the validity and operation of the gift such that a modification to the purposes would frustrate GF's intention as disclosed by the Deed.

116. There is a logical distinction between this question and the question whether the gift effected by the Deed is subject to a condition precedent. The lack of condition precedent would not necessarily demonstrate the presence of a general charitable intent. On the facts of this case, however, much of the reasoning which led to my conclusion that the Deed effected an unconditional and immediate gift to charity (see paragraphs 58 to 90 above) also supports the conclusion that there was here a general charitable intent. I refer in particular to the first, second and fourth points relating to the terms of the Deed (paragraphs 82, 83 and 85 above) and the indications to be gleaned from the extrinsic evidence referred to in paragraphs 88 and 89. In addition:
- 1) GF 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 GF'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.
117. Against this, Mr McDonnell submitted that GF and his family were not known as benefactors to charity generally. I do not consider this to be a relevant consideration. As the cases I have referred to above make clear, general charitable intention is not to be equated with a disposition towards charitable giving generally. The question is instead, as Vinelott J put it in *Re Woodhams*, whether a modification to the particular purposes would frustrate the intention of the donor of the gift.
118. Mr McDonnell also placed reliance on the following matters, which he submitted were to be gleaned from the contemporaneous correspondence: (1) GF was concerned to ensure the future of Barings, from which he had only recently retired (citing various correspondence of GF in which he demonstrated a consistent concern for the survival of Barings); (2) GF must have been aware of the great interest at the time in the reduction of the National Debt; (3) GF must also have been aware of the controversy generated by the prospect of a very large fund being invested by a private entity, with the risk of distorting the financial markets (see above at [20]); (4) GF's insistence on remaining anonymous; and (5) GF was insistent on the 1927 Act being passed in the terms which he had, through his solicitors Farrers, formulated, allowing the National Fund to be held, accumulating profits and income, for an unlimited period. Mr McDonnell submitted that in light of these factors, it is impossible to attribute to GF a general charitable intent. His intention was instead to put into the hands of Barings, as part of their working capital, a fund which would accumulate tax-free exempt from

any legal limits until such time as it was sufficient to discharge the National Debt.

119. In answer to Mr Henderson's objection that this was no more than speculation, Mr McDonnell submitted that in the absence of clear words in an instrument demonstrating a general charitable intention, the court is necessarily involved in speculation in determining whether such intention exists. I do not accept this. While it is of course impossible to know what GF's intentions were, the task of identifying a general charitable intention involves reaching a conclusion, on the balance of probabilities, from an analysis of the terms of the Deed and admissible evidence as to its context.
120. I accept that each of the individual points identified by Mr McDonnell (summarised in paragraph 118 above) is likely to be correct. I agree with Mr Henderson, however, that the submission that these points demonstrate that GF was motivated by the great benefits that would be conferred on Barings, so much so that it makes it impossible to attribute to him a general charitable intention, does not rise above the level of speculation. I consider it, on the basis of the evidence as a whole, to be highly unlikely.
121. In my judgment, for the reasons I have set out above, looking at the terms of the Deed and the extrinsic evidence as a whole (including, but notwithstanding, the documents to which Mr McDonnell took me), GF 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). I do not accept, in the words of Vinelott J, that because it has become impossible to fulfil GF's primary purpose, his broader intention as disclosed by the Deed and the admissible evidence is thereby frustrated.

(3) The impact of s.9 of the 1927 Act

122. My conclusion that the trust is not invalidated on either of the grounds advanced by the second and third defendants means that it is unnecessary to consider whether, had it otherwise been invalidated, s.9 would have saved it.

Conclusion on the Invalidity Issues

123. For the above reasons, I reject the claim of the second and third defendants that the National Fund is held on resulting trusts for the donors or their estates. No party suggested that there was any difference, in this respect, as between GF (and his estate) and Lord Dalziel or anyone else who subsequently donated to the National Fund (and their estates). In the absence of any evidence or argument to the contrary, I consider that later donations must be treated as having been made on the terms of the trust effected by the Deed.

The Winding-up Issues

124. Before turning to the specific issues raised under this head, it may be helpful to rehearse briefly the legal framework.

125. The court exercises two parallel jurisdictions relating to the alteration of charitable trusts: first an inherent equitable jurisdiction to regulate the administration of a charity without altering its purposes by way of an “administrative scheme”; and, second, a statutory jurisdiction (previously exercised under its inherent equitable jurisdiction) to alter the purposes of a charity by way of a “cy-près scheme”).
126. The court’s jurisdiction to make a cy-près scheme is now governed by the 2011 Act.
127. The circumstances in which the jurisdiction arises are set out in s.62(1) of the 2011 Act:

“(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) have been as far as may be fulfilled, or

(ii) cannot be carried out, or not according to the directions given and to the spirit of the gift,

(b) where the original purposes provide a use for part only of the property available by virtue of the gift,

(c) where—

(i) the property available by virtue of the gift, and

(ii) other property applicable for similar purposes,

can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes,

(d) where the original purposes were laid down by reference to—

(i) an area which then was but has since ceased to be a unit for some other purpose, or

(ii) a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift, or

(e) where the original purposes, in whole or in part, have, since they were laid down—

(i) been adequately provided for by other means,

(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.”

(emphasis added to identify the two possibly relevant circumstances in this case.)

128. The “appropriate considerations”, referred to in sub-section (1) are defined by subsection (2) as:

“(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.”

129. Section 62(3) provides that subsection (1) “does not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près except in so far as those conditions require a failure of the original purposes”. This preserves, in particular, the distinction developed at common law between cases of initial failure and subsequent failure:

- 1) In cases of initial failure, it is necessary to find a general charitable intention before a cy-près scheme can be made: Tudor on Charities (above) at 9:004;
- 2) In cases of subsequent failure, there is no such requirement, but it is necessary to establish that the donor intended to give the property out-and-out for specific charitable purposes: see Tudor on Charities (above) at 10-071.

130. Section 67(1) provides that the power of the court or the Commission to make schemes for the application of property cy-près must be exercised in accordance with that section. Section 67(2) and (3) provide as follows:

“(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.”

131. The “spirit of the gift” was described by the Court of Appeal in *Varsani v Jesani* [1999] 2 Ch 219, per Morritt LJ at [24] as: “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.” In the same case, Chadwick LJ said (at p.238C):

“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.”

132. The Charity Commission has an additional power, under section 73 of the 2011 Act, to settle a scheme, where it is necessary or desirable for the scheme either to alter provision made by an Act establishing or regulating the charity, or to make any provision which might go beyond the powers of the Commission apart from s.73. Such a scheme may be given effect by order of the Secretary of State. Approval by resolution of each House of Parliament is also necessary if the scheme requires an alteration to a statutory provision under a public general Act. Otherwise, it is subject to potential annulment in pursuance of a resolution of either House of Parliament.

(1) An Administrative Scheme

133. An alteration of the original purposes of a charitable trust can only be achieved by a cy-près scheme: *Oldham B.C. v Attorney-General* [1993] Ch 210, per Dillon LJ at p.219B-C.
134. In light of my conclusion that the direction in the Deed to transfer the National Fund to the National Debt Commissioners on and from the date of application is an integral part of the main purpose to discharge the National Debt, any scheme which permitted the National Fund to be applied in reduction (but not discharge) of the National Debt or (*a fortiori*) for any other purpose would involve an alteration in the original purpose of the trust. Accordingly, this cannot be achieved by an administrative scheme.

(2) A Cy-près Scheme

135. On the basis of my finding that the main purpose of the trust is the discharge of the National Debt, the court has jurisdiction under s.62(1)(a)(ii) and s.62(1)(e)(iii) of the 2011 Act to make a cy-près scheme.
136. As to s.62(1)(a)(ii), this is engaged because the original purposes cannot be carried out. Mr Pearce submitted that in light of the experts' joint conclusion that the prospect of the National Fund ever being sufficient to discharge the National Debt is "vanishingly small", it has not been established that the main purpose of the trust "cannot be carried out". I do not accept this. The phrase used by the experts reflects the fact that, since the future cannot be predicted with complete certainty, it could not be said that there are absolutely no circumstances in which the National Fund could be sufficient to comply with the main purpose of the trust. The circumstances in which it might be sufficient are so remote, however, that for all practical purposes there is no possibility of it ever being sufficient to discharge the National Debt (whether alone or with other funds available for the purpose). That is sufficient, in my judgment, to satisfy the requirements of s.62(1)(a)(ii).
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, that would not be a suitable and effective method of using the property.
138. In light of my conclusion that this is not a case of initial impossibility, there is no requirement to demonstrate a general charitable intention: see for example *Re Wright* [1954] Ch 347, per Romer LJ at pp.362-363:
- "Once money is effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator's next-of-kin or residuary legatees are for ever excluded and no question of subsequent lapse, or of anything analogous to lapse, between the date of the testator's death and the time when the money becomes available for actual application to the testator's purpose can affect the matter so far as they are concerned."
139. All that is necessary, in the case of subsequent impossibility, is that there was an out-and-out gift for specific charitable purposes. It necessarily follows from my conclusion that there was an unconditional immediate gift to charity upon execution of the Deed that this requirement is satisfied here.
140. The first defendant contends, however, that s.9(1) of the 1927 Act operates to oust the court's jurisdiction to make any scheme at all. I have set out s.9(1) above. It applies to an instrument which gives "directions" for property to be held on trust, accumulated for a period and then transferred to the National

Debt Commissioners to be applied in reduction of the National Debt. Its effect is to render the directions “valid and effective” and to preclude any “person” from requiring the transfer of any part of the property “otherwise than in accordance with the provisions of the instrument.”

141. Section 9(1) clearly applies to the Deed. Mr Pearce submitted: (1) that any cy-près scheme which permitted a transfer of the National Fund to the National Debt Commissioners in advance of the date of application would be a transfer “other than in accordance with the provisions” of the Deed; and (2) that the court is a “person” within the subsection and is thus precluded from requiring the National Fund to be so transferred.
142. Mr Pearce cited *R (on the application of Black) v Secretary of State for Justice* [2018] AC 215, at [22] for the proposition that, although a statutory provision does not normally bind the Crown, it may do so by express words or necessary implication. In *Province of Bombay v Municipal Corpn of the City of Bombay* [1947] AC 58, the Privy Council rejected the view that necessary implication could be found if the law could not operate “efficiently and smoothly” unless the Crown were bound, but Lord du Parc said, at p.61: “if it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named”.
143. Mr Pearce’s argument that “person” in s.9(1) includes the court followed the following steps: (1) s.9(1) must have been intended to apply to the National Debt Commissioners, because the section was, among other things, specifically designed to prevent a trust that required a fund to be accumulated over a lengthy period from being frustrated by operation of the rule in *Saunders v Vautier* and it was the National Debt Commissioners who would otherwise have been entitled to call for the fund under that rule; (2) the National Debt Commissioners are an emanation of the Crown; (3) s.9 therefore binds the Crown by necessary implication; (4) the Crown is a single person; and (5) as the court is also an emanation of the Crown, it too is bound.
144. I do not accept this argument. The court is, of course, bound to apply any Act of Parliament, as it represents the law of the land. It is, therefore, required to give effect to the section. The pertinent question in my judgment is whether the section, construed purposively, is intended to prevent in *all* circumstances the property of the trust being transferred otherwise than in accordance with the provisions of the instrument and, if not, whether it permits the application of the cy-près doctrine in the circumstances of this case. Whatever the answer to that question, I do not think it is relevant to go on to enquire whether the court is a “person” bound by the injunction against requiring a transfer of the funds contained in s.9(1).
145. The purpose of the section is to protect directions given in a specific type of instrument (being those intended to confer a gift on the nation via a trust of property to be accumulated for a potentially lengthy period before being applied in reduction of the National Debt) against acts or rules of law that would otherwise render them invalid and ineffective. That purpose is evident from the words of the section alone. It is reinforced by statements made by

Viscount Cave, the Lord Chancellor, as the bill passed through Parliament. In the debate in the House of Lords, he “shortly stated” the purpose of the section as follows:

“Certain public-spirited persons have expressed a desire to give considerable sums to be held in trust to accumulate the income during a long period after which the fund and the accumulations are to be applied to the reduction of the National Debt. That, of course, is a very laudable purpose, but unfortunately there again a rule of law steps in and prevents indefinite accumulations of income. We want to facilitate the execution of the purpose of these public-spirited individuals, and therefore by Clause 9 of the Bill we propose to make a trust of that nature valid notwithstanding the rule to which I have referred.”

146. In committee, the Lord Chancellor said the following:

“Your Lordships will of course bear in mind that the funds with which Clause 9 proposes to deal are funds under purely voluntary settlements, settlements made by some public-spirited donors as free gifts to the nation. We think it would be not only ungracious, but impolitic, to put statutory difficulties in the way of the intentions of any one who may desire to benefit the nation in that way.”

147. The mischief at which the section was aimed was, therefore, rules of law that would frustrate the donor’s intentions by invalidating the gift altogether (such as the rule against perpetuities or accumulations) or by preventing it taking effect in accordance with those intentions (such as the rule in *Saunders v Vautier*). The latter was highlighted in the following comment of the Lord Chancellor during the committee stage of the Bill, objecting to an amendment that would place a limit on the period for which funds might be accumulated:

“A man might very easily say: “My scheme is an accumulation for sixty years. I am limited by your Statute to fifty years, and I will not make the gift.” It seems far better to us to let the matter be free to that extent, subject to this condition, that if it should happen that the settlement is drawn in such a way as to be a disadvantage to the nation, then the Treasury would be able to say: “We cannot accept a gift on those terms.””

148. Construed purposively, therefore, the section ought not to prevent the court ordering (whether pursuant to the *cy-près* jurisdiction or some other jurisdiction) the application of the trust fund otherwise than as directed under the instrument, where to do so would not frustrate the donor’s intentions. Specifically, it ought not to preclude the application of the *cy-près* doctrine where it is to be applied so as to facilitate, not frustrate, the donor’s charitable intentions in circumstances where it has become impossible to carry out the specific directions set out in the instrument.

149. In this case, GF's specific purpose (to discharge the National Debt) has been frustrated, not by "an Act or rule of law", but by circumstances. Where, as I have found, the donor intended an unconditional gift to charity and/or had a general charitable intention notwithstanding the particular purpose specified in the instrument, I do not think that the section was intended to prevent the court giving effect to that unconditional gift to charity or general charitable intention.
150. I acknowledge that, save it follows that I reject the argument that the court is a "person" bound by an absolute restriction on requiring the trust fund to be transferred otherwise than in accordance with the instrument, this was not an argument adopted by Mr Henderson (although it reflects in part an argument advanced by Ms Rushton in support of her contention that s.9(1) could not save the Deed if the trust was subject to a condition precedent). Mr Henderson's principal argument was that if the court made a scheme for the immediate transfer of the National Fund otherwise than in discharge of the National Debt, it would not be "requiring" the transfer of the National Fund otherwise than in accordance with the provisions of the Deed. On the contrary, he submitted that the court should "make" a scheme by ordering that the Deed be amended (for example by removing the references to the date of application) and that by so doing it would be requiring the transfer of the National Fund "in accordance with" the Deed, albeit as amended. As Mr Pearce pointed out, this argument does not overcome the problem that in directing that the instrument be amended pursuant to a cy-près scheme, the court would be requiring that the property be transferred otherwise than in accordance with the Deed as its terms stand as at the date of that direction. Accordingly, I prefer the analysis that on its true construction s.9(1) does not prevent the court exercising its cy-près jurisdiction where it has become impossible for the gift to be carried out in accordance with the specific provisions in the instrument.
151. Mr Pearce objected that the fact that the prospect of the National Fund ever being sufficient to discharge the National Debt is "vanishingly small" as opposed to "impossible" does not mean that it is impossible for the directions in the instrument to be carried out. For the reasons I have set out above, however, I consider that no practical distinction is to be drawn between "vanishingly small" and "impossible" in the circumstances of this case.

(3) Which jurisdiction should be exercised, if the court can make both an administrative scheme and a cy-près scheme?

152. This question does not arise, since I have concluded that the court can only exercise its cy-près jurisdiction.

(4) A cy-près scheme to transfer the property to the National Debt Commissioners, or some other scheme?

153. As I have noted, the court's function at this hearing is limited to determining whether the scheme to be made under the cy-près jurisdiction is one which requires the National Fund to be transferred to the National Debt

Commissioners to be applied in reduction of the National Debt, or some other scheme.

154. In those circumstances, no evidence or submissions have been presented as to the nature or content of any other possible scheme.
155. Section 67(2) (see above at [130]) confers a broad discretion on the court, once a *cy-près* occasion has arisen, to make such scheme as it considers appropriate, having regard to the three matters identified in subsection (3).
156. Mr Henderson submitted that I should exercise the discretion in favour of a scheme that applied the National Fund in reduction of the National Debt, because the spirit of the original gift (which he described as a gift to the nation in order to reduce the National Debt) and the desirability of securing that the National Fund was applied for charitable purposes which are close to the original purposes outweighed any other consideration irrespective of the nature or content of any alternative scheme that may be proposed.
157. Mr Pearce, while accepting that on a full consideration of the question with the benefit of evidence and submissions as to other possible schemes the court may conclude that the appropriate scheme was one which applied the National Fund in reduction of the National Debt, contended that it was premature to make that decision without having considered the possible alternatives. In support of that contention he submitted that:
 - 1) The spirit of the original gift included an intention: to benefit the nation; to benefit future generations (given the long-term nature of the gift); and to stimulate altruism in others;
 - 2) Any benefit to the nation and to future generations would be *de minimis* if the National Fund were used to reduce the National Debt, and there was no possibility of it encouraging altruism in others;
 - 3) Various examples were given in evidence in support, including that applying the National Fund in reduction of the National Debt would have no real permanent effect on the interest payments due on the National Debt, and would result in the government being able to increase real spending by a mere 0.0006%;
 - 4) The spirit of the gift would be better served by applying the fund towards other charitable purposes where a more tangible benefit to the nation could be achieved;
 - 5) The need to take into account the “desirability” of securing that the property is applied for purposes close to the original purposes did not assume that it *was* desirable, but required the court to consider whether it was or was not desirable;
 - 6) The third criteria, the need for the charity to have purposes which are “suitable and effective” in light of current social and economic

circumstances would be wholly unsatisfied if the fund was used to reduce the National Debt; and

- 7) When exercising the discretion under s.67(3) the court or the Commission must keep in mind all three, potentially conflicting, factors at all times.

158. I am persuaded by Mr Pearce that without an ability to compare the effect of using the National Fund to reduce the National Debt with any other charitable scheme, in the light of the three factors identified in s.67(3), I cannot be satisfied that the only realistic conclusion that could be reached is one in favour of a scheme for the reduction of the National Debt. Accordingly, I will make directions for the resolution of this issue on another occasion.

(5) Scheme under s.73

159. My conclusion that the court has jurisdiction to make a scheme under s.67 means that it is unnecessary to consider the alternative route proposed by Mr Pearce, namely that the Attorney General could apply to the Commission under s.73 for a scheme to be given effect by order of the Secretary of State. It was common ground between the claimant and the first defendant that (assuming the court had no jurisdiction otherwise to make a scheme) the Attorney General had standing to proceed under s.73. There remains a question whether the appropriate route is under s.73(1)(a)(i) (which applies where it is necessary or desirable to alter the provisions of an Act establishing or regulating the charity) or under s.73(1)(a)(ii) (which applies where it is necessary or desirable to make any other provision which goes or might go beyond the powers of the Commission). It is unnecessary to reach a decision on that point, and better not to do so when neither the Commission nor the Secretary of State is before the court.

Disposition

160. For the above reasons, I conclude as follows:

- 1) The Deed created a valid charitable trust with the principal purpose of benefitting 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 and the subsidiary purpose of benefitting the nation by applying part of the National Fund in reduction of the National Debt, if the trustees determine that national exigencies required it;
- 2) The Deed effected an immediate and unconditional gift to charity (such that there was no condition precedent to the coming into existence of the charitable trust);
- 3) In the following circumstances:

- a) the original purposes of the charitable trust cannot be carried out and have ceased to provide a suitable and effective method of using the trust property;
- b) this constitutes a case of subsequent (and not initial) failure of the charitable purposes; and
- c) GF intended to give the property out-and-out for the specific charitable purposes identified in the Deed;

the court has jurisdiction to make a scheme altering the charitable trust pursuant to its cy-près jurisdiction;

- 4) The court does not have jurisdiction to make a scheme altering the trust under its administrative jurisdiction;
- 5) The question whether the court should make a scheme, under its cy-près jurisdiction, for the transfer of the National Fund to the National Debt Commissioners for the reduction of the National Debt or for some other, and if so what, charitable purposes will be deferred to a subsequent hearing.