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England and Wales High Court (Chancery Division) Decisions

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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
21 January 2022

Before:

MR JUSTICE ZACAROLI

Between:

H.M. ATTORNEY GENERAL

Claimant

- and -

ZEDRA FIDUCIARY SERVICES (UK) LIMITED

Defendant

**William Henderson (instructed by Government Legal Department) for the Claimant
Robert Pearce QC and Daniel Burton (instructed by Macfarlanes LLP) for the Defendant**

Hearing dates: 17 and 20 December 2021

HTML VERSION OF JUDGMENT APPROVED

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Mr Justice Zacaroli:

Introduction

1. The "National Fund" was established by a deed of trust dated 9 January 1928 (the "Deed") by Baring Brothers & Co Limited ("Barings"), acting on behalf of a donor whose identity remained anonymous for 92 years, Mr Gaspard Farrer ("Mr Farrer"). The Deed provided for an amount of cash and securities in excess of £500,000 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 present trustee of the National Fund is the defendant, Zedra Fiduciary Services (UK) Limited (the "Trustee").
3. Upon an application brought by the claimant, the Attorney-General (acting pursuant to her functions and duties in relation to charities), and following a judgment delivered on 9 November 2020 (the "First Judgment"), I made the following declarations:
 - (1) The Deed created a valid charitable trust, the principal purpose of which is (either alone or with other funds available for the same purpose) benefitting the nation by the discharge of the National Debt, and the subsidiary purpose is benefitting the nation by the application of part of the National Fund in the earlier reduction of the National Debt if the trustees determine that national exigencies so require;
 - (2) The Deed effected an immediate and unconditional gift to charity, there being no condition precedent to the coming into existence of the charitable trust;
 - (3) The court has jurisdiction to make a scheme to allow the property comprised in the charitable trust to be applied cy-près on the grounds that:
 - (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, within the meaning of the Charities Act 2011 section 62(1)(a)(ii) and (e)(iii); and
 - (b) there has been a subsequent (and not initial) failure of those purposes.

4. I refer to the First Judgment for a fuller background to the Deed and the reasons for making those declarations. Having determined that the charitable trust constituted by the Deed should be applied cy-près, the Attorney-General's application raised the further question whether the court should make a scheme 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. That question was deferred, however, to be determined in light of further evidence and submissions as to what the possible alternatives might be and is the subject matter of this second judgment.
5. The National Fund (to which a further substantial sum was later bequeathed by Lord Danziel) is today worth in the region of £600 million. The National Debt, as at the end of October 2021, was £2,277.6 billion.

The Cy-près jurisdiction

6. The court's jurisdiction to make a cy-près scheme is governed by the Charities Act 2011 ("the 2011 Act").
7. The circumstances in which the jurisdiction arises are set out in s.62(1) of the 2011 Act. This provides as follows:

"(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."

8. In this case, as noted in the First Judgment, the jurisdiction arises under section 62(1)(a)(ii) and section 62(1)(e)(iii).

9. 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."

10. Section 67(1) of the 2011 Act 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."

11. The "spirit of the gift" means "the basic intention underlying the gift or the substance of the gift rather than the form of the words used to express it or conditions imposed to effect it": see *Varsani v Jesani* [1999] 2 Ch 219, per Morritt LJ at [24] (a case on what is now section 62 of the 2011 Act, but the

phrase is to be given the same meaning under section 67: see *White v Williams* [2010] EWHC 940 (Ch), per Briggs J at [21]). In *Varsani v Jesani*, 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."

The competing schemes

12. The Attorney-General's scheme is straightforward. It simply replaces clause 3 of the Deed (which defines the date of application of the National Fund primarily by reference to when it, either alone or with other funds, is sufficient to discharge the National Debt), with the following:

"the date of application shall be [14th January 2022]" (or some other date shortly after the date of the order giving effect to this judgment).

13. This would ensure that the National Fund is applied, now, in *reduction* of the National Debt.

14. The Trustee's scheme is more complex but is equally simple in terms of the charitable *purposes* to which the National Fund is to be applied. The scheme involves the incorporation of a new company to which the National Fund shall be transferred, to hold as trustee on the following trust:

(1) to pay or apply the income thereof for such charitable purposes within the United Kingdom as the Trustee shall in its discretion from time to time think fit; and

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

15. The new trustee would be obliged, in executing the trusts, to aim to: (1) benefit the whole of the United Kingdom; (2) stimulate altruism in others; (3) benefit future generations as well as the present generation; and (4) collaborate with and support other charities.

16. The scheme contains detailed provisions for the appointment of directors and an advisory board. It is accompanied by a schedule setting out the new trustee's administrative powers and draft articles of association.

17. The Trustee has obtained an expert report from Sir Stephen Bubb, whose experience includes helping to set up the infrastructure and grant-making processes of the National Lottery and working with the Government on policy and practice, and with member charities of ACEVO (which represents the UK's charity Chief Executives) on developing leadership and good governance.

18. Sir Stephen has suggested three possible models for the new trust. Option A is to make an immediate distribution of the National Fund for charitable purposes. Option B is to establish a new grant-making trust. Option C is to establish a new "wholesaler", making grants and loans through other existing charitable organisations. Sir Stephen favours Option C, as does the Trustee. The Trustee's scheme, however, proposes that it would be for the new trustee, taking such advice as is appropriate, to determine which option to follow.

19. Much of the detail of the Trustee's scheme is concerned with administrative matters. The parties were agreed that the court has power, when making a cy-près scheme, to incorporate purely administrative matters into its order. Leaving aside the administrative details of the Trustee's scheme, however, its essence is simple: the National Fund is to be applied for general charitable purposes in the United Kingdom.
20. Accordingly, the two options with which the court is faced for the application of the National Fund cy-près are: (1) to apply it in reduction of the National Debt; or (2) to apply it for general charitable purposes within the United Kingdom.

The spirit of the gift

21. The parties are agreed that evidence as to the spirit of the gift is to be found principally in the Deed itself and in the following documents (some of which were recited in the First Judgment, but are repeated here for convenience).
22. On 26 March 1927 Sir Otto Niemeyer (a close friend of Mr Farrer) wrote to the Chancellor of the Exchequer, Winston Churchill, in the following terms:

"I have been approached by a gentleman (who has forbidden me to mention his name to anyone) with an offer to contribute half-a-million immediately, and possibly more later, for the redemption of the National Debt, provided this money can be used in the hands of private trustees to accumulate under a Trust Agreement ... 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."
23. On 10 November 1927, Lord Revelstoke (a partner in Barings) wrote to Sir Otto Niemeyer saying:

"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 legislation referred to was what became the Trust Funds (Validation) Act 1927 (the "1927 Act"), to which I refer in the First Judgment at [8] and [21], enabling the Deed to avoid issues arising as a result of, for example, the rule against remoteness of vesting.
25. On 11 November 1927, Sir Otto Niemeyer forwarded Lord Revelstoke's letter of the previous day to Winston Churchill, in which he referred to the wish to give £500,000 "to be held on trust for the nation in certain circumstances".
26. Winston Churchill replied on 18 November 1927, expressing thanks on behalf of the Government "on behalf of the nation" for the offer to place the fund "...in trust for the nation, to be applied in reduction of the National Debt." He continued: "[t]he Government hope and fully expect that such an outstanding example of public spirit may prove an inspiration to others and mark a turning-point in the history of the Debt".
27. Lord Revelstoke replied to Winston Churchill on 21 November 1927 "with reference to the proposal of a fund to be placed in trust for the Nation", reiterating the importance of the condition that the planned legislation was enacted, so as to enable the National Fund to remain in place, and accumulate further funds, over a long period.

28. In his letter of 5 January 1928 to Lord Revelstoke, Winston Churchill referred to the 1927 Act having now been passed, "framed to cover the creation of a fund to be applied to the reduction of the National Debt". He indicated that he would like to take an early opportunity of expressing publicly his appreciation for the gift "...and of referring also to the great public benefit which might follow from the copying of his generous example."

29. In a letter dated 26 January 1928 from Barings to Winston Churchill, in a form approved by Mr Farrer, 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.'

30. Winston Churchill replied to Baring Brothers on 1 February 1928, again expressing the Government's thanks for "the trust for the benefit of the Nation". He noted that "[a]mong the motives which actuated the donor, as your letter shows, was the hope that others may be prompted from time to time to follow the example he has set on so spacious a scale."

31. On 2 February 1928, Mr Hopkins (of HM Treasury) wrote to Mr Grigg (the PPS to Winston Churchill), referring to the donor's specific wish that his letter to Winston Churchill, and the reply to it, be given to the press.

32. Winston Churchill duly issued the following statement to the press on 6 February 1928, attaching a copy of Baring Bank's letter of 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."

33. The parties differ as to their interpretation of the spirit of the gift to be gleaned from these documents.

34. The Attorney-General contends that the spirit of the gift was the making of a gift to the Nation from Mr Farrer's private funds for the purpose of reducing the amount of public borrowing and of encouraging others to do the same. This is evidenced principally by the Deed itself, Mr Farrer's letter to Barings,

quoted in Barings' letter to Winston Churchill of 26 January 1928, Winston Churchill's letter to Barings of 1 February 1928 and his public announcement in respect of the gift.

35. Mr Henderson submitted that the central themes visible in these documents are: to benefit the Nation and the "end" of repaying the National Debt. Repayment of the National Debt benefits the Nation as it increases the amount the Government can spend on public purposes. He submitted that a subsidiary element is the encouragement of others to do the same (described merely as a "hope" or "idea" in the contemporaneous documents). He submitted that the fact that there may be a long period of accumulation until the National Fund was applied in discharge of the National Debt did not prevent it being of immediate benefit to the Nation. The mere fact that the National Fund existed, for the purpose of discharging the National Debt, was something the Government of the day could take into account in its policy-making. Its benefit might be felt by the current generation since, although the policy of the day was to repay the National Debt through a series of budget surpluses, the existence of the National Debt might reduce the amount of tax that had to be raised from the current generation of tax payers in order to achieve that purpose. That this was the spirit of the gift is reinforced, he submitted, by the provision in the Deed requiring the Trustee to render to the National Debt Commissioners accounts and information relating to the trust as they reasonably required.
36. The Trustee contends that the spirit of the gift has three elements: (1) a desire to benefit citizens in the whole of the UK; (2) a desire to benefit future generations, in preference to the generation in existence at the time of the gift; and (3) a desire, by setting an example, to stimulate altruism in others.
37. Mr Pearce submitted that the first element is evidenced by the fact that Mr Farrer described the gift as being to or in trust for "the Nation" and likened it to "gifts to the Nation of historic sites, buildings and works of art." He submitted that the second element is inherent in the mechanism for accumulation of income and retention of capital over what could have been a very long period. The third element is evidenced by numerous references in the correspondence referred to above and by Mr Farrer's wish that the fact of the gift (albeit not his identity) be publicised.
38. Both parties agree that an essential element in the spirit of the gift was to benefit "the Nation". The Attorney-General contends that this was limited, however, to benefitting the Nation for the purpose of reducing the National Debt, whereas the Trustee contends that it was unlimited and is to be equated with benefitting all the citizens of the Nation.
39. Mr Pearce submitted that the Attorney-General's formulation is wrong as it simply restates her formulation as to the *purpose* of the Deed (the reduction of the National Debt) which I rejected in the First Judgment.
40. I agree that formulating the spirit of the gift by reference to its purpose is confusing. The purpose is the starting point but, necessarily, the spirit must be broader than the purpose. I do not accept however, that the idea that the spirit of the gift encompassed the reduction of the National Debt can be dismissed so easily, for the following reasons.
41. First, as I noted in considering the relevance of section 9(1) of the 1927 Act in determining the purpose of the Deed, at [54] of the First Judgment, reduction is a broader term than, and encompasses, discharge.
42. Second, a gift *to* the Nation, for example a gift of funds to the Exchequer to be used for government purposes, is not charitable since (as was common ground) although government spending is for public purposes, it includes both charitable and non-charitable purposes. It is perhaps something of an anomaly, but it has long been held that a gift to benefit the Nation by reducing the National Debt (whether wholly or in part) *is* a charitable purpose, notwithstanding that the way in which citizens of the Nation benefit from that gift is either by a reduction in their taxes or an increase in funds available

for general public spending (see the First Judgment at [11]). The fact that, in order to be a valid charitable gift, a gift to the Nation had to be used in reduction of the National Debt supports the view that the spirit within which the gift was given was the relief of the debt burden on the Nation.

43. Third, that is reinforced by the fact that the subsidiary purpose, expressed in the Deed, was to reduce the National Debt if national exigencies required it, and by the fact that the interest of the National Debt Commissioners was recognised from the beginning, both in the fact that it was to them that the Fund would be transferred and in the provision requiring them to be provided with accounts and information when requested.
44. Fourth, it is also supported by the fact that in the key correspondence emanating from Mr Farrer, or others on his behalf, references to a gift to the Nation were invariably qualified by reference to the repayment or redemption of the National Debt (either expressly, or by implication). This is most clearly seen in Mr Farrer's own letter, quoted in Barings' letter to Winston Churchill of 26 January 1928. Mr Pearce submitted that Mr Farrer, in this letter, equated his gift with other gifts "to the Nation", such as gifts of historic sites, buildings or works of art, and that this supports the conclusion that the spirit of the gift was to benefit the Nation without qualification. I disagree with that reading of the letter. On the contrary, Mr Farrer was *contrasting* his gift "to repay debt" from those other types of gift to the Nation. I think that the final sentence of the letter is a better clue to the spirit of the gift, where the hope was expressed "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."
45. Fifth, given the relative value of the National Fund (at the time of the gift) –approximately 0.007% of the National Debt – it was not likely that it would ever be sufficient to do more than effect a partial reduction of the National Debt. It was of course hoped that the National Fund would increase because others were indeed prompted to add to it, but the purpose was more likely to be achieved because it would at some point be sufficient *together with other funds* (including the sinking fund the Government was committed to creating) to discharge the National Debt. While this does not detract from the *purpose* of the Deed being to discharge the National Debt (for reasons set out in the First Judgment), it does provide some support for the conclusion that the spirit of the gift was to *assist* in that end, rather than to achieve it by itself.
46. Mr Pearce's contention that the spirit of the gift was to benefit all citizens of the United Kingdom has at least a superficial attraction to it, in that the discharge of the National Debt would, if achieved, have benefitted each and every citizen of the Nation. For the reasons I have set out above, however, I consider that is too broad an analysis, and that the spirit in which this gift was given was to benefit the Nation, and all of its citizens, by attempting to free it from debt. Further, as I develop below, the scheme proposed by the Trustee does not reflect the spirit of benefitting *all* citizens of the Nation.
47. It is common ground that part of Mr Farrer's intention in establishing the Deed was to encourage others to do something similar. I do not think this is particularly illuminating, however, in identifying the spirit of the gift for the purposes of deciding on an appropriate *cy-près* scheme. Encouraging others to do something similar is not a charitable purpose to which the funds could be applied. The important issue is "similar to what?" As to that, the disagreement between the parties simply reflects their disagreement as to the core element in the spirit of the gift: encouraging others to join in the effort to relieve the Nation of debt or more generally encouraging others to altruism by making gifts to benefit citizens of the UK. The former is, in my judgment, what Mr Farrer had in mind, as demonstrated most clearly by the last sentence of his letter quoted at [44] above.
48. The additional aspect of the spirit of the gift, as advanced by the Trustee, is to benefit future generations. I do not accept that this amounted to any part of the spirit of the gift.
49. The most that can be said is that it was implicit in the terms of the Deed that the National Fund may not have been used to discharge the National Debt for a long time so that, by definition, those that would benefit directly from the deployment of the fund would be a future generation.

50. It all depended, however, on how quickly other donations were made to the National Fund or other funds for a similar purpose were established. If Mr Farrer's wish that others would be encouraged to act similarly was realised, then that might well have happened relatively quickly.
51. Moreover, the mere existence of the National Fund might well have had the effect of reducing the tax burden on (and thus benefitting) the current generation, in circumstances where government policy was to burden the current generation with the discharge of debt, because the Government might be able to factor in the National Fund and other similar gifts, in determining how much the existing debt should be reduced by such taxation.
52. In any event, even if it could be said that the original intention was to benefit future generations, the fact is (as Mr Pearce neatly put it in acknowledging this point) the future has arrived: it is now nearly 100 years after the National Fund was established. I do not think it is a relevant consideration – in determining how to apply the funds *cy-près* – to seek to benefit future generations as of now. It is not a relevant consideration, therefore, to ensure that the funds are applied so as to *continue* benefitting future generations.

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

53. The parties disagreed as to the meaning of "having regard to ... the desirability of securing that the property is applied for charitable purposes which are close to the original purposes" in section 67(2) and (3) of the 2011 Act. The Attorney-General contends that this *assumes* that it is desirable that the property is applied for charitable purposes which are close to the original purpose, and that desirability is something to which regard must be had. The Trustee contends that it is to be read as requiring the court to make an assessment of the extent to which it is desirable that the property is so applied.
54. The *cy-près* doctrine has its origins in the common law. In *Attorney-General v Ironmongers' Company* (1844) 10 Cl & Fn 908, Lord Cottenham LC defined *cy-près* to mean "as near as possible to the object which has failed" (see p.922). This necessarily imports a significant degree of latitude, depending on how narrow, or broad, was the scope of the original gift, and what other purposes may exist. In the same case, Lord Lyndhurst described the court's task as follows:
- "We may look at his disposition in the will to see what his charitable inclinations were, and, having ascertained them, then we must provide something corresponding with our opinion of those charitable inclinations. You cannot talk of his intention with respect to something that he never contemplated. The true mode is, to consider what he did, and from what he did to collect what were his inclinations with regard to charity."
55. I prefer the argument of the Attorney-General, that the section presupposes that it *is* desirable for the property to be applied for charitable purposes which are close to the original purposes. That has always been the essence of the *cy-près* doctrine, and I do not believe that parliament intended to jettison the concept when it enacted section 67. Ultimately, however, I doubt that the difference between the parties would make much difference in most cases. As Mr Pearce QC pointed out, the word used is "desirability", not "need", and the court is required to "have regard" to that desirability, but it does not have to give effect to it: it is merely one of the three factors to which regard is to be had.
56. There is no dispute as to what the original purposes were in this case: they are as found in the First Judgment, and noted above at [3]. The importance of this factor lies, in part, in ameliorating the deterrent effect on donors of the ready application of charitable funds for purposes distant from those intended by the donor: see, for example, *Varsani v Jesani* (above), per Morritt LJ at [29].

The current social and economic circumstances

57. As Mr Pearce pointed out, the court is to have regard to the "need" for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances. That is to be contrasted with the "desirability" of securing that the property is applied for purposes close to the original purposes.
58. This is explained by the fact that one of the triggering events for an application of charitable property *cy-près* is if the original purposes have ceased to provide a suitable and effective method of using the property, having regard to the spirit of the gift and the prevailing social and economic circumstances. There would be no point in applying the property to new purposes, if those were similarly unsuitable and ineffective.
59. As Mr Henderson submitted, however, that does not mean that this factor trumps the others, in the sense that the scheme adopted must be that which is *most* suitable and effective in the current social and economic circumstances: this remains one of three factors to which the court is to have regard.
60. The Trustee points, as the current social and economic circumstances which it is relevant to take into account, to matters similar to those that rendered the achievement of the original principal purpose of the gift impossible. These comprise: the enormous discrepancy between the size of the National Fund and the National Debt; the wholly different attitude towards reduction of the National Debt, from that which existed at the time the National Fund was established (see [33] to [39] of the First Judgment); the fact that there is now no realistic prospect of others being encouraged to follow Mr Farrer's example (no-one having contributed to the National Fund at all since 1985). Most importantly, as a result of these matters, Mr Pearce submitted that to apply the National Fund towards reduction of the National Debt would to all intents and purposes cause it to disappear.
61. The current attitude towards the National Debt is summarised in the first report of Professor Ellison, filed on behalf of the Trustee:

"15.1 Recent growth rates in real UK GDP have been below their long-run average. The latest estimate is that there has been 1.8% year-on-year growth in real GDP to the first quarter of 2019, less than the average growth rate of 2.6% experienced post World War II. Despite this, the unemployment rate of 3.8% in the second quarter of 2019 is the lowest since 1974. The combination of below-average real GDP growth and low unemployment is consistent with UK labour productivity experiencing a fall and only weak subsequent recovery since the 2007/8 Global Financial Crisis; it is a major concern for policymakers. Consumer price inflation at 1.9% to June 2019 is close to the 2.0% target mandated to the Bank of England.

15.2 The UK Government's primary budget balance was marginally in surplus in financial year 2018/19 (0.3% of GDP), but was dominated by interest payments due on existing debt (1.5% of GDP) that meant the general government budget balance was in deficit and the government had to increase the National Debt by £23.6 billion. The last time the primary surplus was large enough to cover interest payments and retire some of the National Debt was in financial year 2001/02.

15.3 The increasing rarity of large primary budget surpluses suggests that retiring the National Debt has become less of a priority for policymakers. At least some part of the National Debt was paid down in 39 of the 50 years that preceded World War I, but in the 50 years that followed World War II there were only 9 years in which the National Debt was reduced. There has been no net paying off of the National Debt since 2001/02. The change in policymaker priorities coincides with the growth of state education, state health expenditures and social spending which have seen government spending increase from about 15% of GDP before World War I to fluctuate around 40% of GDP after World War II."

62. Professor Ellison also cited recent developments in economic theory which support a more relaxed approach towards paying down the National Debt, building on the ideas of Keynes (whose views at the time of the Colwyn Report in 1927 recommending the repayment of the National Debt, as I noted in the First Judgment, were in the minority) that repaying the debt should be delayed so that distortions from the burden of taxation are minimised.
63. Professor Ellison's first report was filed prior to the Covid-19 pandemic, in August 2019. In his recent third supplemental report, which takes into account the effects of the pandemic (in particular its impact in reducing tax receipts and increasing public spending), he notes as follows:
- (1) The Office of Budgetary Responsibility's forecast, as at October 2021, is that anticipated rises in tax rates, and fall-back in public spending – on the assumption that the UK economy continues to re-open – will be insufficient to generate a surplus in the UK General Government Balance, which it expects to be in deficit by £183 billion in 2021/22, by £83 billion in 2022/23, with the deficit thereafter stabilising at around £44 billion by 2026/27;
 - (2) This deficit in the UK General Government Budget continues to be financed by government borrowing that increases the National Debt;
 - (3) The National Debt is therefore anticipated to rise to £2,369 billion by the end of the financial year 2021/22.
64. Professor Ellison also provides illustrations of the (extremely limited) effect that using the National Fund to reduce the National Debt could have. Assuming (contrary to the current reality) that the National Debt was not increasing year on year, using the National Fund to retire part of it would result in a reduction in real terms of £5.6 million in the annual interest payments on the National Debt. The total budget for government spending for the financial year 2021/2022 was £934.5 billion, of which £5.6 million is 0.0006%. One practical illustration of the use of £5.6 million is that, if it were allocated entirely to the primary school budget, it would enable real spending per pupil to be raised by £1.19. Alternatively, based on government revenue for the same financial year, it would enable VAT to be reduced from 20% to 19.9997%. Overall, he concluded that liquidating the National Fund to reduce the National Debt would "...have a negligible effect on the government's primary spending budget position and hence the UK economy."

Application of the section 67(3) matters to the rival schemes

65. In view of my conclusion as to the spirit of the gift, the first factor inevitably points towards the Attorney-General's scheme. Even if the Trustee's gift is to be interpreted more broadly as benefitting the Nation, in the sense of every citizen of the United Kingdom, there is still a gap to bridge between that and the Trustee's scheme. That is because, if the funds were provided to new trustees in order to provide grants to other charitable bodies as the trustees in their discretion decided upon, that would not in fact benefit the Nation, but only such part of the citizens of the United Kingdom that benefitted from the charities to whom the grants were made.
66. The second factor also points in favour of the Attorney-General's scheme. Applying the fund in *reduction* of the National Debt is clearly close to applying it in *discharge* of the National Debt.
67. The Trustee suggested that the new purpose in the Attorney-General's scheme (reducing the National Debt) is *so close* to the original failed purpose that it suffers from the same defects. It is not "desirable", Mr Pearce submitted, to apply the fund for a purpose that is so close to the original failed purpose that it perpetuates the defect which caused those original purposes to fail. I do not accept this. The defect in the original purpose (that it is impossible for the National Fund to be of sufficient size to *discharge* the debt) does not infect the new purpose at all.

68. It is true that the National Fund is so small, in comparison to the National Debt, that it will have only a miniscule impact in terms of reducing the National Debt. It is also true that, in light of current Government policy and economic circumstances, the National Debt is set to increase by something in the region of £183 billion in this financial year, so that applying the National Fund towards repaying the National Debt would in reality have the effect merely of reducing, by a fractional amount, the extent to which the National Debt *increases* this year.
69. While this gives rise to the superficially attractive argument that the National Fund would thereby not be used to reduce the National Debt at all, I do not accept that analysis. The National Debt has always fluctuated, both up and down. The fact that in this financial year, a reduction in the National Debt on one particular date (by the National Fund being used that day to retire part of it) is counterbalanced by greater increases throughout the rest of the year does not alter the fact that, on the day it was so applied, the National Fund was applied in partial reduction of the National Debt.
70. The more difficult question relates to the third factor. There is considerable force in Mr Pearce's argument that to apply the National Fund in discharge of the National Debt would make nothing but a miniscule dent in the overall volume of the National Debt. He submitted that far from being a suitable and effective use of the funds, application of the National Fund in accordance with the Attorney-General's scheme would be "a futile, symbolic gesture". I also have sympathy with the contention that a great deal of good could be done if the National Fund were applied to particular charitable causes. Mr Pearce anchored these points in the language of section 67(3)(c), which refers to purposes which are "suitable and effective".
71. Nevertheless, I have concluded that taking account of current social and economic circumstances does not point sufficiently in favour of the Trustee's scheme to tip the balance in its favour, when weighed with the other two factors.
72. It is important to stress that it is no part of my function to decide what *I* think would be the best use of the National Fund. Rather, it is for me to determine what is the most appropriate use of the National Fund having regard to the section 67(3) factors.
73. It is common ground that *any* gift to the nation for the purposes of repaying the National Debt is a valid charitable gift, irrespective of the amount of National Debt that could be repaid by the gift. However small the amount by which the National Debt is reduced, the Nation (which is the debtor) benefits directly by that amount. While superficially attractive, I do not think that the utility of gifts to repay the National Debt is measured by the extent to which the citizens of the Nation receive any benefit themselves. In other words, it is not appropriate to measure the effectiveness of a gift to repay the National Debt to enquire what use could be made of that sum if hypothecated towards some particular item of public spending. The fact is that, in the eyes of Mr Farrer and others motivated to make charitable gifts in reduction of the National Debt, the National Debt is itself a burden on the Nation and to reduce that burden on the Nation is a worthy object.
74. The evidence in this case reveals others who donated to the National Fund, motivated by the same public spirit as Mr Farrer, but with much smaller amounts. The Southwold branch of the British Legion, for example, donated £2.19.0d, and a letter from Winston Churchill's private secretary dated 18 February 1928 referred to numerous other gifts "of various amounts varying from 10/- to £100". The amount by which any citizen of the United Kingdom might have benefitted from any of those gifts would have been as close to nothing to be immaterial. Nevertheless, even the gift of just over £2 would, once paid to the National Debt Commissioners, have the consequence of reducing the National Debt by that amount.
75. In addition, while the National Fund could indeed do much good if applied to particular charities, that is a false analogy in view of the spirit of the gift (even on the Trustee's case) being to benefit the Nation as a whole. According to the Trustee's evidence, £600 million as a proportion of the entirety of funds held for continuing charitable purposes in 2018 was 0.4%. That is a greater proportion than as compared to the National Debt, but still very small, and the difference that the sum could make if shared among each and every existing charity would be *de minimis*.

76. Accordingly, for the above reasons, I conclude that application of the National Fund in reduction of the National Debt in accordance with the cy-près scheme for which the Attorney-General contends is appropriate, having regard to all three of the factors listed in section 67(3).

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