

SUPREME COURT OF QUEENSLAND

CITATION: *Kieninger v Perpetual Trustee Company Ltd & Anor* [2017]
QSC 020

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: 28 February 2017

DELIVERED AT: Brisbane

HEARING DATE: Further evidence and submissions provided on 18 November 2016, 1 December 2016 and 8 December 2016

JUDGE: Martin J

ORDER:

It is declared that, as at 13 January 2015:

- (a) there was not in existence a charitable organisation in Queensland similar to Cancer Council Queensland, which conducted cancer research; and**
- (b) there is no reasonable prospect that it would be practicable:**
 - (i) prior to the death of the life**

tenant under the will,
Pamela Jane Kieninger; or

(ii) within a reasonable period of
such death;

that any such organisation would come
into existence so as to permit the
intentions of the deceased to be carried
into effect.

CATCHWORDS: CHARITIES – CHARITABLE GIFTS AND TRUSTS – IN GENERAL –
CONSTRUCTION – ASCERTAINMENT OF OBJECTS –
GENERALLY – GENERAL PRINCIPLES – where the will of the
deceased established a trust – where Cancer Council
Queensland (CCQ) sought a declaration that there was not in
existence a charitable organisation in Queensland similar to
CCQ that conducted cancer research – where CCQ sought a
declaration that there was no reasonable prospect that a
similar organisation would come into existence – where the
first respondent submitted otherwise – whether such a
declaration should be made

Succession Act 1981 (Qld)

*Attorney-General for New South Wales v Perpetual Trustee
Co Ltd & Ors* (1966) 115 CLR 581

Kieninger v Perpetual Trustee Company Ltd & Anor [2016]
QSC 186

Mays v Roberts [1928] SASR 217

Spunwill Pty Ltd v BAB Pty Ltd (1994) 36 NSWLR 290

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

SOLICITORS: McCullough Robertson for the first respondent
HopgoodGanim Lawyers for the second respondent

[1] In August 2016 this application was adjourned¹ in order that the parties might provide
further evidence and submissions.

¹ See *Kieninger v Perpetual Trustee Company Ltd & Anor* [2016] QSC 186.

- [2] The second respondent (CCQ) now seeks leave, which is granted, to amend the relief sought in its application so that it reads as follows:

“That pursuant to s 6 of the *Succession Act 1981* (Qld) it be declared that as at 13 January 2015:

- (a) there was not in existence a charitable organisation in Queensland similar to Cancer Council Queensland, which conducted cancer research; and
- (b) there was no reasonable prospect that it would be practicable:
 - (i) prior to the death of the life tenant under the will, Pamela Jane Kieninger; or
 - (ii) within a reasonable period of such death;

that any such organisation would come into existence so as to permit the intentions of the deceased to be carried into effect.”

- [3] In order that the amended application be placed in context, it will assist if a brief review of the relevant circumstances be undertaken. That is best done by repeating part of the reasons given in the earlier matter:

“[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:
 - (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* (Qld). 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'."

[4] In the earlier decision I held that the relevant test was that which was enunciated in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd & Ors*.² It was held there that the appropriate questions to be asked were: whether, at the date of death, it was practicable to carry the intentions of the deceased 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. The evidence and submissions provided after the matter was adjourned last year go to the issues of "similarity" and whether there was any reasonable prospect that it would be practicable to carry the intention of the deceased into effect at some future time.

The requirements

[5] Whether a body is a charitable organisation in Queensland is easily determined. The dispute between the parties is whether there is, or could be, such an entity which is or would be:

- (a) "similar" to CCQ; and
- (b) which conducts cancer research.

² (1966) 115 CLR 581.

Similar

[6] “Similar” is a simple English word which can give rise to complex considerations. As Angas Parsons J said in *Mays v Roberts*:³ “The word ‘similar’ is an ambiguous word”.

[7] The use of the word in the phrase “business of a similar nature” was considered in some detail by Santow J in *Spunwill Pty Ltd v BAB Pty Ltd*.⁴ That reasoning is of some assistance but, because his Honour was construing that term as it appeared in a contract, there are limits to its use when considering a will. Nevertheless, his more general remarks provide some help:⁵

“In order to determine whether the conduct by the defendant in advertising and selling gas appliances is in breach of cl 14, it is necessary to determine what is meant by ‘business of a similar nature’. As was noted above, the parties as reasonable persons are usually treated as having intended the document’s language to bear its ordinary and commonly accepted meaning: *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1986) 8 NSWLR 621. There is no dispute that the defendant, by advertising and selling gas appliances, is engaging in a business. So the question is whether this business is of ‘the similar nature’ to the business of the plaintiff in operating the Retravisson stores.

For the purpose of construing the words ‘similar nature’, counsel for the defendant referred the Court to the old edition of the Shorter Oxford English Dictionary, which defined the word ‘similar’ as ‘Having a marked resemblance or likeness, of a like nature or kind ...’. But must resemblances necessarily be ‘marked’ for objects to be ‘similar’ (granted this might be required in particular circumstances)? Other dictionaries contain definitions with no such requirement. The New Shorter Oxford English Dictionary (1993) defines ‘similar’ as ‘Having a resemblance or likeness; of the same nature or kind’. **The Macquarie Dictionary, 2nd ed defines ‘similar’ as ‘Having a likeness or resemblance, esp in a general way’. Generally Australian dictionaries should be consulted when ascertaining the commonly accepted meaning of a word, and I am satisfied in this case that the Macquarie Dictionary should be preferred**

³ [1928] SASR 217 at 219.

⁴ (1994) 36 NSWLR 290.

⁵ *Ibid* at 302.

to the extent of any minor inconsistency between the definitions: *John While & Sons Pty Ltd v Changleng* (1985) 2 NSWLR 163.

...

The phrase 'similar nature' does not have a single, unambiguous ordinary meaning to be applied in the circumstance, but rather has a spectrum of possible meanings. It is cognate with what the late Julius Stone termed 'a category of indeterminate reference'. For example, counsel for the defendant suggested that in some circumstances it would be sensible to suggest that 'a cat and a dog are similar', because each has a head, four legs and a tail. In a different context the statement would be absurd. In some circumstances, the Brown Bros and Retravisio stores might be considered to be of a 'similar nature' merely because they are both profit-making enterprises operating in the retail sale of manufactured goods, while in another context they would only be considered to be of a 'similar nature' if they stocked a largely synonymous range of products. **Concepts such as similarity and likeness are purely relative, and rely for content on the existence of other things which are relatively dissimilar and unlike to the things being compared. The words are 'chameleons, which reflect the colour of their environment,';** *Commissioner of Internal Revenue v National Carbide Corporation* (1948) 167 F(2d) 304 at 306, per Learned Hand J. ..." (emphasis added)

- [8] In these circumstances, when one is considering whether an entity is "similar" to another and, in doing so, seeks to determine whether there is a likeness or resemblance in a general way, it will assist to consider at least three matters:
- (a) how is the entity organised?
 - (b) what work does it do?
 - (c) how does it do that work?

Organisation and work

- [9] A former chairman of the CCQ, the Hon Richard Chesterman AO, swore an affidavit in which he set out some of the history, and the current operations, of CCQ. He said that CCQ is one of a number of State and Territory cancer councils which share the same logo, trademarks and emblems, and conduct major fundraising events as national

events. There is an Australia-wide body called Cancer Council Australia which acts as the coordinating body for the State and Territory councils.

[10] The CCQ was founded in 1961 and has been engaged in activities and measures which have as their aim the prevention and treatment of cancers, the alleviation of suffering of those diagnosed with cancers, the support of their families and friends, and an increase in survival rates and quality of life of those affected. Mr Chesterman identifies a number of features which are possessed by CCQ. They include:

- (a) it has its own research centre, the Viertel Cancer Research Centre;
- (b) it funds biomedical and scientific research by other organisations, including QIMR Diamantina Institute and the University of Queensland;
- (c) it manages the Queensland Cancer Registry, which codes and registers cancer notifications of all types from all over the State by age, sex, disease type and location of diagnosis pursuant to an agreement with Queensland Health;
- (d) it provides accommodation for cancer patients receiving treatment in a number of locations in Queensland;
- (e) it has established a large palliative care centre in Townsville;
- (f) it engages in public education about cancer risk factors;
- (g) it operates a telephone help line and employs 10 trained staff to answer enquiries;
- (h) it has offices in Brisbane, Toowoomba, Rockhampton, Townsville and Cairns;
- (i) it has 2,400 registered volunteers and 40 volunteer branches throughout Queensland; and
- (j) it engages with government in a number of ways, including advocating for smoking bans.

[11] Jeffrey Dunn, the Chief Executive of CCQ, also swore an affidavit in which he exhibits CCQ's full financial report for 2015. It shows that, at that time, CCQ employed 162 full-time, 55 part-time and 29 casual employees with staff expenses exceeding \$16 million. In 2015, CCQ invested over \$26 million in research, community and public health services, partnerships and engagement, and the maintenance of its lodges. The assets of CCQ exceed \$58 million, including property in various parts of Queensland and

including property for the provision of accommodation services for families who need a place to stay when treatment is being provided for cancer.

- [12] Evidence on affidavit was also given by James Beveridge, the head of fundraising for CCQ, and Joanne Aitken, the head of research at CCQ. Mr Beveridge identified the manner and types of fundraising which is engaged in by CCQ, including its national associated bodies. Ms Aitken deposed to there not being, in Queensland, any other organisation that both conducts cancer research within the organisation and provides funding for researchers employed by other organisations who conduct their own independent cancer research. She said that that had been the position for 25 years.
- [13] It was contended on behalf of CCQ that the evidence which had been filed on its behalf demonstrated the following:
- (a) That CCQ operates within a national framework of State member organisations which operate cooperatively and in a complementary fashion to assist in relief against cancer.
 - (b) The intellectual property associated with the nationally affiliated State organisations is very extensive.
 - (c) The range of activities conducted by CCQ is extensive and is by far the largest organisation conducting those types of activities in Queensland.
 - (d) The carrying out of cancer research is a very expensive exercise and is systematically organised throughout Australia and performed by specialist researchers who receive large grants in order to assist them.
 - (e) The research in Queensland into cancer is largely carried out by CCQ and medical institutes.
 - (f) In the 50 or so years since it came into existence, CCQ has achieved pre-eminence in its field as a charity focussing upon cancer.
- [14] It was also submitted that no other organisation had emerged in Queensland which replicated the functions and activities of CCQ.

Other entities?

- [15] Evidence was provided by the respondent from representatives of the Leukaemia Foundation and the Translational Research Institute Foundation. It is not disputed by CCQ that those bodies, like the QIMR Berghofer Medical Research Institute, are charitable organisations in Queensland which engage in cancer research.
- [16] It is important to note that it is not contended by anyone that the bodies argued by Perpetual Trustee Co Ltd (Perpetual) to be similar to CCQ are anything other than eminent and entirely worthy bodies engaged in extremely useful work. The question in this case is not whether one is “better” than another but whether one or more of the bodies is or are “similar” to CCQ.
- [17] The submissions for Perpetual are to the effect that there are bodies which are potential members of the class described in cl 4.4. of the will. But, as is pointed out by CCQ, the two medical research institutes have, as their charter, the conduct of research into “all branches of medical science” and the promotion of “the prevention or control of disease by providing and promoting medical research in relation to the disease”. The Leukaemia Foundation of Queensland Limited does not conduct research into cancer but has a mission to “beat blood cancers”.
- [18] When the will of the deceased speaks of a body which is similar to CCQ **and** which “conducts cancer research” it should be read as referring to a body which actually conducts such research rather than simply promoting or funding other bodies to conduct such research.
- [19] The entities which are advanced as falling within the class referred to in cl 4.4 of the will by Perpetual do not do so for a number of reasons. It is not a requirement that there be an identity of purpose or operation but there must be a similarity. The other entities are dissimilar to CCQ because their substantial differences in size, area of operation, type of operation, extent of research undertaken, and the manner in which they engage in research. It follows then that, at the date of the testator’s death, there was no body which fell within the class in cl 4.4 of the will.

[20] The question of whether there was any reasonable prospect that it would be practicable for some other entity to come into existence at some time before the death of the life tenant (or within a reasonable period of her death) and be similar to CCQ must also be answered in the same way. As is pointed out in the evidence led by CCQ, it has taken that body some 55 years to build up to its current size and its current scale of operations. To construct another set of facilities with a network of employees and volunteers over many locations would be costly, time consuming and, in the absence of any demonstrated need for another body similar to CCQ, highly unlikely. No evidence was called which suggests that there is any entity which is seeking to proceed in such a way that it would achieve similarity with CCQ within a reasonable time or that there is any entity capable of doing so. Similarly, there was nothing in the evidence to suggest that there were any plans or proposals by the Commonwealth, the State of Queensland or a non-governmental organisation which would encourage, or lead to, the creation of a body similar to CCQ.

Order

[21] It is declared that, as at 13 January 2015:

- (a) there was not in existence a charitable organisation in Queensland similar to Cancer Council Queensland, which conducted cancer research; and
- (b) there is no reasonable prospect that it would be practicable:
 - (i) prior to the death of the life tenant under the will, Pamela Jane Kieninger; or
 - (ii) within a reasonable period of such death;

that any such organisation would come into existence so as to permit the intentions of the deceased to be carried into effect.