Case Comment: ***New Zealand Guardian Trust Company Limited v Presbyterian Support (Upper South Island)*** **[2015] NZHC 468 [13 March 2015].**

This is case very usefully sets out the current law with regard to a variation sought to a will under s 32 of the Charitable Trusts Act 1957 (the Act). Gendall J dealt with the application on the papers.

The applicant sought to vary the will of the late Iris Utterson-Kelso, where the issue was clause 5 of the will, which pertained to a gift to the Green Gables Trust Board (the GGTB) and the Green Gables Home. At the relevant time, the GGTB may not have been in existence, and further the Green Gables Home had been sold by Presbyterian Support. The variation sought was that the income that would have been paid under the Trust to the GGTB should be paid instead to Presbyterian Support.

Section 32(1) of the Act provides for the application of the property to another charitable purpose and expressly states that it applies whether or not there is any general charitable intention. However, s 31(1) cannot apply if s 32(3) applies, that being the doctrine of lapse. In other words, the doctrine of lapse will apply if the charitable purpose has failed before a will came in to effect and there is no general or paramount charitable intention.

The requirements for s 32(1) to apply are that the property is to be given for charitable purpose and it is impossible, inexpedient or impracticable to carry out that purpose; or the amount available is inadequate to carry out that purpose; or the purpose has already been effected; or the purpose is illegal, useless or uncertain, notwithstanding the application of s 32(3).

The question therefore for Gendall J was whether there was initial failure, in other words, did the gift to GGTB lapse. Presbyterian Support bought the Green Gables Rest Home, and subsequently entered in to a joint venture with Methodist Central Mission, with GGTB being the end result. GGTB then discharged its charitable functions for the next 20 years. In 1996, the two bodies decided to discontinue the operation of the Rest Home due to philosophical differences. A resolution was agreed in 1998 to dissolve the GGTB, effective from 1996. Presbyterian Support took over the full management of the Rest Home. Both parties appeared to have agreed to the dissolution, and treated it as occurring, although it was not until 2005 that the GGTB was removed from the Register of Incorporated Societies. Presbyterian Support subsequently sold the Rest Home and that sale occurred 1 June 2001, one day before the deceased's death.

Gendall J noted that the question of initial failure will be answered on the facts. All the parties considered the dissolution effective, and the lack of the GGTB not being removed from the register was merely an anomaly, therefore the substance of GGTB had been eroded by agreement. Further, the gift required that it be used for the purposes of the Green Gables Home in Nelson, which was a problem. This was because the Home had been sold the day before the will maker died, meaning not only did the GGTB not exist in substance, but the gift could not be applied for the purposes that it was made.

As a result, the Judge found that there had been an initial failure. However, an initial failure will not lead to a lapse where a court can find general or paramount charitable intention, which was the next question for Gendall J.

The gift undoubtedly indicated charitable intention, and whilst this would be sufficient where solely invoking s 32(1), where there is initial impossibility or impractability, a paramount charitable intention is required, which was the next question for the his Honour because the purpose of the gift had failed when the Rest Home was sold prior to the will maker's death.

Usefully, Gendall J considered a number of authorities in relation to what may amount to a paramount charitable intention,[1] and concluded that a common sense approach was required where paramount charitable intention requires something beyond the particular, but nothing more than that. His Honour asked whether the gift was the mechanism for achieving the charitable intent, or was it the only way in which the will maker wanted to manifest a charitable intent? This would be a question of judgment, assessment and construction to be applied in each case.

Helpfully, his Honour provided some assistance however with this matter, noting that the greater the specificity of the charitable aspect of the will is detailed, then the greater the difficulty a court will have in finding some paramount charitable intent. This means that if the gift was for the purposes of an institution, as opposed to the specific institution, then it is likely that a court would find a paramount charitable intention.

Unfortunately then it appeared, on the evidence, that the will maker did not intend to benefit charity generally. This is because, firstly, the will maker made a specific gift to the GGTB for the sole purposes of the Rest Home. Secondly, cl 5(b)(iii)(5) tends against paramount charitable intention as it notes that if any gift should fail, only the remaining gifts specified should benefit from the failure. Thirdly, the selection of bodies for which the will maker provided in her will was methodical, no doubt because of the link between her and the intended beneficiaries. This indicated that gift was only for the benefit of the Rest Home and no other.

Therefore his Honour concluded that the gift had only a specific charitable intention and not a paramount charitable intention. He also added some further thoughts, hypothetically speaking, had he found a general charitable intention. Where a paramount charitable intention is found, s 32(1) remains the appropriate route for determining an application because s 32(3)(a) does not apply. While there is a prima facie lapse, the cy-pre doctrine may rescue the gift, which renders the gift applicable for any other charitable purpose. This means that s 32(1) would not be excluded by subs (3)(a), which reads:[2]

> This section shall not operate to cause any property or income to be disposed of as provided in subsection (1) or subsection (2)—
>
> (a) if in accordance with any rule of law the intended gift thereof would otherwise lapse or fail and the property or income would not be applicable for any other charitable purpose:
>
> (b) in so far as the property or income can be disposed of under Part 4.

This is because both elements of the subs are not met.

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[1] These included *Re Wilson* [1913] 1 Ch 314 (Ch) at 320-321; Peter Luxton *The Law of Charities* (1st ed, Oxford University Press, Oxford, 2001) at 15.44; *Alacoque v Roache* [1998] 2 NZLR 250 (CA) at 254.

[2] Charitable Trusts Act 1957, s 32(3)(a)-(b).

Further, Gendall J acknowledged that whilst the cy-pres doctrine does not apply to s 32 situations, New Zealand courts have consistently followed the notion that will maker's intentions should be followed as closely as possible.

This case provides a very useful review as to the law pertaining to s 32 of the Act and the cy-pres doctrine generally, and highlights the real issues surrounding specific bequests made in wills, which may then defeat a finding of paramount charitable intention.