

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.



RE SIR COLIN AND LADY MACKENZIE TRUST (NO 2) [2020] VSC 335

Supreme Court of Victoria, McMillan J, 5 June 2020

The liability of a professional trustee for making distributions when a gift condition had lapsed; the recovery of costs from the trust fund.

Key words: Testamentary Trust, Victoria, Distributions Honest and Reasonable, Excused of Breaches, Costs

1. In [Re Sir Colin and Lady Mackenzie Trust](#) [2019] VSC 834, the court previously gave judicial advice to the professional trustee about a testamentary trust.
2. Lady Winifred Iris Evelyn MacKenzie died with a will dated 1966. The will established a charitable trust known as Sir Colin and Lady MacKenzie Trust Fund (the trust) with a present value of approximately \$2.4 million. According to the will, the income of the trust was to be applied one third in favour of the committee administering the Sir Colin MacKenzie Sanctuary, also known colloquially as the Healesville Sanctuary (the gift to the Sanctuary), and two thirds for the provision of prizes and grants for studies in comparative anatomy (the gift for anatomical studies). The gift to the Sanctuary was made upon the condition that its name was never altered from the 'Sir Colin MacKenzie Sanctuary'.
3. The court found that between June 2002 and February 2012 the name of the Sanctuary was altered. The will directed that, in the event that the name of the Sanctuary was altered, the funds which comprised the gift to the Sanctuary be applied in accordance with a gift over provisions, which were for anatomical studies.
4. The professional trustee had made distributions totalling \$223,560.61 in breach of the trust and was prima facie liable to compensate the trust for losses associated with the breach. The proper person to bring an action was the Attorney General.
5. The professional trustee sought relief of liability for the breaches and costs of the application from the trust. The court noted that in the case of professional trustee companies, a more onerous burden is placed upon an applicant to satisfy the court that it is entitled to relief.
6. The court examined the evidence put before it about the internal processes of the professional trustee to ensure that the condition was adhered to before each distribution, and also when a reasonable trustee would have known that the name had in fact changed and the condition breached. The court had found in the previous proceedings

that the gift lapsed when the registration of the name was not renewed in June 2002, probably due to an act of omission.

7. The court found that there was nothing to put the professional trustee on notice as to the change of name as its internal process was to ask before each distribution to the Board. Although in hindsight there were a number of possible flags such as the name of the bank account and letterheads, but these were not enough to trigger further investigation.
8. The court found that 'the penny should have dropped' when the professional trustee learned that the ATO had recorded the name of the Sanctuary as 'Sir Colin MacKenzie Zoological Park' in September 2009. The claim of the professional trustee that they considered that there was still "substantial compliance" with the condition was not found to be reasonable by the court (at [40]). The advice of the court should have been sought at the time the professional trustee learned of the name change, and distributions ceased at that point. Therefore, distributions after this date should not have been made to the Board.
9. The court also frowned upon the fact that when the distributions were actually stopped, it took six years for the matter to come before the court. The court noted that the professional trustee (at [44]):

...must prima facie make good the loss caused by the breach of trust so as to put the trust in the same position as if the breach had not been committed. It is a matter for the Attorney-General, as protector of charities, whether to pursue a claim for breach of trust against the plaintiff to recover losses and interest.

Costs

10. The professional trustee and the Zoological Parks and Gardens Board (Board) (the agency which operated the Sanctuary) sought costs of the litigation to be paid from the trust fund. The court noted that trustees are ordinarily entitled as of right to an indemnity out of the trust for expenses properly incurred, including litigation expenses.
11. The court found that notwithstanding its decision, the professional trustee was justified in seeking the advice of the court and entitled to costs from the trust fund. It did note its reservation about a six-year delay from when payments were ceased to bringing the application before the court.
12. The Attorney General did not appear in court, but as a necessary part of the proceeding was also entitled to costs from the trust fund. The Board was to bear its own costs as its claims were not adopted by the court.
13. In relation to the professional trustees' claim for costs in the proceedings to relieve liability, the court examined the extent of the success in its claims (at [54]). Treating each breach as a separate issue, the court found the professional trustee failed on 34 per cent of the distributions, and so 34 per cent of the costs should be borne by the professional trustee.

IMPLICATIONS



This decision will be a useful case study for professional trustees to reflect upon in the management of their internal systems concerning distributions made under gifts with conditions. It is also a timely warning to recipients of gifts to ensure that they understand the terms of the gift and have internal processes to ensure that they adhere to them.

The court's attitude towards the delay of the professional trustee in bringing the matter before the court should also be a salutary warning. Six years was too long. In a working paper written 20 years ago, [Regulatory Infrastructure for Nonprofit Organisations](#), the Centre drew attention to the delays of trustees bringing appropriate charitable issues before the court, with one languishing for over 90 years. It may be a matter that the Attorney General considers in any further action in this matter, if indeed the Attorney General decides to bring new proceedings.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/vic/VSC/2020/335.html>

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