SUPREME COURT OF QUEENSLAND

CITATION:	*Kieninger v Perpetual Trustee Company Ltd & Anor* [2016] QSC 186
PARTIES:	**PAMELA JANE KIENINGER** (applicant) **v** **PERPETUAL TRUSTEE COMPANY LIMITED ACN 000 001 007 (EXECUTOR OF THE WILL OF KENNETH HARDIE DECEASED)** (first respondent) **CANCER COUNCIL QUEENSLAND ACN 009 784 356** (second respondent)
FILE NO/S:	BS No 10231 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2016; 4 April 2016; 18 May 2016 (supplementary written submissions of the first respondent); 23 May 2016 (supplementary written submissions of the second respondent)
JUDGE:	Martin J
ORDER:	**Application adjourned.**
CATCHWORDS:	CHARITIES – CHARITABLE GIFTS AND TRUSTS – VALIDITY AND PRACTICABILITY – GIFT FOR CHARITABLE OBJECT: PRACTICABILITY – TEST AND TIME FOR DETERMINING – where the will of the deceased established a trust – where the trust income was to be distributed to the applicant (the deceased's daughter) and the Cancer Council Queensland (CCQ) – where, on the applicant's death, that trust would terminate and a second trust would be created with the first respondent (Perpetual) as trustee – where the trust's income was to be distributed to CCQ and 'any other similar charitable organisation in Queensland which conducts cancer research' – where Perpetual brought an application after following the applicant's successful family provision application effectively varying the effect of the first trust and

otherwise proposing to execute the second trust in accordance with the will – where CCQ sought a declaration that, at the date of the testator's death, there was no 'other similar organisation in Queensland which conduct[ed] cancer research' – where such a declaration would put CCQ in a position to call for the entire corpus of the trust fund following the applicant's death – whether the date for determining whether CCQ is the sole beneficiary of the second trust is the date of the testator's death – whether the test requires an inquiry not merely as to the practicability of the immediate execution of the trust after the testator's death, but as to the existence of a reasonable possibility that the trust could be executed at some future time

CHARITIES – CHARITABLE GIFTS AND TRUSTS – IN GENERAL – CONSTRUCTION – ASCERTAINMENT OF OBJECTS – GENERALLY – GENERAL PRINCIPLES – where CCQ submitted that there was no 'other similar organisation in Queensland which conduct[ed] cancer research' as at the date of the testator's death – where Perpetual adduced evidence suggesting otherwise – whether the Court was in a position to answer this question

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – PARTICULAR CASES – where Perpetual brought an application that it was justified in administering a trust created by a will in a certain manner following the applicant's family provision application – where CCQ brought a cross-application regarding the administration of those trusts – whether CCQ's application, if successful, would leave it in a position where it could call for the entire corpus of the trust

Succession Act 1981 (Qld), s 6
Trusts Act 1973 (Qld), s 96

Attorney-General for South Australia v Bray (1963-1964) 111 CLR 402, followed
Attorney-General for New South Wales v Perpetual Trustee Co Ltd & Ors (1966) 115 CLR 581, applied
Congregational Union of New South Wales v Thistlethwayte (1952) 87 CLR 375, considered
In re Tacon; Public Trustee v Tacon [1958] Ch 447, applied
Re Leitch, deceased [1965] VR 204, applied
Sir Moses Montefiore Jewish Home & Ors v Perpetual Company Ltd & Anor [2012] NSWSC 210, considered
Perpetual Trustee Co Ltd v Morehead [1965] NSWR 1690, followed

COUNSEL: R T Whiteford for the applicant
R M Treston QC for the first respondent
D B Fraser QC for the second respondent

SOLICITORS: Bennett & Philp for the applicant
McCullough Robertson for the first respondent
Cancer Council Queensland for the second respondent

[1] Kenneth Hardie died on 13 January 2015. He left a will in which he made some minor gifts and established a trust in favour of the applicant, Pamela Kieninger (his daughter), and the Queensland Cancer Fund ("QCF"). It was accepted that QCF should be read as Cancer Council Queensland ("CCQ") – it being the same body. Perpetual Trustee Co Ltd ("Perpetual") is the executor of the estate and the trustee of the trust. As the result of a family provision application the terms of that trust have been affected and this application concerns the manner in which the will should now be administered.

The terms of the will

[2] In his will, Mr Hardie gave a pecuniary legacy of $25,000 to the applicant and pecuniary legacies of $1000 to each of his grandsons. The residue of the estate was settled on a trust fund the terms of which are as follows:

> "4 MY TRUSTEE SHALL HOLD MY ESTATE ON TRUST:
>
> …
>
> 4.3 If my daughter Pamela Kieninger survives me for 30 days:
>
> (a) To set up a fund (the Fund) consisting of the residue of my estate and any income added to the Fund from time to time.
>
> (b) To invest the Fund as authorised by law or any clause of this Will.
>
> (c) During the lifetime of my daughter PAMELA KIENINGER to pay to my daughter an annual payment from the income of the Fund to be calculated as follows:
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> (i) within the 12 months after my death AU$25,000.00; and
>
> (ii) in each 12 month period commencing one year after my death during my daughter's lifetime an amount increased annually in direct proportion with any increase in the Consumer Price Index All Groups based on Brisbane starting from a base amount of AU$25,000.00 ("total annual allowance"). If the Consumer Price Index is not in operation at the date of my death or ceases operation during my daughter's lifetime, my Trustee may apply any other scale or formula it considers will provide for the calculation of an amount approximately equal to the increase which would have been applicable had the said Consumer Price Index then have been in operation.
>
> My Trustee shall pay the total annual allowance to my daughter in half yearly instalments.

My Trustee may in its absolute discretion increase the total annual allowance to my daughter so that it amounts to at least half of the net annual income of the Fund. My Trustee may also at its absolute discretion decrease the total annual allowance to my daughter if the net annual income of the Fund is insufficient to cover the total annual allowance to my daughter.

(d) To give the balance of the net annual income of the Fund each year to the QUEENSLAND CANCER FUND for its charitable purposes.

(e) This trust will terminate on the death of my daughter Pamela Kieninger.

4.4 If my daughter Pamela Kieninger does not survive me for thirty days to hold the residue of my estate, or on the termination of the trust in clause 4.3 of my Will to hold the balance of the Fund (income and capital), in perpetuity in memory of my late brother as the "John Hardie Charitable Trust". In this regard I declare a general charitable intent and direct that the income of the John Hardie Charitable Trust be paid from time to time as my Trustee may determine to the QUEENSLAND CANCER FUND and, at the absolute discretion of my Trustee, any other similar charitable organisation in Queensland which conducts cancer research.

If the income tax exemption provisions of the Income Tax Assessment Act ("the Act") so require, the income or capital of the John Hardie Charitable Trust may only be distributed to any other fund, authority or institution which:

(i) is located in Australia and undertaking its work solely in Australia; or

(ii) is an institution to which a gift by a taxpayer is an allowable deduction because the institution is mentioned in a table in subsection 78(4) of the Act; or

(iii) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident.

…

6 If at my death any of the organisations benefiting under this my Will have ceased to exist or have amalgamated with another organisation or have changed name these gifts shall not fail but my Trustee may pay them to the organisation in Queensland which my Trustee considers most closely fulfils the objectives that I intend to benefit."

The family provision application

[3] The applicant made an application for provision under the *Succession Act* 1981. The parties took part in a mediation as a result of which a settlement was agreed subject to the

order of this court. Upon reading the material and hearing the submissions I was satisfied that the settlement was appropriate.

[4] The effect of the order ("family provision order") was:

(a) the applicant was to receive a 60% share of the residue of the estate in lieu of the gifts otherwise made to her,

(b) to reduce the fund otherwise available to be invested and thereafter distributed, by way of income, to CCQ for its charitable purposes during the applicant's lifetime, and

(c) upon the Applicant's death, that reduced fund would be available to be invested and thereafter distributed, by way of income, to CCQ and "any other similar charitable organisation in Queensland which conducts cancer research".

Perpetual's application

[5] Perpetual applied for orders relating to the administration of the estate following the family provision order. Anorder in the following form was sought:

> "That pursuant to section 96 *Trusts Act* 1973 (Qld), the Respondent is justified in administering the last Will of Kenneth Hardie deceased dated 25 August 1998 on the basis:
>
> (a) Clause 4.3 of the will be read and construed as the Respondent should distribute the net annual income of the trust fund to Cancer Council Queensland during the Applicant's lifetime; and
>
> (b) Upon the termination of the trust in clause 4.3, the Respondent holds the balance of the Fund on the trusts in clause 4.4."

CCQ's application

[6] CCQ was joined as a respondent to Perpetual's application. Before the hearing on 23 March, CCQ had given informal notice of an intention to make an application for a declaration. During the hearing on 23 March 2016 it became evident that further material was necessary and directions were made for the further hearing of that application.

[7] Pursuant to those directions CCQ filed an application seeking this order:

> "That pursuant to section 6 of the *Succession Act* 1981 (Qld) it be declared that there was not in existence, as at 13 January 2015, a charitable organisation in Queensland similar to Cancer Council Queensland, which conducted cancer research."

[8] So far as it is relevant, s 6 of the *Succession Act* provides:

> "(1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make

and enforce all such orders as may be necessary or convenient in every such respect.

…

(4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.

…"

[9] Mr Fraser QC made it clear that CCQ's application, if successful, was intended to place it in the position whereby the gift of income under the will would carry with it a gift of the capital which gives rise to the income. CCQ argues that it is the only entity which is entitled to receive income under the trust or trusts created by the will and, therefore, it is entitled to call for the corpus of the trust with the result that the trust or trusts would come to an end as would, at some stage, the Respondent's role as trustee.

[10] The principle underlying this submission was the subject of consideration by Ball J in *Sir Moses Montefiore Jewish Home & Ors v Perpetual Company Ltd & Anor*[1] where he said:

"[12] There is a principle of construction of wills that a gift of income in perpetuity will carry with it a gift of capital. GE Dal Pont in *Law of Charity*, 1 st ed (2010) LexisNexis Butterworths at [6.12] explained the rule in these terms:

> **As a rule of construction, a perpetual gift of income from real or personal property to a person carries with it an absolute interest in the capital of the fund to which the person is entitled to call for**. The rule is designed to prevent gifts of income being void by reason of the perpetuity rule. As a perpetual gift of income for a non-charitable object or to a non-charitable institution is void because of the rule against perpetuities, to adopt a construction that a perpetual gift of income carries the capital that generates the income stream is a means to ensure that the gift will vest within the perpetuity period. This gives effect, it is presumed, to the donor's likely intention, in that only by payment of the capital can the donee receive the full benefit and extent of the gift that the donor is presumed to have intended. (emphasis added, footnotes omitted)

As Dal Pont points out, there is conflicting authority on whether the rule of construction applies to charitable trusts. For Australia, that conflict has been settled by the decision of the High Court in *Thistlethwayte's* case.[2] In that case, Dixon CJ, McTiernan, Williams and Fullagar JJ said at 440:

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1 [2012] NSWSC 210.

2 *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375.

> We cannot agree that this distinction [that is the distinction between charitable and non-charitable trusts] exists. In our opinion, the rule is the same whether the gift of income is to an individual or to a charity consisting of a body capable of holding property. **The beneficiary is entitled to the capital unless there is a clear intention express or implied from the will that the beneficiary is not to take more than income**.

[13] Since the decision of the High Court in *Thistlethwayte's* case, there have been a number of decisions, particularly of the Supreme Court of Victoria, that have held that **proof of a contrary intention is more readily found where the beneficiary is a charity and that the fact that the beneficiary is a charity is one matter the court can take into account in determining whether a contrary intention exists**: see *Re Williams (dec'd)* [1955] VLR 65 at 69 per Dean J; *Re Weaver* [1963] VR 257 at 262 per Hudson J; *Re Inman (dec'd)* [1965] VR 238 at 240 per Gowans J; *Re Denheart (dec'd)* [1973] VR 449 at 451 per Starke J. The position was summarised by Gillard J in *Melbourne Jewish Orphan and Children's Aid Society Inc v ANZ Executors and Trustee Company Ltd* [2007] VSC 26 at [74] in these terms:

> In my opinion, the fact that a gift of income is given in perpetuity to a charitable institution provides some evidence of a contrary intention. However, in the end, of course, it is a matter of intention of the creator of the trust. Nevertheless, in my opinion, the cases have established that the courts are more ready to find a contrary intention where the gift is to a longstanding charity in perpetuity.
>
> Although that statement correctly summarises the earlier cases, it is not easy to reconcile it with the statement by Dixon CJ, McTiernan, Williams and Fullagar JJ that the rule is "the same" whether the gift is to a charity or to an individual. In each case, there must be a clear intention express or implied from the will that the beneficiary is not to take more than the income.

[14] In a number of the cases I was taken to, **the courts have found a contrary intention from the fact that the gift was structured as a gift of income in perpetuity to established charities.** So, for example, in *The Melbourne Jewish Orphan and Children's Aid Society Inc* case, Gillard J thought that it was of significance that the testator created a trust and gifted "the net annual rents" of a particular property to the charitable beneficiaries of that trust and made provision for new trustees to be appointed in the event that the original ones retired or died. A significant part of the parties' submissions in this case focussed on identifying points of similarity and differences with that case. In my opinion, however, the court should be wary of attempting to ascertain the testator's intention in this case by comparing the conclusions reached in other cases about wills that are expressed in different terms from the will in question. In addition,

> although I accept that the matters referred to by Gillard J are relevant to ascertaining the testator's intentions, in my opinion, evidence that the testator intended to make a gift of income in perpetuity is of limited assistance in displacing the rule. **The rule has as its starting point the fact that the testator has made a gift of income in perpetuity. A gift of income in perpetuity cannot itself be evidence of a contrary intention, since the rule is concerned with what is intended by such a gift. Similarly, the fact that the will contains other provisions that contemplate the gift of income continuing in perpetuity is of limited assistance in rebutting the rule, since those provisions are an obvious incidence of such a gift. Of greater significance is whether there are terms in the will which make it clear that the testator could not have intended that the beneficiaries would have the right, if they chose to exercise it, to call for the capital. In other words, the fact that a testator chose to allow for the possibility that the beneficiaries may not call for the capital is of limited assistance in determining whether the testator has evinced a clear intention that they not be permitted to do so.** If the rule of construction is to have substance, it is the latter intention that must be clear." (emphasis added)

[11] The issue of whether a contrary intention can be found in the will has not yet arisen in these proceedings. It is, if at all, for determination on another occasion.

[12] The issues which arise are:

(a) when does one determine whether CCQ is the sole beneficiary?

(b) what time period is to be considered?

[13] CCQ argues that the time for determination is at the date of the deceased's death and that that one only assesses whether CCQ was the sole beneficiary at that date. If that is correct, and CCQ is the sole beneficiary, then there will be no need to consider Perpetual's application as CCQ has said that, in those circumstances, it will call for the corpus of the trust.

The time for determining whether CCQ is the sole beneficiary

[14] CCQ relied upon the analysis in *Re Leitch, deceased*[3] and *In re Tacon; Public Trustee v Tacon*[4] to construct the following argument:

(a) whether a gift to a charity lapses because of the non-existence of a particular recipient, whether described as a charitable entity or not, is determined as at the date of death of a testator in the case of a trust sought to be established under a will,

(b) that principle applies regardless of the existence of a life interest in place prior to payment being required to be made to any nominated recipient,

(c) there was no entity as described, other than CCQ, in existence at the date of death,

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3 [1965] VR 204.
4 [1958] Ch 447.

(d) as there is a general charitable intention expressed in the will and no change in purpose, there is no question of the gift lapsing and it is simply a matter of construing the will,

(e) it follows, then, that because the charitable purpose can be carried out by CCQ, the will should be construed on the basis "that the reference to another entity can be ignored".

[15] I turn to the authorities to which Mr Fraser referred. In *Re Leitch* the testator had, by his will, set up a trust to establish a scholarship at a school in Scotland where, at his death, all schooling was free. His will further provided that if the school should come under government control there should be a gift over. In that case before Adam J it was accepted that the proposed trust came within a well-recognised head of charity but that the charitable trust was impracticable and, for that reason, failed. It was argued that a particular charitable trust, that is, a trust evincing no more general charitable intention, lapsed if, at the relevant time, it was impracticable of fulfilment. Adam J agreed with the submission that the trusts for the establishment of scholarships at the school disclosed no general charitable intention wider than the establishment of such scholarships at that school. Adam J said:

> "It follows then, that if such trusts were impracticable, the gifts would lapse for the benefit of the next of kin. Impracticability is to be determined in this case as at date of testator's death, when, notwithstanding the life interest given to testator's widow, the gifts are to be considered as vesting in charity: *Halsbury*, 3rd ed., vol. 4, pp 321-2, and the cases there cited."[5]

[16] The part of *Halsbury* to which his Honour referred reads as follows:

> "A gift to charity which comes to an end after the death of a testator but before the legacy is paid will be applied *cy-pres*…; And if a legacy is payable after a life interest for a charitable purpose which becomes impracticable after the death of the testator but before payment is due, it will also be applied *cy-pres* (*re Moon's Will Trusts* [1948] 1 All ER 300). The question whether there is lapse of a legacy to charity either immediate (*Re Slevin, Slevin v Hepburn* [1892] 2 Ch 236) or deferred (*re Moon's Will Trusts*), and consequently whether there is initial or subsequent failure of the charitable purpose is to be determined at the moment of the testator's death (*re Moon's Will Trusts* at 304)."[6]

[17] The test for practicability (referred to in *Halsbury*) was considered in *In re Tacon; Public Trustee v Tacon*[7] by Upjohn J (as he then was). His formulation was approved by the High Court in *Attorney-General for South Australia v Bray*.[8] In that case, the will of a testator (who died in 1957) directed that her trustee should stand possessed of her estate upon the following trusts, (a) to purchase and properly equip a home for the purpose of the maintenance and care of or for otherwise mercifully and kindly dealing with homeless, stray and unwanted animals, (b) to invest the balance of her estate and to apply the income thereof for the permanent upkeep, including wages, of the home. The testator empowered

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5 [1965] VR 204 at 206.
6 *Halsbury*, 3rd ed., vol. 4, pp 321-2.
7 [1958] Ch 447.
8 (1963-1964) 111 CLR 402.

the trustee to postpone the carrying out of these trusts for such period as should be necessary in order to accumulate a fund sufficient in the opinion of the trustee to carry them out and, for that purpose, to capitalize the net income of her estate during such period of postponement. The testator also empowered the trustee to postpone the realization of her estate for such period or periods as it in its discretion should think fit. It was held that, for the purpose of determining whether the trusts were practicable, the proper inquiry was whether, at the date of the death of the testator, it was practicable to carry out the intentions of the testator and, if not, then whether, at that date, there was any reasonable prospect that it would be practicable so to do at some future time.

[18] Kitto J (with whom Taylor, Menzies and Windeyer JJ agreed) said:

> "The next question is whether the destination of the capital and income of the estate should be decided on the footing that the precise scheme prescribed by the will must be held to have failed ab initio by reason of impracticability. **The question has of course to be considered as at the death of the testatrix, for the trusts were expressed to take effect immediately**… **The question to be considered as at the death, however, is not limited to the feasibility of an immediate execution of the trusts. To say of a charitable trust that it fails for impracticability as at the date of death is to say not only that it was impossible at that date to use the trust fund for the charitable purpose immediately but also that there was at that date no reasonable prospect of its becoming possible so to use the fund at any future time**: see *Attorney-General v Oglander*; *Wallis v Solicitor-General for New Zealand*. The formula now used in the Chancery Division in England for defining the scope of the relevant inquiry is designed to bring out both aspects of impracticability. It is the formula approved by Upjohn J (as he then was) in *In re White's Will Trusts; Barrow v Gillard*: "**whether at the date of the death of the testatrix it was practicable to carry the intentions of the testatrix into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time**". In *In re Tacon; Public Trustee v Tacon* the formula was used and its use was approved by the Court of Appeal. In that case the charitable gift was in remainder after a prior life interest but was not subject to any contingency. A misunderstanding seems to have arisen in the present case as to the significance of a passage in the judgment of Evershed MR in which his Lordship referred to the second branch of the inquiry—the question whether it could be said at the date of death that the gift would at any relevant time be practicable (as his Lordship expressed it in his judgment)—and used words which have been read as meaning that that question was material only because the charitable gift was not an immediate gift. His Lordship cited in this connexion *In re Moon's Trusts* and *In re Wright*. Reference to those cases, particularly the former, and to the judgment of Romer LJ, will show that the point about the gift being postponed was not that that circumstance made the second inquiry necessary. **The point was that notwithstanding that the gift was made subject to a life interest the date of death was the date as at which the question of practicability in both its aspects fell to be determined, because the charitable gift was what would be called, if it had been to an individual, a vested and not a contingent gift**. The case of *In re White's Will Trusts*, in which the modern formula was evolved, was a case of an

> immediate charitable gift. In the present case the order for an inquiry as to the practicability of the trusts did not follow the formula. Only the first branch of it was used, and **the proceedings before the Master seem to have proceeded without sufficient attention being given to the fact that the prospects for a future execution of the charitable trust were as much a matter for consideration as the immediate possibilities**."[9] (emphasis added, citations omitted)

[19] Further consideration was given to this principle in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd & Ors*[10] where a unanimous High Court considered *Bray* and said that the determination of practicability is not to be postponed until the termination of the life interests:

> "The case re-affirms the principle that it was proper to consider the question of practicability as at the date of the death of the testatrix but added that the question was whether at that date "it was practicable to carry the intentions of the testatrix into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time". That and like cases are no authority for the proposition that where the execution of a trust is postponed to successive life estates the question whether the execution of the trust was practicable or impracticable at the date of the death of the testator may be left to be resolved until the termination of the prior life estates and then determined in the light of events that have occurred in the meantime. Indeed, the suggestion that this may be done is, in our view, directly opposed to the decision in *In re Tacon* ."[11]

[20] So far as it is relevant in this case, the test enunciated by the High Court may be summarised in this way: was there a reasonable prospect, at the date of death of the testator, that it would be practicable to effectuate the gift at that or some future time?

Who bears the onus?

[21] With that test in mind, the next question is: who bears the onus? I respectfully agree with the answer given by Master Dawes in *Perpetual Trustee Co Ltd v Morehead*[12] where he said:

> "In so far as the form of the inquiry may give rise to a question as to where the onus lies, it is clearly on those who allege impracticability. The question whether at the date of death there was any reasonable prospect that the trust under consideration would be practicable at some future time must, I think, be answered in the affirmative unless it be established by those on whom the onus lies that there was no such reasonable prospect."

[22] In this case, it is CCQ which alleges impracticability.

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9 Op cit at 418-419.
10 (1966) 115 CLR 581.
11 Op cit at 601.
12 [1965] NSWR 1690 at 1693.

What form does the inquiry take?

[23] The reasons in *Re Tacon*[13] provide guidance as to how this type of inquiry is to be conducted. Lord Evershed MR said:

> "… the question of "practicability" is to be answered on the footing that the gift does at some date take effect: though the answer must be given as at the testator's death. In other words, the court must, as it were, put on for all purposes 1922 spectacles, must put itself into the position of one forming a judgement of future prospects (of practicability) at the date of the testator's death."[14]

[24] Romer LJ envisaged a hypothetical reasonable person looking into the future from the moment of death.[15] Ormerod LJ, on the facts in that case, said: "It is true that, in the light of subsequent events, the money available is not now sufficient for the purpose, but no reasonable person would have been likely in 1922 to expect that the fall in the value of money and increase in death duties would have taken place, at least to the extent to which they have done so."[16]

Application in this case

[25] The declaration sought by CCQ, if made, would not answer the test outlined in the authorities as it only deals with one part of it – whether it was practicable to carry the testator's intentions into effect at the date of death. The parties have not – in their evidence or their submissions – considered the second part of the test.

[26] I have given consideration as to whether I should attempt to answer both the first and second parts of the test without the assistance of the parties on the second part. It would, I consider, be inappropriate to proceed without, at least, hearing argument on this point. It follows, then, that I will adjourn further consideration of this matter and will, after hearing from the parties, give directions for its further hearing.

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[13] [1958] Ch 188. Adopted and approved in *Attorney-General (SA) v Bray* (1964) 111 CLR 402 at 418 and *Attorney-General (NSW) v Perpetual Trustee* (1965) 115 CLR 581 at 595.

[14] *Re Tacon* at 456-457.

[15] Ibid at 458.

[16] Ibid at 460.