[2015 Gib LR 365]

TRUSTEES of the JOHN MACKINTOSH EDUCATIONAL TRUST v. ATTORNEY-GENERAL and CHARITY COMMISSIONERS

SUPREME COURT (Jack, J.): December 8th, 2015

Charities—charitable trusts—cy-près doctrine—for original purpose to be "fulfilled" under Charities Act 1962, s.13(1)(a)(i) finality required—ongoing fulfilment of charitable purpose, e.g. promoting teaching English language, literature and history, insufficient

Charities—charitable trusts—legal proceedings—Attorney-General necessary party to all charitable trust proceedings since no identifiable beneficiary—for Attorney-General to ensure terms of trust observed in public interest

The trustees of a charitable trust applied to vary the objects of that trust under the *cy-près* doctrine.

In his will, the deceased provided for a charitable trust for educational purposes for the benefit of children in Gibraltar, with a number of subsidiary purposes including the promotion of teaching of the English language, English history and English literature.

The trust property included a piece of land on which a public hall was erected, housing a library, a theatre and a café. Given that the hall was being used for purposes other than the educational purposes of the trust, the trustees applied for an order to approve a *cy-près* scheme authorizing the maintenance of a public hall as one of the purposes of the trust.

The trustees submitted that the court had jurisdiction to order the proposed *cy-près* scheme under various provisions of s.13 of the Charities

Act 1962: (a) the court had jurisdiction under s.13(1)(a)(i) (which permitted a *cy-près* scheme when the original purposes of the trust had been "fulfilled") because the educational purposes of the trust had been fulfilled by the Gibraltar Government's education system; (b) it had jurisdiction under s.13(1)(b) (which permitted a *cy-près* scheme when the original purposes of the trust provided a use for only part of the trust property); or (c) it had jurisdiction under s.13(1)(e)(i) or (iii) (which permitted a *cy-près* scheme when the original purposes of the trust had been adequately provided for by other means or had ceased to provide a suitable and effective method of using the trust property).

The Attorney-General and the Charity Commissioners did not object to the proposed *cy-près* scheme. The Attorney-General submitted that s.16 of the Crown Proceedings Act 1951 made it unnecessary for him to be a party to proceedings such as these against the Charity Commissioners.

Held, refusing the application:

(1) The court had no jurisdiction to approve the proposed *cy-près* scheme as none of the circumstances envisaged by s.13 of the Charities Act 1962 existed. Section 13(1)(a)(i) was not satisfied because there was inadequate evidence that the educational purposes of the trust were being achieved, and even if they were being realized at present, "fulfilled" implied an element of finality that did not exist because the educational purposes were ongoing and their being achieved at the present time was no guarantee that they would continue to be achieved in the future. Section 13(1)(b) and (e) was not satisfied because all the trust assets could still be applied to the fulfilment of the educational purposes (paras. 24–32).

(2) Even if the court had jurisdiction under s.13, it would not approve the proposed *cy-près* scheme because (a) it had to ensure that the new charitable purposes were as close as possible to those which had failed and there were many educational purposes to which the trust funds could be applied before the court would authorize the maintenance of a public hall as an alternative; (b) if there were no alternative educational purposes, the court would need to consider giving the trust funds instead to the ultimate residuary beneficiary of the deceased's estate, as that would most closely accord with his intentions; and (c) the trustees had not provided relevant documents such as accounts and minutes of their board meetings (paras. 33–35).

(3) The fact that neither the Attorney-General nor the Charity Commissioners objected to the proposed *cy-près* scheme did not relieve the court of its duty to ensure that the terms of the trust were honoured. Section 13 went to the court's jurisdiction; it was obliged to take points on jurisdiction of its own motion and the parties could not expand its jurisdiction by concession. The Attorney-General was not entitled to consider whether enforcement of the terms of a charitable trust was in the public interest (since it was assumed) and he had no power to consent to a breach of trust. He was obliged to present arguments as to whether the court had

jurisdiction to order a *cy-près* scheme on the facts of each case and, if so, on what terms (para. 36; paras. 49–50).

(4) It was necessary for the trustees to add the Attorney-General as a party to the proceedings. He was always a necessary party to a charity action because, given that a charitable trust had no beneficiary, he was the only person who could ensure in the public interest that the trustees observed the terms of the trust. The Crown Proceedings Act 1951 did not apply to charity proceedings because proceedings against the Charity Commissioners were excluded from Part III of the Act by s.16(3)(c) and an application for the order of a *cy-près* scheme was not "proceedings . . . against the Attorney-General" for the purposes of s.16(2)(b) (paras. 43–46).

Cases cited:

(1) *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341; [1944] 2 All E.R. 60, referred to.
(2) *Diplock, In re, Ministry of Health* v. *Simpson*, [1951] A.C. 251; [1950] 2 All E.R. 1137, referred to.
(3) *Gouriet* v. *Att. Gen.*, [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, referred to.
(4) *Pyrmont Ltd.* v. *Schott*, 1812–1977 Gib LR 78; [1939] A.C. 145; [1938] 4 All E.R. 713, referred to.
(5) *Spence, In re, Barclays Bank Ltd.* v. *Stockton-on-Tees Corp.*, [1938] Ch. 96; [1937] 3 All E.R. 684, referred to.

Legislation construed:

Charities Act 1962, s.13: The relevant terms of this section are set out at para. 19.

Crown Proceedings Act 1951, s.16: The relevant terms of this section are set out at para. 40.

John Mackintosh Will (Variation of Trusts) Act 1967, s.2: The relevant terms of this section are set out at para. 20.

J. Triay for the claimants;
C. Gomez for the Attorney-General;
C. Bonfante for the Charity Commissioners.

1 **JACK, J.:** The John Mackintosh Hall is one of the main cultural venues of Gibraltar. It has a library, theatre, cafeteria and various multi-function rooms, all placed around a courtyard with a fountain. It is also where the counting of votes and the announcement of results in elections (most recently a fortnight ago) and referendums (most famously in 1967) take place. The theatre is used for amateur and commercial entertainments, in both English and Spanish. The venue is also used for professional and trade meetings and for political rallies.

2 The current application arises out of a concern that some at least of these functions are outwith the objects of the John Mackintosh Education Trust ("the education trust"), the charity which holds the freehold of the Hall. The trustees of this charity ("the education trustees") seek to vary the objects of the charity to permit all the current uses of the Hall under the *cy-près* doctrine.

The facts

3 John Mackintosh was born in Gibraltar in 1865. He was a successful businessman. He died on February 28th, 1940, leaving his wife, Victoria; three sons, John, Carlos and Ernest; and a daughter, Adelaide. His will, dated March 6th, 1938, was admitted to probate in this court on April 1st, 1940 and in the English High Court of Justice on June 5th, 1942.

4 By his will, the deceased appointed his wife and a number of others as his executors and trustees ("the testamentary trustees"). After various legacies (including a gift of a year's salary to every manager and clerk of Mackintosh & Co. (Gibraltar) Ltd. and any other company owned or controlled by him) and annuities to family members, he directed that the residue of his estate be held on trust. The testamentary trustees were given a power to continue to carry on the business of companies owned or controlled by him and the deceased expressed wishes as to which managers should carry on the management of those businesses. Moneys were directed to be held on trust for Adelaide, with her or her issue ultimately to be entitled to £300,000. The residuary estate was to be held on trust for his wife, Victoria, for life.

5 The remainder, after the dropping of Victoria's life, was to be held on the trusts set out in cll. 22 and 23 of the will. Clause 22(a) directed the testamentary trustees to appropriate from the residuary estate sufficient funds to found and endow almshouses for the aged poor to be called the "John Mackintosh Home." The sums so appropriated were to be passed to the four governors of the proposed almshouses, who were to be the Colonial Secretary (though the trusteeship is now exercised by the Deputy Governor), the Anglican and Roman Catholic bishops and the Chief Rabbi, so that the almshouses could be built.

6 Clause 22(b) provided:

> "MY TRUSTEES shall appropriate out of the balance of my residuary estate remaining after the appropriation of the fund mentioned in paragraph (a) of this Clause a fund of such value as my Trustees in their absolute and uncontrolled discretion consider expedient and shall vest the same in the names or under the legal control of such trustees as my Trustees in consultation with the Governor and Council for the time being of Gibraltar shall select to the intent that the fund so appropriated and the income thereof may be used in

> perpetuity for educational purposes for the benefit of children whose parents are resident in Gibraltar and in particular for the purpose of promoting the teaching in Gibraltar of the English language and of English history and literature and generally to promote and strengthen so far as practicable by educational means the ties between England and Gibraltar AND I DECLARE that it is my desire that such fund shall be applied and administered entirely on an undenominational basis and that the means by which the foregoing objects may be accomplished shall be left to the free discretion of the trustees for the time being of the said fund except that the purposes to which the fund is applied shall include the provision of at least six scholarships of a value of not less than two hundred pounds per annum each to be held by boys or girls resident in and attending any of the schools in Gibraltar (preferably the Public Elementary Schools) for such schools in England as the said Trustees shall select."

7 Clause 22(c) provided for the testamentary trustees to set aside a fund sufficient to build an additional wing to the Colonial Hospital. Clause 23 directed that the testamentary trustees should out of any balance remaining pay £500 to each of three charities with the residue to be paid to the Magistrates' Poor Fund.

8 Although not formally in evidence, Mr. Triay said that Victoria Mackintosh died in 1958. As appears from Wikipedia (https://en.wikipedia.org/wiki/John_Mackintosh_(philanthropist) accessed December 2nd, 2015), both the John Mackintosh Home and the John Mackintosh Hall were opened in 1964. The extension to the Colonial Hospital was opened in 1969.

9 The site of the John Mackintosh Hall was originally a military store room. By letters patent made on March 17th, 1955, the then Governor granted the site to Pyrmont Ltd. ("Pyrmont") in fee simple. No consideration was paid but a rentcharge of £10. 0s. 0d. per annum was reserved. Clause 1 of the letters patent provided:

> "The premises or any part thereof shall be used for educational social or residential purposes or as an hotel, cinema, shops, or offices or alm[s]houses for the aged, school rooms, large assembly rooms or for a combination of any of these purposes and for no other purpose and in particular neither the premises nor any part thereof shall be suffered or permitted to be used for noisy, noxious or offensive trade or business or for any other purpose which may be or bec[o]me a nuisance or source of or cause injury or annoyance to the owner or owners for the time being of the adjoining or adjacent property or properties."

10 Mr. Triay said that the original idea was to build a school on the site. The education trustees had approved a plan for building an "educational centre" at a meeting with the Director of Education on March 18th, 1959. He did not know why the plan changed or when. In particular, it is unclear why the site had been given, effectively gratuitously, to Pyrmont at a time when the deceased's widow was still alive (and therefore potentially able personally to benefit from the gift under her life interest in the estate).

11 After the deceased's widow's death, the shares of Pyrmont became beneficially owned by the education trustees of the education trust created by cl. 22(b). Once the Hall was erected, Pyrmont leased the property back to the Governor. The most recent lease is dated March 26th, 2004. By it, Pyrmont leased the Hall to the then Governor for a term of 14 years from July 1st, 1999 "paying therefor during the first seven years of the term . . . the yearly rent of £1 and thereafter such increased rent as may be agreed between the lessors and the lessee." The Governor is currently holding over on the expiry of the 2004 lease.

12 By cl. 2(xii), the Governor covenanted:

> "To use and allow to be used the demised premises only for educational purposes for the benefit of children whose parents are resident in Gibraltar and in particular for the purpose of promoting the teaching in Gibraltar of the English language and of English history and literature and generally to promote and strengthen so far as practicable by educational means the ties between England and Gibraltar."

The lessee gave a full repairing covenant. The lease contained a forfeiture clause in standard form.

The problem

13 The problem identified by the education trustees is that the Government of Gibraltar appears (as noted in para. 1 above) to be using the Hall otherwise than for the educational purposes of the education trust and is in breach of cl. 2(xii) of the lease. In order to try and rectify the problem, the order which they seek is—

> ". . . that such parts of the property of the John Mackintosh Educational Trust comprising the John Mackintosh Hall be applied *cy-près* to the effect that a new cl. 22A be applied to the will as follows, [namely] to maintain a hall known as the John Mackintosh Hall . . . for the purposes outlined in cl. 22(b) of the will of John Mackintosh deceased and as a public hall."

Discussion

14 A slightly unusual feature of this case is that the freehold of the premises is held by Pyrmont, not directly by the education trustees. The education trustees describe Pyrmont as "the charity's property-owning company"; however, that is not historically the position. The shares in Pyrmont would have come into the education trustees' hands solely after the testamentary trustees transferred them to them. It is unclear what other assets Pyrmont has or when it ceased (if it did) to carry on business. The Privy Council in 1938 described Pyrmont as "an investment company": *Pyrmont Ltd.* v. *Schott* (4) (1812–1977 Gib LR at 79), a case where Pyrmont had borrowed half a million Spanish pesetas from the respondent in order to avoid having to convert sterling into pesetas.

15 Mr. Triay sought faintly to argue that Pyrmont itself was charitable. He pointed out that the objects clause of the memorandum of association of Pyrmont includes a power to make charitable donations: cl. 3(2)(v). That, however, is not in my judgment sufficient to make Pyrmont itself a charity, because the company has other, non-charitable, purposes: see *Chichester Diocesan Fund* v. *Simpson* (1) and *In re Diplock, Ministry of Health* v. *Simpson* (2). During the deceased's lifetime, it seems to have been one of the vehicles for his commercial enterprises and the objects clause is consistent with that. There is no evidence of any subsequent declaration that Pyrmont's assets were held on charitable trust.

16 Clause 1 of the letters patent does not impose a charitable purpose on the use of the land either, again because some of the uses, such as use as an hotel, are commercial, not charitable. It would therefore be open to the education trustees to treat the Hall as part of its endowment, which stood to be rented out at the best rent available, or redeveloped or sold, if that would produce a better return.

17 The education trustees do not want to do that. Instead, they want the court to change the charitable objects of the education trust, so that they can authorize the use of the Hall at a nominal rent for the various non-educational purposes for which it has been used.

18 I am not asked to consider whether the historic use made of the Hall by the Government and the community of Gibraltar is a breach of the terms of the education trust. Clearly some of the activities, such as vote counting, are in breach of the terms of the 2004 lease, but whether the turning of a blind eye by the education trustees to the Government's breaches of covenant is itself a breach of trust is not altogether straightforward. I have no evidence about how the library and the educational activities which take place in the Hall are funded. If the Government funds these matters, then it may be a sensible use of trust assets to grant a lease to the Government at a nominal rent, even if the Government uses the Hall

for non-educational activities as well. On the view I take of the case, it is not necessary to determine this issue and I shall not do so.

Cy-près

19 The equitable doctrine of *cy-près* has been given statutory form in Gibraltar in s.13 of the Charities Act 1962, which provides:

> "(1) Subject to subsection (2), 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-pres shall be as follows—
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> (a) where the original purposes, in whole or in part,—
>
> (i) have been as far as may be fulfilled; or
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> (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or
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> (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or
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> (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or
>
> (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or
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> (e) where the original purposes, in whole or in part, have, since they were laid down—
>
> (i) been adequately provided for by other means; or
>
> (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 spirit of the gift.
>
> (2) Subsection (1) shall not affect the conditions, which must be satisfied in order that property given for charitable purposes may be applied cy-pres, except in so far as those conditions require a failure of the original purposes.

(3) References in this section to the original purposes of a gift shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.

(4) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-pres, to secure its effective use for charity by taking steps to enable it to be so applied."

20 As regards s.13(3), the education trust has been the subject of statutory elucidation. Section 2 of the John Mackintosh Will (Variation of Trusts) Act 1967 provides:

"Notwithstanding anything contained in clause 22(b) of the will . . . in discharging the duty imposed upon the trustees of the fund in relation to the provision of scholarships to enable boys or girls from Gibraltar to attend schools in England the trustees shall have power to act and shall be deemed always to have had power to act as if the reference to schools in England included reference to universities, colleges of higher education or similar institutions of higher education in England and no act or thing heretofore done by any trustee or other person under the direction of such trustee shall, if the act or thing was done bona fide in the purported exercise of the extended power conferred by this section, subject him personally to any liability, action, claim or demand whatsoever in respect thereof."

21 Mr. Triay relied on s.13(1)(a)(i), (b) and (e)(i) and (iii) in support of the education trustees' application. I shall consider each of these heads in turn.

22 In relation to s.13(1)(a)(i), Mr. Triay argues that the purposes of the education trust have been fulfilled "in part." The education trustees say "that the purposes of providing English education are largely provided for through the Gibraltar Government's education system, and that Gibraltar's cultural links with the United Kingdom are strong . . ." Therefore, argues Mr. Triay, part of the purposes have been fulfilled as far as may be.

23 Clause 22(b) contains a number of purposes. The overriding objective is "educational purposes for the benefit of children whose parents are resident in Gibraltar." There are then particular purposes as follows (with added numbering): (1) the purpose of promoting the teaching in Gibraltar (a) of the English language, and (b) of English history and literature; (2) generally to promote and strengthen so far as practicable by educational means the ties between England and Gibraltar; and (3) the provision (now amended by the 1967 Act) of "at least six scholarships of a value of not less than two hundred pounds per annum each to be held by boys or girls resident in and attending any of the schools in Gibraltar (preferably the

Public Elementary Schools) for such schools in England as the said Trustees shall select."

24 The evidence adduced by the education trustees as to the fulfilment or otherwise of these purposes is woefully inadequate for the court to make any finding that any of these objectives has been—even in part—"as far as may be fulfilled." As to (1), it is true that all schools in Gibraltar teach in English, but that is not to say that there are not some children whose English could be improved, particularly those from families where Spanish or Arabic is the language of the home. There is no evidence that the school curriculum in Gibraltar contains any particular emphasis on English history, or indeed that the study of history (insofar as it may occur) has any depth for pupils who do not take it as an elective subject. Likewise, the extent to which pupils (including the less able) are taught English literature (as opposed to English language) is unclear. English is a "core subject" under the Education (National Curriculum) Regulations 1991, but to what extent the study of literature is compulsory is not elaborated upon in evidence. History is neither a "core" nor a "foundation" subject under those Regulations and so would not seem to be compulsory at all.

25 Further, even if purposes (1)(a) and (b) are currently satisfactorily met as a result of improvements to the Gibraltarian education system, that is no guarantee that they will continue to be. "Fulfilled" requires there to be some finality. In the case of cl. 22(c), it is easy to see that once the wing of the Colonial Hospital was built, that part of the testamentary trusts was fulfilled. In relation to education, there is never any finality. The education of the young is a Sisyphean labour: each new generation needs to be educated afresh.

26 As to (2), the evidence adduced by the education trustees is that Gibraltar has strong cultural links with the United Kingdom, rather than specifically with England. Nor is it at all clear how the promotion of the ties between Gibraltar and England is effected "by educational means." Most Gibraltarians who go to university do so in the United Kingdom and it may be (there is no evidence adduced of this) that most do go to English universities rather than Scots, Welsh or Northern Irish institutions, but that is not to say that more could not be done. In particular, there is no evidence that school-age children have their ties with England facilitated.

27 Moreover, just as with purpose (1), even if the ties between Gibraltar and England are very strong at the moment, that may change. Purpose (2) will not have been fulfilled if there is a risk that ties weaken.

28 As to (3), what the testator appears to have contemplated was that the scholarships should be given to school-age children to go to public school in England. Such scholarships appear never to have been granted. Instead, scholars are selected from school leavers in order to provide additional

support at university in England. Mr. Triay accepted that granting scholarships to go to public school in England is still charitable as a matter of Gibraltarian law. The education trustees are not obliged to grant scholarships for boys and girls to attend public school (the 1967 Act makes that clear), but they can do so. Further, there will always be new generations of students to whom scholarships to assist them to go to university (or, for that matter, public school) can be awarded. This purpose of the trust is not fulfilled either.

29 As to s.13(1)(b), there is no evidence that the education trustees have so much money that they cannot spend it all on the relevant educational purposes (and it is inherently unlikely that that is the case). The education trustees are given a broad discretion to promote the various purposes identified by the testator, subject to the overriding objective that the purposes be educational. They could, for example, decide to give more, or more valuable, scholarships to more students going to university.

30 No doubt over time, the importance which the education trustees attach to particular heads will change. For example, it is likely that the general standard of spoken and written English among school children in Gibraltar is higher nowadays than it was in 1938 or 1958, so the education trustees may feel they can focus their resources less on that objective. However, that is not to say that circumstances may not change. It is perfectly possible that there may be an increased number of, say, Arabic-speaking children who need help with their English over and beyond that given in the ordinary school environment. I do not accept that there are moneys which cannot be applied to the fulfilment of the testator's charitable educational purposes.

31 It follows from the above discussion that s.13(1)(e)(i) and (iii) is not made out either.

32 Accordingly, I hold that the court has no jurisdiction to order a scheme be approved to apply the education trust moneys *cy-près*. I therefore refuse the education trustees' application that a *cy-près* scheme be made.

33 Even if I am wrong in that conclusion, it would not follow that I would grant the order sought. It is true that the maintenance of a public hall is charitable: *In re Spence, Barclays Bank Ltd.* v. *Stockton-on-Tees Corp.* (5). However, in approving a *cy-près* scheme, the court must ensure that the new charitable purposes are as near as possible to those of the charitable trust which have failed. (It is what *cy-près* means in Norman French.) There are plenty of educational purposes to which the moneys of the education trust could be applied before the court would authorize the maintenance of a public hall as an alternative.

34 The education trustees have not exhibited the accounts of the education trust. Normally, the court would expect to see several years' accounts and to be given a detailed explanation of how moneys have been expended and what surplus remains. The minutes of meetings of the board of the education trustees have not been adduced in evidence, nor any of the reports and papers submitted to the board for consideration as to how moneys should be expended. Even if I had accepted that the objects of the education trust had been achieved in part, the absence of this evidence would have made approving a sensible *cy-près* scheme impossible.

35 Further, even if there were no other educational purposes for which the education trust moneys could be spent, the court would need to consider giving the money instead to the ultimate residuary beneficiary of the estate, the Magistrates' Poor Fund, because that would most nearly accord with the deceased's charitable wishes.

36 It is true that neither the Attorney-General nor the Charity Commissioners object to the making of the proposed *cy-près* scheme (and I have some comments on the Attorney-General's position below). That does not, however, relieve the court of its duty to ensure that the terms of the trust established by the testator are honoured. The parties cannot by concession expand the court's jurisdiction. Section 13, in my judgment, is jurisdictional and the court has to take points on jurisdiction of its own motion.

37 It may be, as the education trustees argue, "that the late John Mackintosh, as a proud Gibraltarian, would have approved of the use of the Hall in [the] manner actually used by the Government," although they have adduced no direct evidence of that. There is, however, no hint of any intention to endow such a hall in the wording of his will, so the court cannot, in my judgment, have regard to this assertion of constructive approval by the deceased.

The way forward

38 The problem which has arisen in this case comes from the education trustees permitting the Hall to be used for non-educational purposes. As I have suggested in para. 18 above, there may, in fact, be no legal problem in the current use of the Hall. If it is thought that there is a problem, as a matter of trusts law, the easiest solution is for the trustees to rent the Hall to the Government at a rack rent or to sell it to the Government at a market price. In either case, the moneys raised would be part of the education trust's endowment and could be used for educational purposes.

39 The alternative is for the Gibraltar Parliament to pass another Act, such as the 1967 Act, so as to vary the trusts of the deceased's will.

Adding the Attorney-General as a party

40 Ms. Gomez raises an issue as to whether it was appropriate to add Her Majesty's Attorney-General of Gibraltar as a party. She submits that the Crown Proceedings Act 1951 makes it unnecessary for him to be a party to proceedings against the Charity Commissioners. Section 16 of the 1951 Act provides:

> "(1) Subject to the provisions of this section, any reference in this Part to civil proceedings by the Crown shall be construed as a reference to the following proceedings only—
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> . . .
>
> (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action at the suit of any Government department or any officer of the Crown as such; and
>
> (c) all such proceedings as the Crown is entitled to bring by virtue of this Act.
>
> The expression 'civil proceedings by or against the Crown' shall be construed accordingly.
>
> (2) Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only—
>
> . . .
>
> (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General, any Government department, or any officer of the Crown as such; and
>
> (c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act.
>
> The expression 'civil proceedings by or against the Crown' shall be construed accordingly.
>
> (3) Notwithstanding anything in the preceding provisions of this section, the provisions of this Part shall not have effect with respect to any of the following proceedings, that is to say—
>
> (a) proceedings brought by the Attorney-General on the relation of some other person;
>
> (b) proceedings by or against the Public Trustee;

(c) proceedings by or against the Charity Commissioners."

41 With some minor drafting variations, this section mirrors s.23 of the Crown Proceedings Act 1947 (UK).

42 The purpose of the 1951 Act was first to permit the Crown to be sued in tort and secondly to modernize civil procedure in relation to proceedings involving the Crown. The first purpose is dealt with by Part II of the 1951 Act, the second by Part III. Under Part III, the Crown was made subject to the bringing of an ordinary action in the Supreme Court, thus replacing the ancient procedure of bringing a petition of right. Various procedural anomalies (such as the Crown's general power to arrest for debt) were corrected. The effect is to treat the Crown in many respects like an ordinary litigant.

43 The Act, in my judgment, does not apply to charity proceedings. First, proceedings against the Charity Commissioners are excluded from Part III by s.16(3)(c). Secondly, the current application for an order under the *cy-près* doctrine does not constitute "proceedings for the enforcement or vindication of any right or the obtaining of any relief . . . *against* the Attorney-General" [Emphasis supplied.] so s.16(2)(b) does not apply either. It follows that charity proceedings, insofar as they involve the Attorney-General, are unaffected by the 1951 Act.

44 So far as the pre-1951 position is concerned, the Attorney-General was always a necessary party to a charity action. The Attorney-General acts in the exercise of the Crown's prerogative as *parens patriae* in order to prevent an injustice to those incompetent to enforce a claim in person. Since a charitable trust has no beneficiaries, there is no one, save the Attorney-General, who can ensure the trustees observe the terms of the trust: see the discussion and cases cited at 8 *Halsbury's Laws of England*, *Charities*, 5th ed., at para. 605, fn. 2.

45 The CPR, Practice Direction 64A, para. 7 provides that "[t]he Attorney-General is a necessary party to all charity proceedings, other than any commenced by the Charity Commissioners, and must be joined as a defendant if he is not a claimant." Ms. Gomez submits that this provision "cannot be reconciled with the exemption in s.16(2)." Since, in my judgment, charity proceedings are outwith the 1951 Act, there is no inconsistency.

46 Accordingly, the education trustees were right to add the Attorney-General as a party. If they had not done so, the court would have had to add him as a party of its own motion.

47 An unfortunate consequence of Ms. Gomez's reading of the 1951 Act is that the Attorney-General did not make any submissions as to the court's power to make a *cy-près* scheme and adopted a position of not

objecting to the change. That, in my judgment, was not a correct course for her, on the Attorney-General's behalf, to have adopted.

48 The Attorney-General has a large number of different roles. The application of a public interest test is different in relation to each. Some of the duties are as follows. First, he is the Government's and the Governor's chief legal adviser. In that capacity, he acts as a normal lawyer and is subject to his client's instructions. Issues of public interest are in these cases, in principle, for the branch of the Government which is his client to determine, not for him. Secondly, he is ultimately responsible for public prosecutions, including bringing applications to commit for public contempt of court. He has a general power to prosecute or not, depending on his view of the public interest. As such, he is not subject to anyone's instructions, so the Government of the day cannot direct him how to act, but he is subject to judicial review. Thirdly, he can authorize the bringing of *ex relatione* proceedings, whereby a private individual is authorized to seek an injunction against a defendant committing a public wrong. When doing so, he acts "in his absolute discretion . . . in the public interest" and is therefore arguably not subject to judicial review: *Gouriet* v. *Att. Gen.* (3) ([1978] A.C. at 442, *per* Mr. Samuel Silkin, Q.C., Attorney General) (although the point was left open by the House of Lords (*ibid.*, at 475, *per* Lord Wilberforce)). Fourthly, historically, he sat as acting Chief Justice in the absence of the Chief Justice: see Restano, *Justice so Requiring*, at 88 (2012). When so sitting, he would exercise a completely independent judicial function, answerable to no one save the Privy Council. As such, he was obliged to give judgment in accordance with the law, regardless of his own view of the public interest (*fiat justitia ruat caelum*).

49 In carrying out his duties in charity cases, the Attorney-General has a different function again. Exercising the *parens patriae* prerogative, he is seeking to ensure that the charitable trusts established by the settlor or testator are carried out in accordance with the wishes expressed in the deed or will establishing the trust. The fact that a trust is charitable is of itself sufficient to show that the trust is in the public interest, so the Attorney-General does not need to, and would be wrong to, consider whether the enforcement of the terms of the charitable trust is in the public interest. The Attorney-General has no power to consent to a breach of the terms of a charitable trust on public interest grounds. Unless the conditions for the making of a *cy-près* scheme existed, he could not properly, for example, consent to moneys of the John Mackintosh Education Trust being spent for primarily non-educational purposes.

50 In my judgment, therefore, it was incumbent on Ms. Gomez to enter the arena and present arguments as to whether the court had jurisdiction on the facts of this case to make a *cy-près* scheme and, if so, on what

terms. It should not have been left to the court itself to take the points on jurisdiction under s.13 of the Charities Act 1962.

Orders accordingly.
