SUPREME COURT OF QUEENSLAND

CITATION:	*Bennett & Anor v The Royal Australian Institute of Architects & Ors* [2015] QSC 85
PARTIES:	**ARNOLD DOUGLAS BENNETT AND CAROLYN LOUISE DART AS EXECUTORS OF THE ESTATE OF PHILIP YEATS BISSET, DECEASED** **(applicants)** **v** **THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS (ACN 000 023 012)** **(first respondent)** **QUEENSLAND UNIVERSITY OF TECHNOLOGY, BOND UNIVERSITY LIMITED, GRIFFITH UNIVERSITY AND THE UNIVERSITY OF QUEENSLAND** **(second respondents)** **ATTORNEY-GENERAL FOR QUEENSLAND** **(third respondent)**
FILE NO:	BS294 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	15 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2015
JUDGE:	Mullins J
ORDER:	**1. It is declared that Philip Yeats Bisset in making the gift in clause 4.4(2) of his will dated 13 October 2006 (the will) had a general charitable intention.** **2. Pursuant to s 105 of the *Trusts Act* 1973 it is ordered that the property which is the subject of the gift in clause 4.4(2) of the will be applied *cy pres*, as if clause 4.4(2) provided as follows:** **"Clause 4.4(2) five parts to THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS to hold the capital moneys as it sees fit and apply the income or any such part of the capital and income therefrom as the National Executive Committee of The Royal Australian Institute of Architects ACN 000 023 012 in its capacity as trustee shall from year to year determine for a scholarship to be granted to one or more students in their final year of the architecture course at a prescribed school of architecture**

in Queensland to study architecture overseas with particular emphasis on the planning and design of buildings. The scholarship is to be known as: 'The Philip Y Bisset Planning (Architecture) Scholarship' and the rules for the granting of such scholarship shall be determined by the National Executive Committee of The Royal Australian Institute of Architects (or its delegate) but nevertheless I express the wish that the guidelines contained in the Third Schedule to this my Will be taken into account wherever possible by the National Executive Committee (or its delegate) when determining such rules and I declare that the receipt of the Chief Executive officer or other appropriate officer of The Royal Australian Institute of Architects shall be a sufficient discharge to my Trustee."

3. The costs of the applicants and the first respondent of this application must be paid from the property which is the subject of the gift in clause 4.4(2) of the will on the indemnity basis.

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – TESTAMENTARY DISPOSITIONS GENERALLY – DISCLAIMER OF GIFT – where deceased left gift in will to beneficiary to establish and administer a scholarship for students of architecture in Queensland – where beneficiary disagreed with terms of gift and requested the executors to reform the gift – whether beneficiary disclaimed gift

CHARITIES – CHARITABLE GIFTS AND TRUSTS – WHEN APPLIED CY PRES – FAILURE OR EXTINCTION OF OBJECT – WHERE GIFT LAPSES – OTHER CASES – where deceased left gift to beneficiary for establishment and administration of a scholarship for a final year student in an architecture program at a Queensland university – where beneficiary disclaimed the gift – whether there was a general charitable intention on the part of the testator – whether gift can be applied cy pres

Succession Act 1981, s 33P
Trusts Act 1973, s 105, s 106

Alleyn v Thurecht [1983] 2 Qd R 706, considered
Attorney-General (NSW) v Perpetual Trustee Co (Ltd) (1940) 63 CLR 209; [1940] HCA 12, considered
Commissioner of Taxation of the Commonwealth of Australia v Ramsden [2005] FCAFC 39, considered
Lady Naas v Westminster Bank Ltd [1940] AC 366, considered
The Public Trustee of Queensland v State of Queensland

[2009] 2 Qd R 327; [2009] QSC 174, considered
Tantau v MacFarlane [2010] NSWSC 224, considered

COUNSEL: R T Whiteford for the applicants
L J Nevison for the first respondent
K A Parrott for the third respondent

SOLICITORS: Thynne & Macartney for the applicants
Holman Webb Lawyers Brisbane for the first respondent
G R Cooper, Crown Solicitor for the third respondent

[1] Mr Bisset was an architect who died in September 2010 aged 89 years without spouse or issue. He left a will dated 13 October 2006 which appointed the applicants as his executors. Probate was granted on 12 November 2010.

[2] Mr Bisset completed a Diploma of Architecture in 1942 at the Central Technical College (a forerunner of Queensland University of Technology) before working for an architect. He obtained a Graduate Diploma in Architecture from the University of Queensland in 1946. Mr Bisset was involved in designing 63 hospitals. He also worked on religious buildings and schools. Many of the buildings which he designed were in regional areas of Queensland and he was considered a pioneer of regional planning and architectural design. He also qualified as a town planner. He owned a significant art collection, encouraged an appreciation of art and was also an artist. In the later years of his life, he was a regular supporter of the QUT Learning Potential Fund which supports low income and disadvantaged students to complete their degrees.

[3] Mr Bisset gave his estate to the applicants as the trustees of his will to give effect to the gifts and directions in the will. Mr Bisset's will divided the residuary estate into thirteen equal parts and by clause 4.4(2) Mr Bisset gave five of those parts to:

> "… THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS to hold the capital moneys and apply the income or such part of the capital and income therefrom as the Executive of The Royal Australian Institute of Architects Queensland Chapter shall from year to year determine for a scholarship to be granted to one or more final year architectural students in a prescribed school of architecture in Queensland to study architecture overseas with particular emphasis on the planning of buildings. The scholarship is to be known as 'The Philip Y Bisset Planning Scholarship' and the rules for the granting of such scholarship shall be determined by the executive of The Royal Australian Institute of Architects Queensland Chapter but nevertheless I express the wish that the guidelines contained in the Third Schedule to this my Will be observed by The Royal Australian Institute of Architects Queensland Chapter when determining such rules and I declare that the receipt of the Chief Executive Officer or other appropriate officer of The Royal Australian Institute of Architects Queensland Chapter shall be a sufficient discharge to my Trustee."

[4] The third schedule to the will contains "Guidelines for Conditions of Scholarship Award" (the guidelines).

[5] Clause 1 of the guidelines allows for the value of the scholarship to be determined by the Executive of the Queensland Chapter of the first respondent "to be awarded annually (if possible) to one (and in special cases, more) student who has completed the final year of studies at a prescribed school of Architecture". The purpose of the scholarship is specified in clause 2 as for "study research and travel overseas" with "[s]pecial emphasis is to be placed on planning of buildings and their inter-relationship". Clause 2 requires the studies and report of each scholarship recipient to be completed within 12 months and the reports of scholarship holders to be made available to members of the first respondent from the Queensland Chapter's library. The eligibility set out in clause 3 of the guidelines is generally "[a] student who has completed the final year at a prescribed School of Architecture in Queensland". Clause 4 specifies that applications will be made on an application form available from the Queensland Chapter of the first respondent. Clause 5 provides for the assessment of applicants to be by a panel of two architects being members of the first respondent in private practice in Queensland to be nominated by the President or the Vice-President of the Queensland Chapter of the first respondent and an Architect-Member from each of the prescribed schools of Architecture in Queensland nominated by the head of the relevant school of Architecture. Clause 6 requires applicants to submit for consideration by the assessors a draft plan and program as to the use of the scholarship, including a proposed itinerary, the outline of studies to be undertaken and the timetable for the submission of the report.

[6] The applicants estimate the value of the share of the residuary estate given under clause 4.4(2) as between $1.2m and $1.3m.

[7] The gifts under clauses 4.2, 4.3 and 4.4(1) and (3) of the will are to charity. The gift under clause 4.1 of the will of Mr Bisset's woodturning equipment and magazines is to a natural person. Under clause 4.4(4) of the will, Mr Bisset gave one part of the residue to a friend, subject to the express provision that if the friend predeceased him, then that part would be divided among the other parts of the residue in the proportion that the other parts bear to twelve. (That would have been the outcome under s 33P of the *Succession Act* 1981 without the express provision dealing with the alternative gift.)

[8] As a result of correspondence between the applicants' solicitors and the first respondent, the applicants concluded that the first respondent had disclaimed the gift. The applicants' solicitors then wrote to Queensland University of Technology, the University of Queensland, Griffith University and Bond University advising the first respondent had disclaimed the gift as it did not consider it practical to comply with the terms of the will and asking each university to submit *cy pres* proposals. Each university responded in November 2013 with a proposal. The applicants submitted the proposals of the universities to the Attorney-General together with the letters from the first respondent to the applicants.

[9] The Crown Solicitor on behalf of the Attorney-General on 26 June 2014 requested the applicants' solicitors to consult with the universities and the first respondent to see if there were another proposal they could submit that more closely approached the original intent of the gift under clause 4.4(2) and schedule 3 to the will. Each university responded in October 2014 with a further proposal. It does not appear that the applicants consulted the first respondent in respect of any of the proposals by the

universities or the Crown Solicitor's letter of 26 June 2014. The Crown Solicitor advised the applicants' solicitors on 12 December 2014 that the Attorney-General had considered the *cy pres* proposals for the administration of the Philip Y Bisset Planning Scholarship advanced by QUT, UQ, Griffith and Bond and the first respondent and considered that the Griffith proposal, the UQ proposal and QUT's proposed first option were close to the original purposes of the will. The first respondent became aware of the detail of the final proposals by the universities when served on 19 January 2015 with the originating application that commenced this proceeding and the affidavit of the applicant Mr Bennett filed in support of that application.

[10] The applicants in this proceeding seek a declaration that in making the gift in clause 4.4(2) of his will, Mr Bisset had a general charitable intention and an order pursuant to s 105(1)(a)(iii) and/or s 105(1)(e)(iii) of the *Trusts Act* 1973 (the Act) that the property which is the subject of that gift be applied *cy pres* by paying it to QUT on trust to invest the same and from the capital and income to pay scholarships to be known as the "Philip Y Bisset Planning Scholarship" to students who have completed a Master of Architecture degree or equivalent degree at a Queensland University for the purpose of studying architecture overseas with particular emphasis on the planning of buildings. The applicants favour option 1 proposed by QUT because it is the most detailed and, in their view, very close to the original purposes of the will and, of the four universities, Mr Bisset had the closest connection with QUT.

[11] Although the universities were named as the second respondents in this proceeding and were served with the relevant court documents, none of the universities appeared at the hearing of the application. The first respondent appeared to dispute that it had disclaimed the gift and opposed the applicants' application and proposed that the wishes and philanthropic intent of Mr Bisset be given effect, or at least as closely as possible to his wishes and intent. Mr Parken who is the chief executive officer of the first respondent, as well as a former president and also a board member since 1999, describes the first respondent as "the peak body for the architectural profession in Australia and is a not-for-profit organisation seeking to promote and advocate the value of architecture and architects throughout Australia". Mr Parken considers that the first respondent is the appropriate body for carrying out the intentions of Mr Bisset. Mr Parken deposes to the first respondent's willingness to accept the gift and the role of trustee for the purpose of clause 4.4(2) of the will, with some relatively minor amendments to its terms relating mainly to procedural aspects.

[12] The Attorney-General did not make any submissions on the issue of disclaimer, other than pointing out that it might be a moot question, since the court had power to give the gift to the first respondent by way of a *cy pres* order, regardless of whether or not there had been a disclaimer. The Attorney-General, as the protector of trusts, is keen to ensure that the gift under clause 4.4(2) of the will is carried out as closely as possible with the intent of Mr Bisset. The Attorney-General does not object to the *cy pres* schemes proposed respectively by the applicants and the first respondent.

Issues

[13] The issues raised in the submissions of the parties are:

1. whether the first respondent disclaimed the gift under clause 4.4(2) of the will;

2. whether there was a general charitable intention on the part of Mr Bisset or whether the gift is for a charitable purpose;
3. whether and what *cy pres* or other order should be made.

Correspondence between the applicants and the first respondent

[14] The first respondent sent a letter to the applicants' solicitors dated 12 July 2013. It was marked "without prejudice". The first respondent did not oppose the letter being received into evidence. The opening paragraphs of the letter include the following statements:

> "The Institute is incredibly grateful to Mr Bisset for nominating the Institute as the recipient of this most generous gift. However, after careful consideration and advice, the Institute is reluctantly inclined to disclaim the gift on its present terms.
>
> Our view is that the current terms and the 'Guidelines' are too prescriptive or require extensive clarification, making the gift impractical for a trustee to administer in accordance with its expressed terms."

[15] The letter then sets out eight administrative issues arising from "the construction and expressed terms of the gift". The first difficulty identified by the first respondent was the emphasis in the wording of the gift on "planning" and the "planning of buildings" which it was asserted did not align with the National Competency Standards in Architecture, the curriculum of modern architectural schools or with architectural practice or, if it was intended to refer to the discipline of planning in the sense of town planning, that is a discipline distinct from architecture. The first respondent noted that it was not clear from the words of the gift and the name of the scholarship which meaning of "planning" is intended.

[16] The first respondent then made the point that the notion of "planning" most likely intended by Mr Bisset is unlikely to attract significant contemporary interest in the intended scholarship. This leads into the third difficulty identified by the first respondent that the administration of a scholarship with emphasis on "planning" or the "planning of buildings" is not aligned with its objectives. The letter then states:

> "On either construction, the Institute finds it difficult to accept the obligations of trusteeship to administer a scholarship that emphasises the very narrow concept of 'planning' and does not directly or indirectly lead more broadly to the 'advancement of architecture'."

[17] The first respondent's fourth point is that it is the national body and seeks to promote its objectives at a national level and the prescription that a scholarship be limited to students in a single state is inconsistent with the promotion of its objectives nationally. The first respondent then identified some of the terms in the gift that would require clarification or reformation as "the Institute feels it would be unable to accept the obligations of the trusteeship to administer the purpose of the gift in a practical way". The terms that caused the first respondent difficulty include "a prescribed school of architecture" and whether a "final year student" is intended to mean a student in the

final year of the undergraduate degree or the master's degree or the final year of either course.

[18] The first respondent noted it had obtained advice that the guidelines are likely to be binding on the trustee in administering the proposed scholarship. The letter then stated:

> "Subject to any clarification or reformation of the terms of the gift, the Institute considers these guidelines to be so prescriptive as to make the administration of a scholarship impractical."

[19] The first respondent noted that although the terms of the gift were in favour of the respondent as trustee, the executive of the first respondent's Queensland Chapter was nominated to administer the scholarship. As the first respondent's chapters are not incorporated entities, the first respondent expressed concern about administrative and governance issues that may arise for the first respondent as trustee.

[20] The last point made in the numbered paragraphs was in these terms:

> "The Institute also considers that administration of the scholarship (and attendant trust obligations) will involve considerable administration costs for the Institute. Such costs are difficult to justify in light of the prescriptive and limiting terms of the gift, as well as the governance structure of the Institute, for the reasons outlined above."

[21] The closing paragraphs of the letter include the following:

> "Mr Bisset's specific nomination of the Institute as trustee is likely to be indispensable to the purpose underlying the gift, although the words of clause 4.4(2) of the Will suggest a general charitable intention. As such, it is likely that the purpose and directions of the gift are capable of being reformed, while still retaining Mr Bisset's intent for the Institute to act as trustee, and his general intent for the purpose of the gift.
>
> If the purposes, directions and prescriptions of the gift could be reformed, to give effect to the apparent general charitable intention of the gift in broader, more contemporary and more flexible terms that address the issues above, the Institute would be very pleased to reconsider our position. Indeed, to be clear, we would very much appreciate the opportunity to be able to bring to the profession the great potential benefits that could flow from a scholarship supported by this gift and bearing Mr Bisset's name."

[22] The applicants' solicitors replied by letter dated 20 September 2013 to the first respondent:

> "The Executors have now taken the advice of Counsel on how they should respond to the Institute's notification, in your letter of 12 July 2013, that the Institute is not prepared to accept the gift under clause 4.4(2) (read with the Third Schedule) of the Will, in its present form.
>
> The Executors have been advised by Counsel that the appropriate course of action is for them to make a *cy-pres* application to the Supreme Court in

> respect of the gift under clause 4.4(2), and to that end papers are currently being drafted. Of course, once filed the application and supporting affidavit will be served on the Institute.
>
> …
>
> However, with the Court application in prospect it is now unlikely the administration will be concluded by Christmas. I am instructed to seek the Institute's attitude to the Executor's continuing to hold the balance of the Estate funds – in which the Institute has the greatest potential stake – off investment pending the outcome of the Court application.
>
> I look forward to hearing from you on this point."

[23] By email dated 19 November 2013 from Mr Mann of the applicants' solicitors to Mr Clark, the chief operating officer of the first respondent, the first respondent was advised that the applicants' solicitors had written to all tertiary institutions in Queensland with architecture schools telling them of the gift under clause 4.4(2) of the will and asking them if they wished to be considered as a recipient of the gift under any *cy pres* scheme that might be approved by the court. The email then noted:

> "Of course, when the application is filed your Institute will be named as respondent and accordingly you will have the opportunity to put forward submissions, if you wish, as to why the gift should be paid to the Institute *cy pres*."

[24] The email then quoted from the letter that was written to the universities which included the advice:

> "The executors intend to apply to the Court for approval of a cy pres scheme applying the gift in a manner which is as close as practicable to the terms of the Will. We are writing to enquire whether your university wishes to be considered as the recipient of the gift under the scheme."

[25] After detailing the information that the applicants requested from the universities, the email continued:

> "The purpose of this email is to invite the Institute to submit to the Executors a written proposal for how the Institute would use the money in a manner that is as close as practicable to the terms of the gift under the will.
>
> I have provided the excerpt from the letter we sent to the universities as a guide only to what the Institute may wish to cover in any submission it put to the Executors. (Obviously, given the difference in function between the universities and the Institute, the points listed above can only serve as a rough guide.)
>
> Any submission you may care to make to the Executors will be included in the material the Executors forward to the Attorney-General for consideration before the application is brought on before the Court.
>
> Would you please let me know whether the Institute intends to forward a submission to the Executors."

[26] The applicants' solicitors requested a response from the first respondent by 9 December 2013. The first respondent's in house legal counsel, Mr Katsavos, sent an email to the applicants' solicitors on 2 December 2013 advising that submissions would be made to the applicants on or before 9 December 2013 and explained that advice was being obtained from counsel and the first respondent's executive would then need to review and approve the letter to the applicants. A request was made to be advised "if there have been any substantive developments in this matter". Mr Katsavos sent another email on the same day advising that the draft submissions had been prepared by way of letter and asked whether this would suffice or whether the applicants were "anticipating that the 'material' we provide includes supporting documents in the way of a proper Brief". Mr Mann replied by email on 2 December 2013:

> "I wouldn't expect that you would assemble a compendious brief of material at this stage. As the Institute will be named as a respondent to the application you may wish to save such material to a later stage."

[27] The first respondent responded to the applicants' solicitors' email of 19 November 2013 by letter dated 9 December 2013 that included as the subject matter of the letter "Gift to The Royal Australian Institute of Architects – Cy-prés Application". After referring to the email of 19 November 2013, the letter stated:

> "The Institute is grateful to Mr Bisset for nominating the Institute as the recipient of his generous gift. The Institute has previously disclaimed the gift on its present terms.
>
> The Institute remains of the view that the terms and the 'Guidelines' are too prescriptive or require clarification and thus make the gift too impractical for a trustee, such as the Institute, to administer in accordance with its expressed terms. In particular, the Institute sees a number of practical administration issues and matters of construction arising from the expressed terms of the gift:"

[28] The letter then set out in 11 numbered paragraphs the problems identified by the respondent. These numbered paragraphs largely repeat and expand the concerns conveyed in the first respondent's July letter. The suggestion is made in the first numbered paragraph that clarification should be sought from the court that Mr Bisset's intended meaning of "planning" refers to the modern sense of "design", rather than of town planning. In the fourth numbered paragraph, the first respondent submits the applicants "should seek the court's approval to reform the gift and broaden the scope of Mr Bisset's clear charitable intent, by opening eligibility for the scholarship to students of architecture nationally". The suggestion is then made in the fifth numbered paragraph that, as the capital sum of the gift is substantial, the gift could support a number of scholarships, as intended, but for students of architecture across Australia, not just within Queensland.

[29] Numbered paragraph 6 then states:

> "Broadening the scope of the gift in this way creates the opportunity to recognize Mr Bisset's name and legacy on a grander, national scale. Of course, the emphasis on providing a scholarship to students in Queensland

> in particular would be observed by the Institute, even if the scholarship(s) were offered nationally."

[30] In numbered paragraph 8, the first respondent confirms that it considers the guidelines to be so prescriptive as to make the administration of a scholarship impractical, but suggests that clarification should be sought as to whether they are advisory or mandatory.

[31] The letter then concluded with the following paragraph:

> "If the purposes and directions of the gift were reformed to give effect to the apparent general charitable intention of the gift but in much broader terms that address the issues above, the Institute would be prepared to accept the gift. If the executors commence *cy-pres* proceedings and join the Institute as a respondent, the Institute is prepared to make formal, comprehensive submissions regarding the proposed administration of Mr Bisset's gift."

Was there disclaimer?

[32] The suggestion on behalf of the Attorney-General that the issue of disclaimer need not to be decided, because there is a need for a *cy pres* application in any case, has attraction. The problem, however, is it is the trustee who usually should apply for an order applying trust property *cy pres*. If there were disclaimer, the applicants as the trustees under the will would be the appropriate parties for seeking the *cy pres* order. If there were not disclaimer and the gift were paid by the applicants to the first respondent to carry out the trust created by clause 4.4(2) of the will, the first respondent would then be the appropriate party to seek the *cy pres* order.

[33] Mr Bisset was extremely generous in making the gift under clause 4.4(2) for the purpose of establishing a scholarship in his profession of architecture, even if his express wish is for the focus of the scholarship to be on planning of buildings and their inter-relationship. As a Queenslander, his focus was on providing the scholarship for the benefit of students studying architecture in Queensland. It is surprising that a national professional body such as the first respondent questioned the appropriateness of administering a gift for scholarships to benefit students studying in the State in which Mr Bisset had studied, lived and worked. The first respondent's attitude expressed in both its letters of July and December about the limitation of the gift to benefit Queensland students was almost cavalier. Using that aspect of the gift as a reason to raise difficulties about the gift is even more surprising when it was disclosed by the chief executive officer of the first respondent for the purpose of the hearing that the first respondent administers at least four awards for architecture restricted to the Queensland Chapter.

[34] The applicants and the first respondent rely on the article by Professor Crago, *Principles of Disclaimer of Gifts* (1999) 28 WALR 65 that suggests three requirements for a disclaimer of a gift to be effective:

(a) the disclaimer must be timely in that it must occur before any act constituting assent to a gift (at 76);

(b) the disclaimer must be peremptory, in that it must constitute an absolute rejection of the gift (at 78);
(c) the disclaimer must be communicated to the donor or the donor's agent (at 79).

[35] The analysis by Professor Crago of the second requirement was considered by Ward J in *Tantau v MacFarlane* [2010] NSWSC 224 at [104]-[121].

[36] It is the second requirement that is in issue in this matter. The applicants submit that the disclaimer was unequivocal from the contents of the first respondent's July letter or, at the latest, by its December letter.

[37] It appears that the applicants were advised by their lawyers, as a result of the first respondent's July letter, that the first respondent had disclaimed the gift. It is unfortunate that the applicants did not confirm at that time with the first respondent in unequivocal terms that was the position. That may have been the intention of the first paragraph of the applicants' solicitors' letter of 20 September 2013 to the first respondent, but it did not say so. It is arguable that the first respondent's July letter was inclined towards disclaimer, but was exploring whether the applicants would be prepared to bring a *cy pres* application that would result in the gift going to the first respondent with some or all of the changes advanced by the first respondent. The point of the letter being marked "without prejudice" was arguably to allow the first respondent to explore this possibility with the applicants without committing to a position of either accepting or disclaiming the gift. The second paragraph of the applicants' solicitors' letter of 20 September 2013 can then be seen as an intimation by the applicants that they would make such a *cy pres* application as foreshadowed by the first respondent's July letter, which would result in a reformed gift in favour of the first respondent. The applicants' solicitors' September letter left the matter about their purpose of approaching the universities for proposals unclear by seeking the first respondent's attitude to the applicants' keeping the balance of the estate funds (in which the first respondent had "the greatest stake") off investment, pending the outcome of a *cy pres* application.

[38] The first respondent submits that its position was that it did want to reform the gift to achieve a practical outcome, but no unequivocal election to disclaim or assent had been made. Although the first respondent was proposing that it receive the gift in a reformed fashion, it submits it did not evince an intention to disclaim the gift in its entirety, if the applicants did not agree with its proposal that the gift be reformed with the first respondent remaining as the trustee.

[39] In the alternative, the first respondent submits that if it were precluded from denying that there had been a disclaimer, the course of conduct on the part of the first respondent demonstrates a retraction.

[40] The applicants submit that the disclaimer cannot be retracted because the effect of the disclaimer was to put an end to the gift. In the alternative, the applicants submit that the disclaimer cannot be retracted, as the applicants have acted on it by incurring the expense and the delay of obtaining *cy pres* proposals from the universities.

[41] If the matter had to be decided by reference only to the first respondent's July letter, I would have great difficulty in finding that constituted an absolute rejection of the gift. The designation of the letter "without prejudice" meant that the letter was not to be treated as the first respondent's making a final decision on whether to accept or disclaim the gift. It was used in the nature of a reservation of rights, as described in *Alleyn v Thurecht* [1983] 2 Qd R 706, 713-714, 718.

[42] The statement in the second paragraph of the first respondent's December letter referring to the first respondent's having "previously disclaimed the gift on its present terms" does not amount to disclaimer (unless there had previously been a disclaimer). The only evidence relied on for disclaimer prior to the December letter is the July letter and, in the circumstances, that did not amount to disclaimer. If the first respondent mistakenly considered it had disclaimed the gift and referred to that mistaken view (without adopting it), that itself could not be disclaimer.

[43] Recourse to the balance of the first respondent's December letter leaves no doubt, however, that the first respondent was disclaiming the gift. Any gift must be assented to or disclaimed on the donor's terms: *Commissioner of Taxation of the Commonwealth of Australia v Ramsden* [2005] FCAFC 39 at [31]. The conclusion in the first respondent's December letter that the first respondent would be prepared to accept the gift if the purposes and directions of the gift were reformed to address the issues raised by the first respondent in that letter and to respond to *cy pres* proceedings commenced by the applicants amounts to a rejection by the first respondent of the gift under clause 4.4(2) of the will on the terms set out in clause 4.4(2). That rejection was communicated by the first respondent to the applicants and is consistent only with, and amounts to, disclaimer of the gift.

[44] It is therefore necessary to consider whether the first respondent can and has retracted the disclaimer. It is a corollary of disclaimer being peremptory that it cannot be retracted: see the article by Professor Crago at 78, and particularly at footnote 60.

[45] This reasoning of Professor Crago was analysed in *Tantau* in which the issue was the ability of the donee to disclaim after initial acceptance of the gift under the relevant will. In *Tantau*, the deceased gave one-half of her residuary estate to the National Gallery of Victoria for the purpose of creating an annual award for a painting by an Australian artist of an Australian subject in sympathy with the works of a named Australian artist. The NGV accepted the gift initially (wrongly believing that the gift would be spent on purchasing works in sympathy with the works of the named Australian artist), but subsequently advised the executors of its wish to disclaim the gift on the basis the NGV was primarily a collector of art and not a promoter of art prizes. Although the case was concerned with retraction of an acceptance of a gift rather than retraction of a disclaimer, the law applying to retraction of a disclaimer was applied by analogy and Ward J stated:

> "107 However, it seems to me that the essence of Associate Professor Crago's criticism of *Re Young, Re Cranstoun, Re Boyd* and *Lawson v Lawson* is that those cases suggested that a disclaimer could be retracted simply by reason that a third party's interests had not or would not be so prejudiced. Insofar as the author explains that once a gift has been

> effectively disclaimed, it cannot be accepted later, nor can the disclaimer be retracted, the original gift having failed by account of an effective disclaimer, this turns on the effectiveness of the initial disclaimer. I accept that, by analogy, in principle it would follow that an *effective* acceptance of a gift could not be retracted, once made, irrespective of whether to retract such an acceptance would affect any third party interests.
>
> 108 Nevertheless, there are circumstances where it seems clear that a disclaimer (and, hence by analogy an acceptance) may be retracted, those being where the disclaimer was made without full knowledge and full intention, as appears from the decisions in *Lady Naas v Westminster Bank Ltd* [1940] AC 366 and *Re Paradise Motor Co.* It would seem that this is because in such a case (ie where there is insufficient knowledge or appreciation of the terms of the gift) there was no *effective* disclaimer in the first place. It is thus not inconsistent with the fundamental principle outlined above (that a disclaimer once made cannot be retracted) to find that a donee is not bound by a disclaimer if it is shown that the disclaimer was made without full knowledge and thus was ineffective, there having been no *effective* disclaimer to retract. Associate Professor Crago appears to support the reasoning in *Lady Naas* and *Re Paradise Motor Co* on that basis and goes on to accept that such reasoning, by analogy, should apply to allow retraction of ineffective acceptances, ie acceptances made without full knowledge and intention (at p 82). It seems to me that this is correct.
>
> 109 If what is required for an effective disclaimer or acceptance, amongst other things, is that such disclaimer or acceptance is made with full knowledge of (and, in the case of acceptance, intention to accept) the terms of the gift (relying on *Lady Naas* and *Re Paradise Motor Co*), then logically (at least in the absence of third party rights being affected) there would seem to be no reason in principle not to permit the retraction of a disclaimer or acceptance made without full knowledge of (and, in the case of acceptance, an intention to accept) all the circumstances, terms and conditions of the gift."

[46] Ward J concluded on the facts in *Tantau* at [114] that the purported acceptance by NGV was ineffective due to the misapprehension on which it was based and found the subsequent disclaimer by NGV was effective.

[47] There was no misapprehension or misunderstanding on the part of the first respondent about the nature of the gift under clause 4.4(2) of the will, as the letters of July and December 2013 were written on legal advice. The first respondent's intention inferred from the December letter was not to accept the gift on the terms it was given. The disclaimer in the December letter was peremptory and therefore effective. The exception recognised in *Lady Naas v Westminster Bank Ltd* [1940] AC 366, 400 as to when retraction of a disclaimer would be permitted (that the disclaimer was made without full knowledge of the extent and nature of the gift or without full intention to disclaim) does not apply to the first respondent's considered rejection of Mr Bisset's gift by its December letter on the terms on which it was given under clause 4.4(2). It is not necessary to consider whether there is another exception to disclaimer (being retraction before the donor or donor's agent acts on the disclaimer). The bringing of the

cy pres application by the applicants after the first respondent had disclaimed the gift was acting on the disclaimer and would prevent retraction, if there were such another exception.

[48] The effect of disclaimer is that the gift on the terms of clause 4.4(2) of the will to the first respondent fails and it is a matter then of considering the *cy pres* application, on the basis of s 105(1)(a)(iii) of the Act.

Whether there was a general charitable intention or whether the gift is for a charitable purpose?

[49] The condition that must be satisfied to enable a charitable gift under a will that would otherwise fail to be applied *cy pres* is the existence of a general charitable intention on the part of the testator.

[50] The applicants submit that the subject gift is a charitable gift for the advancement of education in that it is a gift to establish a scholarship for education in a recognised field of study, namely architecture. Apart from the gift itself under clause 4.4(2) being charitable, the applicants submit a general charitable intention can be inferred from the other gifts to charity under the will and the express provision for the alternative gift, if the primary gift under clause 4.4(4) of the will failed.

[51] I find the nature and structure of the gifts under Mr Bisset's will, even apart from clause 4.4(2), easily justify the conclusion that Mr Bisset had a general charitable intention that went beyond the specific gift to the first respondent for the purposes set out in clause 4.4(2): *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, 225.

[52] The first respondent and the Attorney-General submit that the gift under clause 4.4(2) of the will is for a charitable purpose. One of the reasons for doing so is that both the Attorney-General and the first respondent were seeking to invoke s 106 of the Act. Section 106 may have been an appropriate provision to consider in relation to the gift to the first respondent, if there had not been disclaimer by the first respondent:. compare *The Public Trustee of Queensland v State of Queensland* [2009] 2 Qd R 327.

What orders should be made?

[53] It is an important feature of the gift under clause 4.4(2) that the first respondent was named as the trustee, as it was (and remains) in an ideal position for administering the scholarship that is available to architecture students who attend any university with an architecture school in Queensland.

[54] Ultimately the first respondent did not pursue some of the objections that it had to the terms of the gift under clause 4.4(2) of the will which had been expressed in the July and December letters, such as its preference that the scholarship not be limited to Queensland students and uncertainty about what was meant by prescribed school of architecture. If the first respondent had put forward in December 2013 the *cy pres* proposal that was the subject of its submissions on this application, the matter may have

resolved expeditiously. The first respondent's proposal addresses the issue that the Council of the Queensland Chapter of the first respondent has a limited role in respect of the administration of the first respondent to act as an advisory body of the Queensland Chapter. It is proposed that the decision making body be the National Executive Committee of the first respondent, but its intention is that it will delegate selection of the scholarship recipients to the Council of the Queensland Chapter. Another machinery amendment proposed is to add the words "as it sees fit" after the words "to hold the capital moneys". This has the effect of confirming the discretion of the first respondent as trustee as to how it holds and invests the capital moneys of the gift. As pointed out on behalf of the Attorney-General, that change was not the subject of express evidence from the first respondent. It has, however, been included as one of few amendments to the terms of clause 4.4(2) now proposed by the first respondent and I therefore infer that it is a change that will assist the first respondent in the manner in which it holds the capital, without in any way diminishing its duties as a trustee. I therefore will incorporate that amendment in the order.

[55] The universities were prepared to use the description "Planning" in the name of the scholarship. The fact that it is offered to an architecture student gives content to the scholarship. I consider that the work "Planning" should be in the name of the scholarship and the concerns of the first respondent can be addressed by the scholarship being called "The Philip Y Bisset Planning (Architecture) Scholarship". Similarly, the first respondent proposes that the purpose of the architecture study undertaken overseas by the scholarship holder have particular emphasis on the "design" of buildings rather than the "planning" of buildings, as specified in clause 4.4(2) of the will. Although Mr Parken deposes that the term "planning" is the historically based term which has been supplanted by the word "design" in relation to buildings, the universities were prepared to use that expression in their proposals. Rather than substitute "planning" with the word "design", I have amended the order proposed by the first respondent, so that the reference is to "planning and design of buildings". The first respondent submitted by its draft order that rather than the guidelines being "observed" they should be "taken into account" by the National Executive Committee. That does not reflect Mr Parken's statement in his affidavit that the first respondent agrees to follow those guidelines "as is practicable from time to time". The first respondent's proposed order would therefore be better expressed if the words "taken into account" were followed by "wherever possible".

[56] The first respondent was Mr Bisset's preferred choice for implementing the scholarship for architecture students. The revised proposal of the first respondent made after this proceeding commenced best achieves the purpose and intention of Mr Bisset in making the gift under clause 4.4(2) of the will and should therefore be the basis for the application of the gift *cy pres*.

[57] In the usual course the parties' costs of the *cy pres* application should be paid from the subject fund. Although the disclaimer issue complicated the proceeding, there appears to have been some miscommunication between the applicants and the first respondent and I am not inclined to deprive the first respondent of its costs as a result. Each of the applicants and the first respondent provided a draft order at the conclusion of the hearing. Neither draft order dealt with the costs of the Attorney-General. Mr Parrott who appeared on behalf of the Attorney-General did not make any specific submission

seeking costs out of the fund the subject of the application. I therefore will not make an order for costs in favour of the Attorney-General, but will give the parties, including the Attorney-General, the opportunity on the publication of these reasons to make submissions on the issue of the costs of the Attorney-General of the application.

[58] At this stage, the orders I propose to make are:

1. It is declared that Philip Yeats Bisset in making the gift in clause 4.4(2) of his will dated 13 October 2006 (the will) had a general charitable intention.

2. Pursuant to s 105 of the *Trusts Act* 1973 it is ordered that the property which is the subject of the gift in clause 4.4(2) of the will be applied *cy pres*, as if clause 4.4(2) provided as follows:

   "Clause 4.4(2) five parts to THE ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS to hold the capital moneys as it sees fit and apply the income or any such part of the capital and income therefrom as the National Executive Committee of The Royal Australian Institute of Architects ACN 000 023 012 in its capacity as trustee shall from year to year determine for a scholarship to be granted to one or more students in their final year of the architecture course at a prescribed school of architecture in Queensland to study architecture overseas with particular emphasis on the planning and design of buildings. The scholarship is to be known as: 'The Philip Y Bisset Planning (Architecture) Scholarship' and the rules for the granting of such scholarship shall be determined by the National Executive Committee of The Royal Australian Institute of Architects (or its delegate) but nevertheless I express the wish that the guidelines contained in the Third Schedule to this my Will be taken into account wherever possible by the National Executive Committee (or its delegate) when determining such rules and I declare that the receipt of the Chief Executive officer or other appropriate officer of The Royal Australian Institute of Architects shall be a sufficient discharge to my Trustee."

3. The costs of the applicants and the first respondent of this application must be paid from the property which is the subject of the gift in clause 4.4(2) of the will on the indemnity basis**.**