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Contentious probate update

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Game, set and match to an unexpected beneficiary in a dispute between a tennis club and a church

Background

Sporting clubs, societies and other unincorporated associations are a very important aspect of English social life. In essence, they arise when two or more people come together for a particular purpose, but decide not to use a formal structure like a company.

Unincorporated associations enjoy greater freedom of operations than companies or partnerships. There is no requirement on them, for example, to file annual returns. They also do not need to register with any government organisations, for they are not bound by regulations. There is therefore no need for an unincorporated association to be registered at either Companies House or the FSA. If an unincorporated association has charitable aims, however, then they can apply to the Charity Commission for charitable status. If that charitable status is obtained, then the association will need to comply with the Commission's regulations.

An unincorporated association also has no legal identity of its own; so it has no legal rights, is not separate from its members and is not able to, for example, hold property in its own name. In theory, that could mean that a club could not even hold a minibus in its own name. Whilst unincorporated associations can get around this by having its members hold such property on trust for the association, it is clear that non-charitable purpose trusts and/or those that do not comply with the rule against perpetuities are bound to be void.

These were some of the issues facing Arnold J in the case of *Philippe and ors v Cameron and ors [2012] EWHC 1040 (Ch)*, as decided in May 2012. The decision, whilst decided on unusual facts, is interesting for charity and trusts and estates practitioners; it required the judge to consider the complex interplay between principles of trust law, how an unincorporated association holds property gifted to it, and certain aspects of charity law (including the Charitable Trusts (Validation) Act 1954).

Facts

The unincorporated association was a tennis club – St Andrew's (Cheam) Lawn Tennis Club ("the Club"). It had been established by members of the congregation of St Andrew's Cheam United Reformed Church ("the Church") in 1930 as tennis was an important social activity for church members at the time. Originally, therefore, membership of the Club was only open to those connected with the Church.

The Club became popular and soon outgrew its available facilities. In 1937, attempts to raise sufficient funds to purchase land for the Club had failed. In 1938, a Mr Tweddle – who was secretary of the Church and a member of the Club – therefore agreed to purchase the land and rent it to the Club.

Four members of the Club (who were also all members of the Church) were appointed as trustees of the St Andrew's (Cheam) Lawn Tennis Club Trust. That appointment was subject to the terms of a trust deed which was executed on 11 July 1938, along with a lease of the land for 10 years with an option to purchase the freehold in favour of the Club.

The trust deed required the trustees to, amongst other things:

- let the land to the Club for "the purpose of a tennis and/or other sports ground for games for any person or bodies of persons associated directly or indirectly" with the Church,
- apply any surplus income from the land to "such funds or such charitable purposes in connection with [the Church] as the trustees shall think fit", and
- hold any proceeds of sale of the land on trust for, amongst other things, the purchase of a sports ground in substitution for the land, the erection of any building to be used in connection with the Church and "for any other purpose in connection with [the Church]" determined by the trustees and the committee of management of the Church.

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The Club paid Mr Tweedle the rent from then until 1948. Rather than the trustees exercising the option to purchase the freehold, Mr Tweddle then entered into a new agreement ("the 1948 Agreement") in which he offered to sell the land to the trustees at less than its full market value. The trustees chose to accept that offer, and the purchase price was paid over a seven-year period in half-yearly instalments. During that time, it was agreed that the Club would occupy the land rent-free.

By 1954, the last payment had been paid to Mr Tweddle's estate (following his death in 1953). The land was then formally transferred to the trustees. However, the transfer made no reference to the trust deed, nor did it make any reference to the 1948 Agreement, when the reduced purchase price had been agreed.

Subsequent events

By 2006, the number of Club members who were also members of the Church had dwindled, such that only 20 of the 91 members of the Club were also members of the Church. Of those, only 9 were playing members.

In May 2006, the Church therefore wrote to the trustees to ask them to consider whether the time had come to sell the land and make the proceeds available to the Church. The Church wished to use the money to extend and refurbish its own buildings, so as to enable it to improve the parochial services it provided to its members. The trustees agreed, whereupon the Club challenged the validity of the Trust Deed and argued that the land was held on a resulting trust for its current members. By 2010, the land was valued at about £1.2m.

Issues

The trustees, who brought the proceedings (and for whom my firm acted), remained neutral throughout the proceedings and no oral evidence was heard. They sought the court's guidance as to the validity of the trust fund, having already been advised by the Charity Commission that the Trust Deed was not a charitable trust.

The issues to be decided by Arnold J were:

1. Was the land subject to the trusts in the Trust Deed?
2. Was the Trust Deed valid?
3. Was the Trust Deed validated by the Charitable Trusts (Validation) Act 1954?
4. Was there an implied trust in favour of the Church?
5. Was there an implied trust in favour of the members of the Club?
6. Was there a resulting trust in favour of anyone else?
7. Should the trustees be excused from any breach of duty to the beneficial owners of the land under s.61 Trustee Act 1925?

1. Was the land subject to the trusts in the Trust Deed?

Yes. Counsel for the Club had argued that the land transferred had not been subjected to the terms of the trust deed, as the option in the lease had never been exercised and the freehold had been acquired by way of the 1948 Agreement. The judge, whilst describing the argument as "ingenious", gave it short shift: the 1948 Agreement should be interpreted as a variation of the lease. If it were otherwise, the trustees would have committed a breach of trust in entering into the 1948 Agreement.

2. Was the trust deed valid?

No. To be valid, a trust must either: a) vest trust property absolutely in ascertainable purposes within the perpetuity period, or b) be for exclusively charitable purposes.

This trust deed attempted to achieve the legally impossible: a perpetual trust for a purpose (enabling the members of the Club to play tennis) that was not charitable.

3. Was the trust validated by the Charitable Trusts (Validation) Act 1954?

No. The Church's argument that, if the trust deed was invalid, it was validated by the Charitable Trusts (Validation) Act 1954 ("the 1954 Act"), was dismissed.

The purpose of the 1954 Act was to validate and restrict to charitable purposes certain instruments that were pre-16 December 1952 that provided for property to be held or applied for objects that were partly but not exclusively charitable. How that 1954 Act should be interpreted, however, had been subject to differences in judicial opinion over the years.

In coming to his conclusion that the 1954 Act did not validate the trust in this case, Arnold J followed Hart J in *Ulrich v Treasury Solicitor [2005] EWHC 67 (Ch)* where he had focussed on the definition of "imperfect trust provision" in s.1(1) of the 1954 Act. He had then held that the test, where objects were capable of being construed either as charitable or non-charitable, was whether anyone (such as a founder or an interested party) would have a legitimate complaint if the whole was applied for charity. Only if no one could object to an exclusively charitable application would the provision be validated by the 1954 Act.

In this case, Arnold J held that it was clear that the primary purpose of the trust was to benefit the Club. If the trust deed were to be restricted to exclusively charitable purposes for the benefit of the Church, the Club would be deprived of the benefit which it had been intended to have and had in fact enjoyed for over 70 years. On that basis, the trust deed was not validated.

4. Was there an implied trust in favour of the Church?

No. Arnold J commented that he could not see how an implied trust on different terms to those contained in the trust deed could arise if the express trust fails.

5. Was there an implied trust in favour of the members of the Club?

No. The Club argued that, if the trust deed was void and not validated by the 1954 Act, there was a resulting trust of the land in favour of the members of the Club because the purchase of the land had been funded from the general assets of the Club.

Arnold J dismissed this argument as being factually inaccurate. He held that, in fact, the acquisition of the land had been funded in four ways:

1. a partial gift from Mr Tweddle (who had sold at an undervalue and had forgone rent for the seven year period when the land was purchased),
2. partial gifts from lenders (who had waived repayments during the same seven year period or entirely),
3. partial gifts from those who had contributed to fund-raising activities to fund the purchase, and
4. subscriptions paid by members of the Club.

That led on to a further problem for the Club, because of the three ways (identified by Cross J in *Neville Estates Ltd v Madden [1962] Ch 832*) in which a gift to an unincorporated association such as a sports club could take effect:

1. a gift to the members of the association at the relevant time as joint tenants, such that any member could sever his share and claim it whether or not he continued as a member of the association
2. a gift to the existing members, not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association (such a share could not be severed but would accrue to the other members on his death)
3. where the terms or circumstances of the gift or rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held in trust or applied for the purposes of the association as a quasi-corporate entity (such a gift would fail unless the association was a charitable body).

In this case, it was common ground that the gifts were not in the first category. Arnold J held that they were also not within the second category, having considered the relevant rules of the Club. It followed, then, that the gifts were in the third category. Since the Club was not a charitable body, they failed on this point.

6. Was there a resulting trust in favour of anyone else?

Yes. Arnold J concluded that the land was held on a resulting trust for the settler, Mr Tweddle – or rather now, his estate. That conclusion was said to be supported by the fact that he was the largest single donor. The land did not therefore pass to the crown as bona vacantia.

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7. Should the trustees be excused from any breach of duty to the beneficial owners of the land under s.61 Trustee Act 1925?

Yes. The trustees had been administering the trust on the assumption that the trust deed was valid. Even if there had been a breach by the trustees of their duty to the true beneficial owner of the land (ie Mr Tweddle's estate), Arnold J accepted that the trustees had, at all times, acted honestly and reasonably and ought therefore to be fairly excused from liability for such breach under s.61 Trustee Act 1925.

What next?

In previous correspondence with us, the executors of Mr Tweddle's estate had indicated that, in the event that the court should consider that his estate had an interest in the land, they wanted to renounce that interest in favour of the Church. As Counsel for the trustees pointed out, however, it was not possible for the executors to simply renounce their beneficial interest. It was possible for the executors to make a gift of the land to the Church, but Arnold J advised them to take tax advice first. The matter was left to the discretion of the executors.

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