IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000695
[2013] NZHC 2749

	BETWEEN	INVERCARGILL CITY COUNCIL Applicant
	AND	THE ATTORNEY-GENERAL AND THE SOUTHLAND SCOTTISH HALL COMMUNITY TRUST Respondents

Hearing: 23 September 2013

Appearances: R H Ibbotson for Applicant
P Gunn for the Attorney-General
M D McKenzie and Ms Robertshawe for the Southland Scottish Hall Community Trust

Judgment: 21 October 2013

JUDGMENT OF D GENDALL J

Introduction

[1] Before the Court is an application under s 3 of the Declaratory Judgments Act 1908 (the Act) concerning the interpretation of rights and obligations under a document described as a "Deed of Agreement and Trust" dated 4 January 1974 (the Deed) made between the Scottish Hall Company Limited (the Company) and the Mayor, Councillors and Citizens of the City of Invercargill (the Council).

[2] The declarations sought from this Court relate to:

- Whether the Deed by the Company transferring to the Council a property and hall at Esk Street, Invercargill, known as the Scottish Memorial Hall (the Hall) created a trust under the Trustee Act 1956 or a charitable trust under the Charitable Trusts Act 1957;

and if so,

- Whether clause 4(a) of the Deed created an obligation on the Council to maintain the Hall;

and if so,

- Whether this obligation would pass to any subsequent trustee(s); or whether the obligation is separate from a role as trustee and would survive the Council being displaced as trustee.

Background facts

[3] Some history as to the background of the Hall is useful here.

[4] The company was incorporated in 1948 following discussions between many Southland and Invercargill descendants of Scottish pioneers to the area. Its purpose was to raise funds for and build a hall as a memorial to those Scottish Pioneers to be known as the Scottish Memorial Hall. With funding raised, building of the Hall started in 1956.

[5] Originally, shortly after World War II, the Highland Piping and Dancing Society of Invercargill (the Society) had acquired ownership of the site at Esk Street, Invercargill. The Society's building plans however were delayed because of restrictions on building and a shortage of materials. Thus, it agreed to transfer this land to the Company to promote the building of the Hall by the Company.

[6] The Hall was finished in 1957. To represent its cultural significance, the Hall was decorated with 49 specially commissioned Clan crests and tartans to recognise it as the home for Southland's Scottish Societies. It provided a centre for the Scottish community and others to use and to pass on Scottish cultural practices including highland dancing and piping. In addition it provided a venue for family and community occasions.

[7] For many years from 1957 the Hall continued to be administered by the Company and a caretaker was employed. However, by 1973 the Company had run into financial difficulty. Additionally, at that time the Directors acknowledged:

- Maintenance of the Hall was becoming an increasing problem.

- Both the interior and the exterior of the building were overdue for refurbishment.

- The Directors were facing increasing problems attempting to keep the Hall facilities up to the standard required by relevant regulations and could foresee many problems ahead as a consequence.

- Income from Hall rentals had continued to decline.

[8] That history confirms that by 1973 the Company found it did not have the funds to properly keep the Hall maintained. This was a significant problem.

[9] The Directors of the Company approached the Council. At first the Directors proposed a sale to the Council of the Hall land and building at market value but that proposition was declined. The door was opened for further negotiations however when the Town Clerk wrote to the Directors advising:

- The City would be pleased to have further discussions regarding the "...possible retention of the Scottish Hall as a hall for civic amenity..."

- That the City was "...anxious to preserve the Scottish Hall as one of the District amenities and is loth [sic] to see it purchased by any commercial enterprise...:

- That it was acknowledged the Directors might put the Company into voluntary liquidation and the City pay the mortgage and acquire the assets of the Company (to relieve the Directors of personal guarantees).

- The City thought it could run the Scottish Hall in conjunction with the Civic

Theatre, the Victoria Concert Chamber and the Centennial Hall.

- The City would not acquire the Scottish Hall for re-sale purposes (which would be written into any agreement entered into).

- The City's interest was the retention of the Scottish Hall as a "...District amenity", and to acknowledge the preferential use by the Southland Scottish Societies.

[10] In March 1973, it was proposed that the Company gift the whole of the Hall land and buildings to the Council under a deed which would provide that the Council would accept the property "...and maintain it for all time as a Scottish Hall in its present form and as a memorial to the Pioneer Scottish Folk of Southland, and take over all liabilities..." In addition, the use of the Scottish Hall by the Southland Scottish Societies "...would be protected by the Deed."

[11] Agreement was reached. The Deed was signed on behalf of the Company and under the seal of the Council. It purported to record the terms of the Council's earlier resolution, and relevantly provided:

> 1. The Company will when called upon to so do execute a Memorandum of Transfer into the name of the City of the land shown in the First Schedule hereto [the land on which the Hall stood] and will Transfer to the City all furniture and fittings, goods and chattels owned by the Company contained in the building on the said land (but excluding all goods and chattels therein owned by other person or persons or Society) and the City will accept transfer of the land "Upon Trust" subject to the following conditions.
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> 2. The City will upon possession pay to the Company sufficient money to discharge the Southland Building Society Mortgages registered on the said land and pay all the Company's outstanding liabilities including costs of liquidation and winding up of the Company as set out in the Settlement Statement submitted herewith subject however to amendments up to the date of possession.
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> ...
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> 4. The City hereby undertakes and agrees –
>
> (a) That as from the date of possession the building situated on the said land shall be called "The Scottish Memorial Hall" as a memorial to the Scottish Pioneers of Invercargill and

Southland and shall be maintained by the City as such for so long as is practicable.

(b) To preserve the Scottish decor in the interior of the Hall and add nothing to diminish this without prior consultation with a Body representing Southland Scottish Societies or its successors.

(c) To erect in the Foyer of the building a plaque recording the gift evidenced by these presents.

(d) That for a period of twenty (20) years from the date hereof the Scottish Societies named in the Second Schedule hereto or their successors will be entitled if possible to the same preferences in hiring the building or parts thereof for their functions as they have enjoyed in the past.

(e) That it will at all times when so requested confer with the said Body representing the combined Southland Scottish Societies or its successors as representing the Company on questions relating to the administration of the said Hall.

5. That as soon as practicable after the Transfer to the City is completed the Company will be wound up voluntarily under section 268(1)(b) of the Companies Act 1955 and any surplus funds to the Company's credit after such winding up shall be paid to the City.

6. That the Company will continue to administer the Hall until the 31 day of March 1974 and as from the 1st day of April 1974 the parties hereto agree that the City will Lease the building from the Company and administer same until the date of possession assuming full control for maintenance, the Caretaker, bookings and as rent therefor will pay the Southland Building Society Mortgage instalments, Insurance Premiums, Invercargill City Council rates, running maintenance costs, office and administration expenses and the Caretaker's wages falling due from and after the said 1st day of April 1974 and the Company for its part hereby undertakes that it will not incur any liabilities over ordinary running expenses during the period from the date of execution of this Agreement until the date of possession and settlement without prior consultation with the City.

[12] On 25 January 1974 the Council by letter advised the Company that the Invercargill Licensing Trust had donated the sum of $30,000.00 together with related costs of a further $3,000.00 specifically toward the "...acquisition of the Hall for the public." As I understand it, this was more than sufficient to repay the Company's mortgages noted at [11](2) above.

[13] On 9 March 1974 the title to the Hall land was transferred from the Company to the Council and this was said to be "pursuant to a Deed of Agreement and Trust dated 4 January 1974." From that time the administration and day to day running of

the Hall was taken over by the Council. An incorporated society was formed, known as the "Scottish Memorial Hall Liaison Committee Incorporated", as the body to represent the combined Southland Scottish Societies to carry out consultation on the Hall with the Council as noted at para 4(e) of the Deed (outlined at [11] above).

[14] Council's administration and running of the Hall continued for some years until 2007. Then, as part of its Draft Annual Plan for 2007/2008, the Council noted that the costs of maintaining and operating the Hall significantly exceeded income. It proposed to close the Hall by 31 December 2007 and to clear the site.

[15] In response to this proposal the respondent, the Southland Scottish Hall Community Trust (the SSHCT), was formed to campaign for the Hall to be saved. It was also intended that it might provide a possible vehicle to which the Hall could be transferred if the Council could be so persuaded. As I understand the position, the SSHCT (which was represented before me by several of its trustees) remains keen to see the Hall reopened under new management.

[16] The SSHCT says it has always assumed the Council owned the Hall as a bare trustee under some form of trust, but it accepts there are uncertainties about the nature of this ownership, and the position concerning ongoing obligations to maintain the Hall.

[17] In this present application, the Council seeks declaratory relief, on the grounds there is uncertainty as to the construction of the terms of the Deed.

Availability of declaratory relief

[18] The Council has applied here for those declaratory orders outlined at [2] above under s 3 Declaratory Judgments Act 1908. This is notwithstanding that the usual procedure where clarification of trust powers is sought is an appropriate application under the Trustee Act 1956. The present application, however, is made seeking orders under the Declaratory Judgments Act 1908.

[19] On this the Council says it needs to clarify the uncertainty caused by the Deed. It says it cannot determine the future of the Hall without an understanding of the obligations (if any) remaining under the Deed.

[20] The leading authority under the Declaratory Judgments Act 1908, *Mandic v Cornwall Park Trust Board*,[1] a decision of the Supreme Court, would appear to support an application made in the current form.

[21] In addition, Mr Gunn, counsel for the Attorney-General agreed that, although possibly unusual, the process in bringing the present application under the Declaratory Judgments Act 1908 was not opposed.

[22] I am satisfied therefore, that the application in its present form is appropriate and can proceed.

[23] And, as I understand it, the SSHCT supports the present application in the sense that it seeks the return of the Hall to the people of Southland for its long term use and enjoyment.

[24] And before me, Mr Gunn for the Attorney, seemed to accept that fundamentally, both the Council and the SSHCT wished to effect a transfer of the Hall to the SSHCT. Issues as to ongoing maintenance obligations for the Hall might remain but the essential point that the Hall would be transferred to a new trustee seemed to be broadly agreed.

Does the Deed establish a charitable trust?

[25] This is the first question to be answered here. The Attorney's position is that the Deed unquestionably does establish a charitable trust and if there is to be any departure from the terms of that trust it should be carried out in accordance with the proper procedures provided for by law.

[26] In support of this proposition, Mr Gunn for the Attorney cites the language of the Deed, specifically the reference to a transfer of the Hall "upon Trust", the fact the

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1 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135.

Deed refers to "establishing a memorial to the Scottish Pioneers of Invercargill and Southland", and the open ended nature of the obligations entered into by the Council (to maintain the building "for so long as is practicable").

[27] It is said the authorities support the proposition the Deed establishes a charitable trust (See *Re Spence*[2] and *Morgan v Wellington City Corporation.*[3]

[28] In certain circumstances there seems to be a presumption of charitability which *Barker and Others, the Law and Practice of Charities in New Zealand*[4] notes at 3.326 as follows:

> **The presumption of charitability**
>
> **3.326** The correct approach to the second limb of the test for charitable purpose, that is, whether the purpose is charitable, was stated by the Court of Appeal in 1997 to be as follows (emphasis added):[107]
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> > Not all such purposes are charitable; to be so the purposes must fall within the 'spirit and intendment' of the preamble to the Statute of Elizabeth 1. *Historically*, in order to find whether a particular purpose came within that spirit and intendment, the courts sought to find an analogy with purposes mentioned in the preamble itself, or with purposes previously held to be within its spirit and intendment. *It now appears that, even in the absence of such analogy, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law*.
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> 107 *Commissioner of Inland Revenue v Medical Council* [1997] 2 NZLR 297 (CA) at 310, per McKay J, citing Halsbury's Laws of England, Vol 5(2), 4th ed, at para 37.

[29] In addition, s 61A of the Charitable Trusts Act 1957 is noted. This provides:

> **61A Trusts for recreational and similar purposes**
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> (1) Subject to the provisions of this section, it shall for all purposes be and be deemed always to have been charitable to *provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:*

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2 *Re Spence* [1938] Ch 96.
3 *Morgan v Wellington City Corporation* [1975] 1 NZLR 416 (CA).
4 *Barker and Others, the Law and Practice of Charities in New Zealand* Lexis Nexis 2013 at 3.326.

> Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.
>
> (2) The requirement of subsection (1) of this section that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless—
>
> (a) The facilities are provided with the purpose of improving the conditions of life for the persons for whom the facilities are primarily intended; and
>
> (b) Either—
>
> (i) Those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity, disablement, poverty, race, occupation, or social or economic circumstances; or
>
> (ii) The facilities are to be available to the members of the public at large or to the male or female members of the public at large.
>
> (3) Without restricting the generality of the foregoing provisions of this section it is hereby declared that, subject to the said requirement, *subsection (1) of this section applies to the provision of facilities at public halls, community centres, and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation,* and extends to the provision of facilities for those purposes by the organising of any activity. (Emphasis added.)

[30] On this aspect, Mr Ibbotson for the Council endeavoured to argue that the Deed did not establish a charitable trust. The Council's position was that it was the beneficial owner of the Hall, although it did wish now to transfer ownership to the SSHCT by way of gift. Also, no other hall, theatre or concert chamber in Invercargill is held in trust by the Council. And, in support of the proposition that this was not a charitable trust, counsel also cited *Morgan v Wellington City Council*. In that case the land transferred to the province of Wellington in 1861 "was originally granted by the Crown...(in trust) for the purposes of public utility to the town of Wellington and its inhabitants".

[31] Mr Ibbotson contends that a singular clarity of purpose was present in that transfer in *Morgan* which is not reflected in the present Deed. With respect I disagree. The Deed does refer to a transfer of the Hall upon trust and for the specific purpose of establishing a memorial to the Scottish pioneers of Invercargill and

Southland. Those words "upon trust" must mean precisely what they say, and the decision to title the Deed as a "Deed of Agreement and Trust" and to refer in the Land Registration Transfer document to the transfer of the land being "pursuant to the Deed of Agreement and Trust", must also be seen as significant. Those aspects, the public utility and public benefit purposes of the transfer, the assistance provided by s 61A Charitable Trusts Act 1957, together with the open-ended nature of the obligations entered into by the Council under the Deed, would appear to me to confirm that this transfer established a charitable trust. I am satisfied that this is the case.

Is there an ongoing obligation on the Council to maintain the Hall?

[32] The next issue is whether the Council is under an ongoing obligation to maintain the Hall. This issue arises because the Deed provides the obligation to maintain the Hall as a memorial to the Scottish pioneers enures only "for so long as is practicable".

[33] This wording gives rise to two possible interpretations; first that the Deed establishes an ongoing obligation to maintain the building throughout but the obligation to maintain it as a memorial may be severed. This interpretation in my view seems somewhat strained.

[34] The second and, as I see it, the better interpretation of this obligation imposed by the phrase "for so long as is practicable" is that it imposes a general and ongoing obligation on the Council to maintain the Hall as a memorial for the stated purposes, but with the added qualification that this is to be limited and to be only for so long as is practicable.

[35] This must lead to the question for the Court as to whether the wording of the Deed contemplates an ending of the trust.

[36] A charitable trust, once created, usually cannot be terminated or wound-up.[5]

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[5] See *National Anti-Vivisection Society v Inland revenue Commissioners* [1974] 2 All ER 217: "A charity once established cannot die, though its nature may be changed."

[37] Similarly, even if the purposes of a trust may have become impossible, impracticable or inexpedient to carry out, or the administration of the trust has become difficult, the trustees of a charitable trust cannot (in the absence of a power of termination) terminate an existing trust. Rather, they have a duty in those circumstances to apply for a scheme to vary the trust.

[38] In this case, there is no specific winding up provision in the Deed. It is possible that the reference in the Deed to maintaining the Hall only "for so long as is practicable" arguably might operate as a winding up provision, if maintenance of the Hall did become impracticable. Accordingly, does the evidence before the Court establish that it is impracticable for the Council to continue to maintain the Hall now?

[39] There is some evidence before the Court suggesting it is no longer practicable for the Council to administer the Hall, because of first, the cost of repairs and maintenance and secondly, the declining use of the facility.

[40] This evidence in my view however falls short of establishing that it is impracticable for the Council to continue its obligation to maintain the Hall. Certainly the evidence does suggest the maintenance obligation may be financially onerous, there is a pattern of declining use and the Council wishes to be quit of the obligation. But is it impracticable to carry on? In the Attorney's view the available evidence does not establish this to be the case. In a rather tentative way on the material currently before the Court, I agree.

[41] There is, for example, insufficient evidence to establish the Council cannot sustain maintenance obligations, particularly when there is evidence from the SSHCT of community enthusiasm for continued use of the Hall facilities. As Mr Malcolm David McKenzie, Chairman of the SSHCT deposed in his 12 July 2013 affidavit filed in this proceeding in support of the present application:

> *The future of the Hall*
>
> 14. The Trustees remain very keen to see the Hall reopened under enthusiastic new management, whatever form that needs to take, and believe that the Hall will play an important role in cultural and entertainment activities in Invercargill for years to come. The city

> needs a small to medium-sized auditorium and the Trust has received many expressions of interest from potential users waiting for it to reopen.

[42] Accordingly, counsel for the Attorney concludes on the available evidence it is not impracticable for the Council to maintain the Hall. It follows that as a matter of law it might be said that the Council could not abandon its obligations to maintain the Hall, whether by disposing of the property to SSHCL, or otherwise. But that is a matter which as I see it at this point really requires more detailed evidence and a fuller investigation here.

Would the obligation to maintain the Hall pass to any subsequent trustee?

[43] This is the third question to be answered.

[44] It is apparent that the Council wishes to be quit of its obligations as trustee and it seems that the SSHCT wishes to assume certain of those obligations, or at least something like them. At a general level, at first sight it does appear to make sense that the maintenance obligation of the Council as trustee here could pass to any subsequent new trustee appointed. Trustees broadly speaking have the obligation to ensure that the property or assets of the trust are maintained in good health and condition for all beneficiaries. And it does not appear to be sensible to suggest that a trustee's obligations to own and hold assets on trust should be separated out from their obligation to maintain them.

[45] While the available evidence before the Court at this point might fall short of establishing either that Council's continued role as trustee is "impracticable", or that maintenance of the Hall as a memorial has become so, administration of the trust at this point might be facilitated by appointing the SSHCT as trustee of the trust in place of the Council. I say this given the enthusiasm of SSHCT for maintaining the same or similar charitable purposes to those presently imposed on the Council, as noted at [41] above.

[46] Conversely, as I see the position it would be inappropriate (on present evidence) to promote a scheme that enables the Council to dispose of the Hall, as any such arrangement might have the effect of bringing the trust to an end.

[47] The best solution in my view would appear to be to replace the Council as trustee with a new trustee, possibly the SSCHT if thought appropriate. In addition, application could be made to vary the Deed and trust to provide for SSCHT to take over the maintenance obligations of the Council in relation to the Hall.

[48] This option could involve application to this Court for an order amending the Deed by variation under s 33 of the Charitable Trusts Act 1957, to enable the SSHCT to take over the Council's role as trustee.

[49] It is possible the trust could be varied at the same time to express the objects and trustee powers more clearly, perhaps by way of a combined s 32 and s 33 variation. This would provide an opportunity to refine trust purposes and include any necessary administrative provisions currently lacking.

[50] The above option would require the SSHCT as the suggested new trustee to adhere to the current trusts, and if it wished to amend any of the purposes it would need to seek a variation pursuant to s 32 of the Charitable Trusts Act 1957.

[51] As an alternative, a change of trustee might also be effected under ss 51 and/or 43 of the Trustee Act 1956 but I do not favour this here. While s 51 is available on its face, it seems to offer no advantages beyond those applying under ss 32 and 33 of the Charitable Trusts Act 1957.

[52] Moreover, the public advertising requirement under s 36 of the Charitable Trusts Act 1957 would offer additional safeguards for the charitable purposes which may not be available under s 43.

Conclusion

[53] In response to the questions posed by the Council here and the other matters before this Court, I conclude:

(a) The Deed did create a charitable trust, under the Charitable Trusts Act 1957;

(b) Clause 4(a) of the Deed created an obligation on the Council to maintain the Hall as "a memorial to the Scottish Pioneers of Invercargill and Southland" but limited to the period only for so long as is practicable; and

(c) There is insufficient evidence before the Court at this point to justify a final conclusion that it is impracticable now for the Council to continue to fulfil this obligation; and

(d) That obligation could pass to a new trustees; and

(e) Any transfer of this obligation could be effected best by an application to vary the Deed effected under s 32 and/or 33 of the Charitable Trusts Act 1957 which in my judgment should occur now.

[54] Costs, if sought here, are reserved and may be the subject of memoranda filed (sequentially) by the parties.

.....
D Gendall J

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