

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



IN THE MATTER OF THE NEW SOUTH WALES RURAL FIRE SERVICE & BRIGADES DONATIONS FUND; APPLICATION OF MACDONALD & OR [2020] NSWSC 604

Supreme Court of New South Wales, Slattery J, 25 May 2020

Whether moneys raised by a successful public internet appeal could be applied to objects wider than those of the relevant Trust Deed

Key words: Charity, New South Wales, Trusts and Trustees, Interpretation of Trust Terms, Facebook Appeal, Use of Paypal Giving Platform

1. The plaintiffs are the trustees of a charitable trust, the NSW Rural Fire Service & Brigades Donations Fund (the RFS Fund) which was constituted by a trust deed of 10 April 2012 (the RFS Trust Deed). The RFS Fund satisfies the requirements relating to a "fire and emergency services" recipient in section 30-102 of the *Income Tax Assessment Act 1997* (Cth) and gifts to it are deductible under item 1 of the table in section 30-15 of that Act. The trustees sought the Court's advice or direction under section 63 of the *Trustee Act 1925* (NSW) as to the proper interpretation of the RFS Trust Deed.
2. Within New South Wales, firefighting is organised under the command of the NSW Rural Fire Service, a body constituted under the *Rural Fires Act 1997* (NSW). Over the spring and summer of 2019 – 2020, Australia suffered a series of catastrophic bushfires, with major destruction of bushland, agricultural holdings, property and animals. The national death toll of 33 included 14 firefighters, six of whom were from New South Wales. Many other firefighters were injured physically and psychologically.
3. Ms Celeste Barber, a well-known New South Wales entertainer, responded to the unfolding disaster by launching a charitable crowdfunding appeal in early January 2020. She entitled the public appeal, "Please help anyway you can. This is terrifying." Her appeal employed PayPal, an internet payment service. Ms Barber nominated, and PayPal published, the RFS Fund as the proposed recipient of the appeal donations. Neither the trustees of the RFS Fund nor the NSW RFS was contacted before she acted. Unexpectedly, the appeal raised \$51 million. In conformity with Ms Barber's nomination, PayPal remitted this money to the RFS Fund.
4. The trustees of the RFS Fund sought the guidance of the court as to the application of the large sum raised by the appeal. They submitted to the court that they wished to honour the intentions and beliefs of Ms Barber and the donors who responded to the appeal concerning what should be done with the donated money, but to do so

consistently with the Trust Deed and in accordance with applicable law. There were four questions put to the court as to whether the moneys raised could be applied to:

- a. Paying money to other charities or rural fire services, whether in New South Wales or other Australian states or territories, to assist in providing relief to persons and animals affected by bushfires;
- b. Setting up or contributing to a fund to support rural firefighters injured while firefighting, or the families of rural firefighters killed while firefighting;
- c. Providing:
 - i. physical health training and resources,
 - ii. mental health training and resources, or
 - iii. trauma counselling services,

to volunteer firefighters (as defined in section 8 of the *Rural Fires Act*), who require them in connection with performing the functions of the New South Wales Rural Fire Service, as defined by section 9 of the *Rural Fires Act*; or

- d. Setting up or contributing to a fund to meet the costs for volunteer rural firefighters, as defined in section 8 of the *Rural Fires Act*, to attend and complete courses that improve skills related to the volunteer-based fire and emergency services activities of the brigades, established under the Rural Fires Act.

5. The RFS Fund is an express charitable trust. The mode of expression used by Ms Barber in making her spontaneous appeal on Facebook was of importance to the outcome for the RFS Fund, as was the method of payment. Her message stated:

Fundraiser for the Trustee for the NSW Rural Fire Service & Brigades Donation Fund. Then under the heading "About" the appeal's title page said: Want to Join me in supporting a good cause? I'm raising money for The Trustee for NSW Rural Fire Service & Brigades Donations Fund and your contribution will make an impact, whether you donate a lot or a little. Anything helps. Thank you for your support.

6. To facilitate their donations, Ms Barber's appeal page directed potential donors to an electronic payment system controlled by PayPal, the PayPal Giving Fund Australia (PPGF). Potential donors were given some information about the operation of the PPGF as follows:

Donations are made to the PayPal Giving Fund Australia (ABN 65 106 950 945) and granted to the charity within 90 days, subject to PayPal Giving Funds policies. Learn more.

7. Potential donors could then click on the "Learn More" option, which gave them access to additional information about the PPGF. This revealed that the PPGF is itself an express charitable trust, constituted by a trust deed dated

3 July 2018 (the PayPal Giving Fund Trust Deed), and that the company PayPal Giving Fund Australia Company Ltd (the PayPal Trustee) is the trustee of the PPGF, which operates as a facility by which charitable donations can be made to other charities. The terms on which it does this are set out in the PayPal Giving Fund Trust Deed and the PayPal Giving Fund's Donor Terms of Service.

8. The PayPal Giving Fund Trust Deed clause 4.1(a) provides for the application of the PayPal Giving Fund as follows:

The [PayPal] Trustee must pay or apply the Trust Fund solely for the purpose of providing money, property or benefits to or for Eligible Entities or the establishment of Eligible Entities as the Trustee decides.

9. The PayPal Giving Fund Trust Deed, clause 2.1 defines "Eligible Entity" as:

a fund, authority or institution:

- a. which is Charitable or would be a 'charity' within the meaning of the *Charities Act 2013* (Cth) if it were not a 'government entity' as defined in that Act; and
- b. gifts to which are deductible under item 1 of the table in section 30-15 of the [*Income Tax Assessment Act 1997*].

10. The RFS Fund met all these requirements – it was an eligible entity, a charity, and had DGR status.

11. When making a payment to the PPGF, all donors to Ms Barber's appeal agreed through a "clickwrap" agreement that they would be bound by the PayPal Giving Fund's Donor Terms of Service (the Donor Terms of Service). The Donor Terms of Service, clauses 3 to 6, require that donors to the PPGF recommend a corresponding grant from/by the PPGF to an Eligible Charity as defined, but the PPGF is not bound by a donor's recommendation and it retains exclusive legal control over donations (subject to the law of charity).

12. Each donor must enter into the Donor Terms of Service before donating. Despite the charitable legal environment of the Donor Terms of Service, they represent a binding agreement between the donor and the PPGF, with the latter at least promising to provide payment services in exchange for the donation. Each donor's subsequent act of making a donation to the PPGF, through the Facebook page displaying the RFS Fund as the nominated charity for Ms Barber's appeal, constituted a "recommendation" of the RFS Fund within the meaning of that term in the Donor Terms of Service, clauses 4 and 5. The PPGF paid all money raised to the RFS without delay. Once the PPGF appeal monies were transferred to the RFS Fund they were held subject to the RFS Trust Deed.

13. However, many donors accompanied their donations with recommendations, comments and directions about what they were donating for. Some comments explicitly referred to public media comments that the donations may not be able to be distributed as broadly as many expected [Annexure 1 – messages generated on Ms Barber's Facebook fundraising page]. The main issue then became, could the moneys transferred to the RFS Fund be used for broader purposes than those nominated the RFS Trust Deed? Clause 2.3 sets out the purposes of the RFS Fund:

2.3 Purpose of Trust

The purpose of the Trust is to pay or apply the income from the Trust Fund, and such parts of the capital from the Trust Fund as the Trustees at any time and from time to time think fit as follows:

- (a) to or for the Brigades in order to enable or assist them to meet the costs of purchasing and maintaining fire-fighting equipment and facilities, providing training and resources and/or to otherwise meet the administrative expenses of the Brigades which are associated with their volunteer-based fire and emergency service activities;
- (b) for Authorised Investments which are consistent with carrying out the purpose in paragraph (a) above;
- (c) to meet the reasonable costs of the current and continuing operation and management of the Trust.

14. The purpose of the RFS Fund is achieved through the maintenance of a "Gift Fund", according to clause 3 of the RFS Trust Deed. Clause 3.3 places limits on the use of the Gift Fund:

3.3 Limits on use of Gift Fund

The Trustees must use the following only for the Purpose of the Trust:

- (a) all gifts and contributions made to the Gift Fund;
- (b) any money or Property received by the Trustees in connection with those gifts and contributions.

No payments from or distributions of the Gift Fund may be made directly or indirectly by the Trustees at any time otherwise than in accordance with this Deed.

15. The court said that each of the donors made a payment to the PPGF by way of an internet facility with published terms that stated the effect of the donation. This was so despite what the donors may have hoped or intended might be done with the money (at [58]):

The donors should be taken to have intended to make the payment to the PayPal Giving Fund and should be taken to have intended that it be received according to the published terms. One of those terms was that an indication of the intended destination of the funds was merely a recommendation. The statement of facts does not suggest any donor made a payment to the PayPal Giving Fund by any other method.

16. Thus, there was no doubt that the money was transferred from PPGF to the RFS Fund on the terms in the RFS Trust Deed. The various public statements made by Ms Barber or any of the donors did not bind the trustees' application of the funds that they received from the PPGF. Only the terms of the RFS Trust Deed that establishes the RFS Fund bind the trustees. Therefore, any funds received by the trustees in that capacity must be applied only for the purposes set out in the RFS Trust Deed. Any other application of the funds would be a breach of trust (at [61]).

17. The court then considered if the moneys raised could be applied to the nominated purposes. The court held that the moneys could not be applied to other charities, interstate rural fire services or to animals. The terms of clauses 2.3 and 3.3 of the Trust Deed were too restrictive. However, the other proposed applications were approved by the court, either because they were directly permissible (training courses) or were permissible by a broadening of the notion of “providing resources” to include “human resources”.

IMPLICATIONS



This case illustrates the complications that can arise when a member of the public commences an appeal spontaneously, without consulting the charity concerned, and of conducting giving by use of internet services, which are themselves subject to numerous contractual terms.

Under state fundraising regulation there are requirements that you seek the approval of a charity before seeking funds from the public for them.¹ This may have avoided the situation before the court.

It is noteworthy that the judge specifically noted that (at [55]):

1 The Court’s judicial advice under *Trustee Act*, s 63 does not preclude an individual donor from later bringing suit and contending that he or she made a donation impressed with a charitable purpose other than that provided by the terms of the PayPal Giving Fund or the RFS Fund. But any such suit would primarily be brought against the PayPal Trustee but may also involve the RFS Fund. Such a case would have to be determined on its individual merits. The present judicial advice does not prejudice the rights of any such potential suitor.

Further, a [report of the Office of The Attorney General of the State of New York](#) records a settlement with the PayPal Charitable Giving Fund Inc. (PPGF) by multistate Attorneys General concerning inadequate disclosure by PPGF. PPGF is a charity that receives charitable contributions from individuals using the world wide web and then makes grants to charities selected by those individuals at no cost to the donor or the charity. Selected charities are vetted by PPGF before the distribution occurs, and in some cases, the donor’s selected charity does not pass PPGF’s vetting requirements. When a selected charity does not pass PPGF’s vetting requirements, PPGF redirects the charitable funds to a similar charity which has passed PPGF’s vetting process.

The US State Attorneys General raised various concerns including timeliness of the transactions and ‘exercising its variance power’ over the donors’ donation if the intended charities selected by the donors did not pass PPGF’s vetting process. After investigation PPGF agreed to settle the matter by agreeing to many actions such as:

¹ For example in NSW, clause 10 [Charitable Fundraising Authority Condition](#) and [Queensland](#) Collections Act.

- altering their website so that it made unavoidable and prominent disclosures that the donors are making donations to PPGF and not to the charity they select;
- making unavoidable and prominent disclosures regarding the expected time frame in which the grant to the charity chosen by the donor will be made;
- notify donors when PPGF exercises its variance power and redirects a donation to an organization other than the one the donor selected; and
- paying \$200,000.00 to the National Association of Attorneys General (NAAG), to be held and deposited in the NAAG Charities Enforcement and Training Fund.

It is believed that there are a number of cases against PPGF by charities and donors making their way through the US courts.

It is also noteworthy that no Australian regulator appears to have intervened during the appeal when concerns were raised publicly that donor expectations might not be satisfied.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2020/604.html>

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