Attorney General v Zedra Fiduciary Services Ltd (UK): Equity Favours Charity

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Once a staple of the reports, *cy-près* cases are now a rarity. In this context, *Attorney General v Zedra Fiduciary Services Ltd (UK) [2020] EWHC 2988 (Ch.)* provided a welcome opportunity for the judicial analysis and development of the modern doctrine, as contemporary cases are now largely settled behind closed doors by the Charity Commission through its administrative processes. This fresh judicial authority is important, not only because of its striking facts, but also because it should influence Commission decision-making in future cases.

Lord Hanworth M.R. once noted that, 'charity is always favoured by Equity' (*Re Watt [1932] 2 Ch. 243 (Note)* at 246). His observation still holds true. A policy of leaning in favour of the interests of charity can be seen in Zacaroli J's decision in *Zedra*. First, the reasoning in the case keeps a very large failed gift fund out of the hands of the donors' next-of-kin. Second, the applicable rules push the court towards modifying the charitable trust so that it serves socially useful purposes.

Certain parts of Zacaroli J's detailed judgment are closely specific to the wording of the deed and its supporting legislation. This note selects a focus on those aspects of the judge's reasoning which continue the long evolution of the charitable *cy-près* doctrine, and which might influence the future decisions of the Charity Commission.

The background to the case is of both social and legal interest. In 1928, Gaspard Farrer, a partner at Baring Brothers, established the National Fund by deed so as to accumulate income, and attract further donations from other wealthy philanthropists. He intended that a growing fund would ultimately pay off the national debt. The contemporary case was brought by the Attorney General acting in as part of her historic role in relation to charities. In our own time, it had become clear that the National Fund would not succeed in its purpose. The Fund had, in consequence of long-term investments, increased significantly in value from £536 thousand in 1928 to £512.2 million in the present day. Yet this increase was dwarfed by the fact that in 2020 the UK national debt had grown from approximately £7 billion to £2,004 billion since the Fund was established.

It has been long established that gifts to the national debt are charitable (*Newland v Attorney-General (1809) 3 Mer. 684; 36 E.R. 263*) but it must be thought unusual for a donor to make a gift for the cause. To understand Farrer's motivation, the trust deed should be contextualised in the inter-war period. The

British contribution to the First World War had been substantially funded by debt, and in the period after the War, its payment had a patriotic motivation.

Gaspard Farrer, who asked to remain anonymous, and whose name was withheld from the public until the court case, was neither idiosyncratic nor acting alone. The establishment of the National Fund was a complex legal enterprise, which received the support of Parliament. Farrer's deed, which provided that value of the Fund was to be transferred to the National Debt Commissioners after an indefinite period of accrual, required special legislation, in the form of the Superannuation and Other Trust Funds (Validation) Act 1927 preventing the application of the ordinary rule against remoteness of vesting.

In the case, the Attorney General argued that the existing capital should be applied as a relatively small part-payment towards the contemporary debt, and the Fund should be dissolved. Contrary to this, Zedra Fiduciary Services acting as trustee, sought to resist its winding up. The next-of-kin of both Farrer and another major contributory donor, Lord Dalziel of Kirkcaldy, were also represented. The next-of-kin hoped that the trust would be declared to have failed from the outset. In this circumstance, the kin would benefit from a resulting trust.

Zacaroli J analysed the deed in forensic detail, holding that its primary purpose was to benefit the nation through the discharge of the national debt, alongside a subsidiary purpose of reducing the debt *ad hoc* if national exigencies required it. He denied the claims of the next-of-kin. With regard to the future of the fund, he held that a later court should consider how it might be modified and spent effectively.

A first key question in the case related to the rights of the next-of-kin in relation to fund. In *cy-près* cases, the next-of-kin, who are often very distant from the donor, might argue that a gift has failed prior to vesting. If they are successful in making this case, then there will be a resulting trust, and because the donor is often long dead, the next-of-kin will benefit from a windfall. In *Zedra*, if this argument had been successful, the next-of-kin would have benefited from an extremely large award.

It would have been a remarkable outcome if many hundreds of millions of pounds had been returned to a disparate of group of relatives. Yet the argument of the next-of-kin, that the gift had been a failure from the outset, was a reasonable one in legal terms. This is because it is a matter of historical record that Farrer's scheme was not ever realistically possible. In the period since the National Fund was established, the government took on a large amount of debt, so dwarfing the National Fund. It is therefore not unrealistic to conclude, contrary to Zacaroli J, that in 1928, the National Fund was established with objects that could not, as a matter of fact, be carried through.

In determining whether the gift had failed at the outset, the test applied by Zacaroli J leans in favour of charity and against the next-of-kin. The judge took the test from *Re Tacon [1958] Ch. 477; [1958] 1 All E.R. 163*. He asked, whether at the time the National Fund deed was effected, according to the ordinary beliefs of mankind, there had ever been a reasonable prospect of success for the. Applying this test, it was found in *Zedra*, that in 1928 it was reasonable, viewed through contemporaneous eyes, to have thought the gift would succeed. In consequence, the judge held that the gift had not failed at the outset (*[2020] EWHC 2988 (Ch.)* at [99]).

This test makes it difficult for gifts to fail *ab initio*. In essence, the judge asks whether or not the gift was hypothetically possible and rational at the point it was made. If it can be said to pass that test, the gift will be saved for charity. It is true that the answer to the test will not always be in the negative. There are some gifts which are both ill-made, and also clearly and unambiguously impossible through contemporaneous eyes. For example, a will containing a grand plan to build a new institution, but providing only meagre funds to do so, is unambiguously impossible and irrational from the outset. But most situations of failure are not of this type. For the most part, gifts to charity are not unreasonable at the point they are made, and as in the case of the National Fund, the discovery of factual impossibility will emerge with the passing of time

The decision also contains another line of pro-charity reasoning, operating to the detriment of kin. In extended *obiter* comments, Zacaroli J assessed whether or not Gaspard Farrer had a general charitable intention when he made the gift by deed. This is a well-established equitable concept. Where a broad and general state of mind is discovered on the part of the donor, then the court will attempt to carry through the donor's abstract plans. It might direct the gift towards an existing organisation that is able to carry through the donor's broad wishes, or choose an alternative trustee willing to effect them. This process of discovering general intent and then judicially effecting that intent prevents a resulting trust for the benefit of the next-of-kin.

In its textbook form, the general charitable intention is difficult to establish. On a traditional view, the gift must be a genuinely abstract and general one in order for a general charitable intention to be found. To this end, Megarry V-C expressed his view in memorable comments in *Re Spence [1979] Ch. 493; [1978] 2 All E.R. 92* that, 'it is difficult to envisage a testator as being suffused with a general glow of broad charity when he is labouring, and labouring successfully, to identify some particular specified institution or purpose as the object of his bounty' (*[1979] Ch. 483* at 493; *[1978] 2 All E.R. 92* at 99).

On a plain interpretation of the deed, it must be thought apparent that Gaspard Farrer did not have a frame of mind which can easily or intuitively be called broad in Megarry V-C's sense. The deed contains a very particular plan to discharge the national debt. The donor went to considerable effort in relation

to his scheme, drafting it in the light of special legislation in parliament. The extrinsic evidence points in the same direction. In a letter, approved by Farrer, from Barings to Winston Churchill, it was written, 'gifts to the Nation of historic sites, buildings and works of art, are happily frequent; gifts to repay debt are comparatively rare' (*[2020] EWHC 2988 (Ch.)* at [24]). This statement suggests that the specific plan to discharge the debt was right at the heart of Farrer's gift.

Zacaroli J leant away from the approach taken in *Re Spence*. If he had not done so, it would not have been possible to find a general charitable intention. The judge stated the test for the discovery of a general charitable intention as being, 'notwithstanding the fact that the Deed has identified a particular charitable purpose… the particular purposes identified are indispensable to the validity and operation of the gift...' (*[2020] EWHC 2988 (Ch.)* at [114]). And so, the question for the judge was whether or not the particular direction to discharge the national debt could be excised. On this approach, if the specific plans of the donor are found to 'dispensable', then a general charitable intention can be found.

This understanding of the test pushes towards a finding of general intention. As a starting point, it directs the attention of the judge away from the specific and towards the general. In place of asking whether the gift has a particular character, the judge instead assesses whether or not specific elements of the donor's plans can be deleted. In this manner, the focus of judicial attention is on the broad and abstract from the very beginning of the judicial analysis. Adopting this test, Zacaroli J found an underlying general gift for the benefit of the nation.

Charity was favoured in more than one sense. First, it was favoured for the plain and straightforward reason that the judge was able to exercise mechanisms which prevented the gift being lost to charity. Second, it was favoured in the way that those tests were conceived by the judge - i.e. the case applies a loose test for failure, and a broad and generous method for the construction of a general charitable intention.

A second key question in the case relates to the future of the Fund. A payment of the value of the Fund towards the existing national debt would have little impact on the very large contemporary obligation of the United Kingdom. Despite this, it is easy to see the legal logic of the Attorney General's argument that such a payment should occur. Once it has been found by the court that Gaspard Farrer made a successful gift attempting to discharge the national debt, and once it is acknowledged that a complete discharge is not possible, then the closest the judge could come to carrying through Farrer's wishes would be to apply the fund towards the contemporary existing debt as a part payment.

Adopting a socially minded perspective, one possible objection to the Attorney General's position is that payment towards the debt would disperse the National Fund without any real impact on

contemporary charitable need. Yet this would jar with current legal policy. One of the ways in which the modern law seeks to favour charity is by ensuring that charitable capital is applied in a socially useful manner. In a *cy-près* case, the judge or Charity Commission, subject to s. 67(3) of the Charities Act 2011, can pro-actively reform existing charitable trusts so that the social impact of charitable funds is maximised.

This was not always the case. Until comparatively recently, the Attorney General's argument that the fund should have been paid towards the national debt might have been straightforwardly adopted. *Cy-près* is said to mean 'as near as possible' in legal Norman French. Taking the principle literally, the judge might have thought he had no discretion in the matter. This is because, on a traditional understanding of the equitable case law, the change to the existing charitable purposes had to be minimal – i.e. the new purposes chosen were as near as possible to the old ones.

In the light of contemporary statute, it is now incorrect to directly equate *cy-près* with the traditional 'as near as possible' rule. As Zacaroli J found in *Zedra*, modern legislation, 'confers a broad discretion on the court, once a cy-près occasion has arisen, to make such scheme as it considers appropriate'(*[2020] EWHC 2988 (Ch.)* at [155]). The law is not without complexity. In deciding upon the new purposes for a modified charitable trust, section 67(3) of the Charities Act 2011 directs the decision-maker to consider different factors, some of which contradict. These are: the spirit in which the donor made the gift; the desirability of ensuring that the property is applied to new purposes close to the old purposes, and the deed for the new purposes to be suitable and effective in the light of current social and economic circumstances.

Nestled within this list of factors is a requirement that the new purposes are close to the old, so echoing the former *cy-près* as near as possible rule. That factor does not stand alone. The other, contradictory, statutory factors will likely lead the decision-maker towards social impact focussed reform. A notable innovation in *Zedra*, is that Zacaroli J accepted a view that the statutory requirement to account for the 'desirability' of proximity between the old and new purposes, 'did not assume that it was desirable, but required the court to consider whether it was or was not desirable' (*[2020] EWHC 2988 (Ch.)* at [157]).' On this interpretation of the statute, the court or Charity Commission has a discretion to set aside all questions of proximity or deference to the original plans. The court can decide on a case-by-case basis whether far-reaching reform of the original purposes is desirable.

Zacaroli J left it to a later court to decide what should happen to the fund. The judge limited himself to holding that he could not be satisfied that the, 'only realistic conclusion that could be reached is one in favour of a scheme for the reduction of the National Debt' (*[2020] EWHC 2988 (Ch.)* at [158]). It follows that it is still open to a later judge to apply the £512 million towards the national debt. This

outcome must nevertheless be thought unlikely. The reasoning in *Zedra* points a path towards an application of the funds which ensures a socially impactful use of the capital.

The judgment will likely be of practical significance. Ordinarily, the Charity Commission, acting in an administrative capacity, is the decision-maker in *cy-près* cases. It is exceptional for a charitable trust modification decision to come into the High Court. In modern times, cases have trickled into the First-tier Tribunal (Charity) but these are scant and without the force of precedent. Yet even in a vacuum of authority, the regulator cannot make or create the law. The Commission must follow the precedents as they are developed by judges. *Zedra* is underpinned by a pro-charity policy logic – i.e. keeping gifts in charity and, separately, permitting the modification of the existing trust to increase social impact. The policy approach in *Zedra* will likely filter its way into Commission practice and published guidance.

The law's favouring of charity has not been cost free. In this case, some of the judicial reasoning is both stretched and difficult. Zacaroli J's logic, derived from the existing case-law, to the effect that Farrer's gift successfully vested in charity in 1928 (so excluding the next-of-kin) is artificial. It would have been more natural to say that Farrer's plans were always impossible as a matter of historical record. Equally, it is also artificial, in the light of a carefully drafted and specific deed, to find that Farrer had a general charitable intention.

Whatever the value of the policy motivating this judicial reasoning, it is very difficult to defend an area of law which pushes courts towards artificial logic. It has been seen in this note that some aspects of the *cy-près* doctrine have been put on a statutory footing. With legislation, legal clarity often follows. In consequence, it can be said that this is an area which would benefit from further legislative attention. In particular, if resulting trusts for the benefit of the next-of-kin are to be circumscribed in *cy-près* cases as a matter of policy, then this is an area which could usefully benefit from statutory intervention to make that clear.