

Brisbane

Before Williams J

IN THE MATTER of THE TRUSTS ACT 1973

- and -

IN THE MATTER of the QUEENSLAND STATE and MUNICIPAL  
ORCHESTRA ENDOWMENT FUND

- and -

IN THE MATTER of an application by PERPETUAL TRUSTEES  
QUEENSLAND LIMITED (ACN 009 656 811) of Level 10, Riverside  
Centre, 123 Eagle Street, Brisbane in the State of  
Queensland the sole surviving trustee of the Fund

JUDGMENT - WILLIAMS J

Delivered the 25th day of August 1999

**CATCHWORDS:**

**CHARITIES - CHARITABLE GIFTS AND TRUSTS - CONSTRUCTION -**  
court should apply a 'benignant approach' in favour of a  
charity if words defining the purpose of a trust are  
ambiguous.

*Taylor v Taylor (1910) 10 CLR 218; Hadaway v Hadaway (1955)*  
*1 WLR 16; Guild v Inland Revenue Commissioners (1992) 2 AC*  
*310*considered.

**CHARITIES - CHARITABLE GIFTS AND TRUSTS - CONSTRUCTION -**  
usage may be presumptive evidence if the words defining the  
purpose of a trust are vague or general - the Queensland  
State & Municipal Orchestra only in existence for a short  
period of time - whether regard may still be had to its  
history.

*Bunting v Sargent* (1879) 13 Ch D 330; *Re Samford Hall Trust* (1995) 1 QdR 60 considered.

CHARITIES - CHARITABLE PURPOSES - ADVANCEMENT OF EDUCATION  
- whether music and musical appreciation is considered an aspect of education - whether purpose of trust was the advancement of education by imparting to the members of the orchestra, and through them to the general public, knowledge and appreciation of music - whether the element of pleasure or amusement may be characterized as an inevitable concomitant or as the real fundamental purpose.

*The Commissioners for Special Purposes of Income Tax v Pemsel* (1891) AC 531;

*In Re MacDuff* (1896) 2 Ch 451;

*Attorney-General v National Provincial and Union Bank of England* (1924) AC 262;

*Williams' Trustees v Inland Revenue Commissioners* (1947) AC 447; *Attorney-General v Marchant* (1866) LR 3 Eq 424; considered.

*Royal Choral Society v Commissioners of Inland Revenue* (1943) 2 All ER 101, applied.

*In Re Delius: Emanuel v Rosen* (1957) Ch 299;

*The Commissioners of Inland Revenue v The Glasgow Musical Festival Association* (1926) SC 920;

*In Re Levien: Lloyds Bank v Worshipful Company of Musicians* (1955) 1 WLR 964;

*Re Lowin: Perpetual Trustee Co Ltd v Robins* (1967) 2 NSW 140;

*Canterbury Orchestra Trust v Smitham* (1978) 1 NZLR 787;

*Re Lloyd: The Trustees Executors and Agency Company limited v Zelman Memorial Symphony Orchestra Limited (1958) VR 523, discussed.*

CHARITIES - CHARITABLE GIFTS AND TRUSTS - VALIDITY - INDEFINITE AND UNCERTAIN OBJECTS - TRUSTS INCLUDING CHARITABLE AND NON-CHARITABLE PURPOSES - If the main purpose of a trust is charitable and the non-charitable purposes are incidental, the trust is still charitable - deed must be read as a whole.

*Trust Act 1973 (Qld) s 103 and s 104, referred to.*

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

*Keren Kayemeth Le Jisorel Limited v Commissioners of Inland Revenue (1932) AC 650, considered.*

*Hunter v Attorney-General (1899) AC 309;*

*Re Douglas: Obert v Barrow (1887) 35 Ch D 472; Sinnett v Herbert (1872) 7 Ch App 232; Stratton v Simpson (1970) 125 CLR 138;*

*Oxford Group v Inland Revenue Commissioners (1949) 2 All ER 537, referred to.*

*Trust Act 1973 (Qld) s 103, referred to.*

Counsel: Mr D Mullins for applicant  
Mr H Weld for Queensland Youth Orchestra Council  
Mr M Green for Attorney-General  
Mr P Sweetapple for Queensland State and Municipal Choir

Solicitors: McCullough Robertson for applicant.  
O'Shea Corser & Wadley for respondent  
Queensland Youth Orchestra Council

Hearing 10 August 1999.

Date:

IN THE SUPREME COURT OF QUEENSLAND

No. 4239 of 1999

Brisbane

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1. The application as filed by the trustee, Perpetual Trustees Queensland Limited, seeks orders and declarations having the effect of applying the capital and income of the Queensland State and Municipal Orchestra Endowment Fund ("the Fund") cy pres. However, counsel on behalf of the Attorney-General, one of the respondents, raised the question at the outset whether or not the trust was charitable. Counsel appeared for the Queensland State and Municipal Choir ("QSMC") and Queensland Youth Orchestra Council ("QYOC") which is responsible for the Queensland Youth Symphony; each of those two organisations was interested in participating in a cy pres scheme and each contended, as did the applicant, that the trust was charitable.

2. I decided to hear argument on the question whether or not the trust was charitable as a preliminary issue because that was critical to the future direction of the

proceedings. These reasons are only concerned with that preliminary issue.

3. In 1907 Mr George Sampson, a highly acclaimed and skilled musician, formed an orchestra in Brisbane known as the Sampson Orchestra principally from musicians who had made up an orchestra attached to the Brisbane Musical Union, a body formed in about 1872. Over the next 17 years or thereabouts, that orchestra performed at various public venues in Brisbane with George Sampson as its conductor. It would appear that one of the objectives behind the formation of that orchestra was the enhancing of the understanding and appreciation of orchestral music by the people of Brisbane. It would appear that largely as a result of the activities of Mr Sampson £1,000 was raised to assist in the maintenance of the orchestra. The sum of £333.6.8 was contributed by each of the State of Queensland and the Council of the City of Brisbane, and an identical sum was raised by public subscription.

4. On 19 May 1924 a Deed of Declaration of Trust was executed by John Huxham, Secretary for Public Instruction for Queensland, Maurice Joseph Barry, the Mayor of Brisbane, James Duhig, the Roman Catholic Archbishop of Brisbane and member of the Senate of the University of Queensland as nominee of that body, Queensland Trustees Limited, and George Sampson. By that Deed those persons jointly and severally declared:

"that from and after the date hereof we and our successors shall hold administer and manage upon the trusts hereinafter contained the sum of £333.6.8 contributed by the State of Queensland, the sum of £333.6.8 contributed by the Council of the City of Brisbane, and the sum of £333.6.8 contributed by various persons making a total of £1,000.0.0 for the purpose of forming a perpetual Endowment Fund for the benefit of a public orchestra to be called the Queensland State and Municipal Orchestra hereinafter called "the Orchestra" and such other contributions and additions as may hereinafter be made to such fund and also the Musical Library donated by the said George Sampson to the said perpetual endowment fund and to be known as the Sampson

Library of the Queensland State and Municipal Orchestra."  
(My emphasis)

5. Clause 2 then appointed as trustees 5 persons, namely: The Secretary for Public Instruction for the State of Queensland for the time being, the Mayor of Brisbane for the time being, a member of the Senate of the University nominated by the Senate for the time being, Queensland Trustees Limited, and the conductor for the time being of the orchestra. Those trustees were then directed to invest the fund in any investments authorised by law for that purpose and to take charge and care of the Sampson Library "for the benefit and use of the said Orchestra in perpetuity and effect adequate insurances thereon".

6. Clauses 5 to 10 inclusive are of some significance and provide as follows:

- "5(a) The Trustees shall stand possessed of the fund and the investments from time to time representing the same upon trust to apply the income thereof in perpetuity for the purpose of maintaining and carrying on the Orchestra in manner hereinafter appearing.
  - (b) The Trustees shall not be bound or concerned to manage or control in any way the musical productions or performances of the Orchestra.
  - (c) In the event of any division or disruption occurring in the Orchestra the Trustees shall be the sole judges whether any and which division shall be the Orchestra under these presence and they may determine that the Orchestra has been disbanded and thereupon shall withhold payment of the said income and add the same to the capital of the fund until in their uncontrolled opinion the Orchestra has again been formed and established.
6. The Trustees shall out of the income of the fund in the first place pay all costs and expenses

incidental to the management of the fund and the income thereof or the execution of any of the trusts or powers of these presence.

7. Subject to Clause 6 hereof the said income shall be applied in maintaining and carrying on the Orchestra and paying the expenses thereof.
8. The residue of the income (if any) and any surplus profits made in any year by the Orchestra after satisfying the purposes aforesaid shall be added to and become part of the capital of the fund.
9. The capital of the fund shall not be used or encroached upon for any purpose whatsoever whether permanent or temporary.
10. The said Library has been donated as aforesaid on the express conditions that no part of it shall be lent or used otherwise than by the Orchestra. The donor being convinced that any such loan or uses will impair or destroy its benefit for the Orchestra."

7. Whilst the precise details of the changeover are not clear from about the time of the execution of that deed, the Sampson Orchestra became the Queensland State and Musical Orchestra (QSMO). From then until it disbanded sometime in the latter part of the 1930s the QSMO performed orchestral works at various public locations, including the City Hall, for the benefit of the people of Brisbane. During its lifetime it was comprised mainly of music teachers and other professionals who desired to play in an orchestra. The musicians owned their own instruments. The orchestra was "community based". The evidence strongly suggests that at the time it disbanded the only asset of the QSMO was its library.

8. In 1872 the Austral Choir was formed and later it became called the QSMC. In the broad period from 1925 to 1940 the QSMO and QSMC worked closely together providing

orchestral and choral concerts for the citizens of Brisbane.

9. By Deed of Assignment dated 7 September 1934 George Sampson assigned to the trustees of the Queensland State and Municipal Orchestra Trust Fund for the benefit of the QSMO and the City of Brisbane, his books, papers, manuscripts and musical scores to hold the same on trust for the QSMO and the City of Brisbane absolutely.

10. The question whether or not the trust was charitable falls to be determined essentially upon the proper construction of the Deed of May 1924 and the circumstances outlined above. However, events which occurred subsequently should be noted briefly because they may throw some light on the problem.

11. At a meeting of the trustees held on 22 October 1937 the following resolution was passed:

"Whereas we are of opinion that although the State and Municipal Orchestra as such has been disbanded, such orchestra has been reformed and re-established as the Brisbane Symphony Orchestra, and in our uncontrolled opinion are satisfied that the Orchestra known as The Brisbane Symphony Orchestra is such an Orchestra as was contemplated under our Trust Deed. We therefore direct that until further or otherwise authorised, the funds of the Trust be utilised in the maintenance and extension of the Library referred to in Clause 3B of the trust Deed."

12. The Brisbane Symphony Orchestra did not exist for long; it does not appear to have survived the outbreak of the Second World War. In the late 1940s the Sampson Library was donated or passed by some means to the Queensland Symphony Orchestra which had been formed in 1947. It is not clear from the material whether or not the trustees were involved in that transaction; on its face it is of doubtful legal validity. From that time the Queensland Symphony Orchestra has been the custodian of at least a substantial part of that Library. Material filed by the QSMC indicate that for some time it has also been the custodian of part



of the original Sampson Library. Other bodies, such as the Queensland Philharmonic Orchestra, have also had access to and the use of material in the Library.

13. There does not appear to have been a meeting of the trustees from 1937 (when the resolution quoted above was passed) until 5 April 1950. At that time the trustees noted that the Queensland Symphony Orchestra operated under the management of the Australian Broadcasting Commission and a question was raised as to whether they should resolve that the Queensland Symphony Orchestra was an orchestra within the provisions of the trust Deed; but nothing was formally done in that regard.

14. Thereafter at various times the incumbent Lord Mayor of Brisbane, officers of the Justice Department, and the present applicant raised questions as to the future management of the trust, the desirability of passing legislation with respect to it, and otherwise debated amongst themselves the future management of the trust. However, nothing concrete has ever been done.

15. In the early 1970s trust funds were used to purchase steel cabinets for housing the Sampson Library at the premises occupied by the ABC/Queensland Symphony Orchestra. The Library continues to be housed at the premises of that Orchestra. It would appear that since about 1937 the only income paid out by the trustees has been in connection with the maintenance and upkeep of the Library.

16. The Endowment Fund now stands at approximately \$64,000 comprising \$3,000 capital and approximately \$60,000 income (including the Library which has a value in excess of \$20,000).

17. The *Trust Act* 1973 repealed the Statute of Elizabeth which is the source of the law defining charities, but such repeal is said not to "affect the established rules of law relating to charity" (s.103(1)). It then goes on to expand that law by incorporating in sub-

sections (2) and (3) the essential provisions of the *English Recreational Charities* Act 1958. Those sub-sections are in these terms:

- "(2) Notwithstanding any rule of law to the contrary, it shall be and be deemed alway to have been charitable to provide, or to assist in the provision of, facilities for recreation or other leisure time occupation, if the facilities are provided in the interests of social welfare.
- (3) The requirement of sub-section (2) that the facilities are provided in the interests of social welfare shall not be satisfied unless -
  - (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
  - (b) either -
    - (i) those persons have need of such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
    - (ii) the facilities are to be available to the members or to the male members or to the female members of the public at large."

It is clear from a reading of s.103 as a whole that it is still essential that in order to be charitable a trust must be "for the public benefit".

18. Those provisions are relevant when considering this trust notwithstanding that it was created prior to 1973 when that Act came into force. That is to be contrasted with the provisions of s. 104 of that Act which provides that no trust shall be held to be invalid by reason that some non-charitable purpose is included in any of the purposes for which the trust property may be applied. Sub-section (3) thereof expressly states that the

section "shall not apply to any trust declared before ... the commencement of this Act". Section 104 is therefore irrelevant when determining whether or not the trust here is a valid charitable trust. In accordance with the general law applying prior to 1973, if the trust fund may be validly applied for a non charitable purpose as well as for some charitable purpose then the trust must be held to be invalid.

19. However, it is clear that in construing a trust deed with a view to determining whether or not the fund may be applied to some non charitable purpose, the court does not adopt a highly technical approach. Sir Samuel Griffith CJ in *Taylor v. Taylor* (1910) 10 CLR 218 at 225 said: "In the case of a charitable gift, if the words are capable of a meaning which will support the gift, that construction should be adopted." In delivering the judgment of the Privy Council in *Hadaway v. Hadaway* (1955) 1 WLR 16 Viscount Simonds said at 19: "Their Lordships do not dissent from the general proposition, which has been stated in various terms, to the effect that, where possible a benignant construction in favour of a charity should be adopted. But this does not justify the insertion of words in order to restrict the plain meaning of an expression and thus give validity to an otherwise invalid bequest. If there is a real ambiguity, it may be resolved in favour of charity: where there is no ambiguity, no question arises: the plain meaning of the words must be accepted and so must the ensuing legal effect." Finally in this regard reference should be made to the judgment of Lord Keith of Kinkel in delivering the decision of the House of Lords in *Guild v Inland Revenue Commissioners* (1992) 2 AC 310; at 322-3 he applied the "benignant approach" in circumstances where the language was susceptible of two constructions, one of which would make it void and the other effectual. Essentially in that case words of possible wide general import were read down to conform with earlier clear express words creating the trust.

20. Two questions arise for consideration in the present case. Firstly, is the purpose of the trust clearly defined in the Deed and, if so, in what terms? Secondly, is that purpose charitable according to general principles? There is a subsidiary question, namely, whether the Deed read as whole, and in particular Clause 7, authorises the dispersement of trust monies for a non-charitable purpose.

21. The primary purpose for which the Endowment Fund was created is declared in the Deed in the operative paragraph which is substantially quoted above. The declaration would be more grammatically correct if the words "and such other contributions and additions as may hereinafter be made to such fund" were inserted immediately after the words "making a total of £1,000.0.0". If that transposition is made then it becomes clearer that the Endowment Fund was for "the benefit of a public orchestra" and for the benefit of the library donated by Sampson for use by that orchestra.

22. Further, one finds in clauses 5(a) and 7 declarations that the fund, and in particular the income thereof, may be applied for the purpose of or in "maintaining and carrying on" the orchestra, that is the public orchestra to be called the QSMO. In accordance with clause 7 the income of the fund may also be used in "paying the expenses" of that orchestra.

23. The critical words are rather vague and general and that largely creates the present problem. It has been said that where the words defining the purposes of a trust are ambiguous or vague, evidence of usage may provide presumptive evidence of the trusts originally established. Jessel MR considered it was "pretty good evidence of a trust if 105 years' user can be proved" (*Bunting v Sargent* (1879) 13 Ch D 330 at 335-6, and Macrossan CJ had regard to user over a period of about 70 years in *Re Samford Hall Trust* (1995) 1 Qd R 60. However, I am of the view that evidence of usage is not all that helpful here in clarifying the position. The QSMO was only in existence

from 1924 to about 1937 and in consequence one cannot speak in terms of such long-continued usage as would enable the court to draw conclusively a presumption therefrom in favour of a particular construction, (cf. Tudor on Charities (6th ed) 193-196). Nevertheless it is important that the QSMO at all times had as its sole purpose and function the public performance of orchestral or orchestral and choral works. Of some significance is the observation in a history of the QSMO that during the period 1924 to 1937 its programs revealed a "considerable repetition of works" reflecting "Sampson's attempts to educate the public, a process which was only possible by making some works very familiar". That history also notes that a contributing factor to the repetition was the "orchestra's limited library". Few soloists performed with the orchestra and that meant that concertos were rarely performed. Again that indicated a concentration on the development of local musical talent and the raising of the general public's awareness and appreciation of orchestral works. A number of performances were specifically intended to educate school children with respect to orchestral music.

24. Further, in the material (particularly that exhibited to the affidavit of Curro) there are financial statements relating to the QSMO which indicate that resources were extremely limited and that generally the orchestra was dismally short of funds. Public performances in the City Hall were apparently subsidised by the Brisbane City Council.

25. Against that background Mr Mullins for the trustee contended that the object of the trust was the advancement of education by imparting to the members of the orchestra, and through them to the general public, knowledge and appreciation of music and orchestral music in particular. He further submitted that the formation of the public orchestra necessarily promoted public appreciation of music. The material suggests that orchestras do not ordinarily exist to give private performances or to engage

in performances solely for the enjoyment and satisfaction of the performers.

26. Applying the "benignant approach" I accept that the purpose of the trust was as contended for by Mr Mullins. The question then becomes whether or not that is sufficient to justify a conclusion that the trust was charitable.

27. As noted above the general law is that a trust is not charitable unless it is within the spirit and intendment of the preamble to the Statute of Elizabeth. The critical words thereof have been the subject of much judicial consideration over the intervening centuries. It is now sufficient to refer to the language of Lord Macnaghten in *The Commissioners for Special Purposes of the Income Tax v Pemsel* (1891) AC 531 at 583 where he said: "Charity in its legal sense comprises four principal divisions: trusts for the relief of property; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." As Lindley LJ pointed out in *In Re MacDuff* (1896) 2 Ch 451 at 466 that did not mean "that every object of public general utility must necessarily be a charity. Some may be, and some may not be". Further as Lord Cave LC said in *Attorney-General v National Provincial and Union Bank of England* (1924) AC 262 at 265: "... it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust." (See also *Williams' Trustees v Inland Revenue Commissioners* (1947) AC 447 especially at 455).

28. For purposes of the relevant law education is given a wide meaning. It is sufficient to refer to the text and authorities cited at pages 28-38 of Tudor (op.cit.). One authority there referred to is of some relevance for present purposes. Kindersley VC in *Attorney-General v Merchant* (1866) LR 3 Eq 424 considered "that the existence

of a large and well assorted library tends to the promotion of education" (431).

29. Of particular importance for present purposes are those cases in which music and musical appreciation are considered as an aspect of the "advancement of education". The starting point must be the judgment of Lord Greene MR in *Royal Choral Society v Commissioners of Inland Revenue* (1943) 2 All ER 101. The issue was whether the Society was established for charitable purposes. The objects of the Society were "for the purpose of providing choral concerts in the said hall - that is to say, in the Albert Hall - and generally for the encouragement and advancement of choral singing in London" (103). Lord Greene then went on to observe: "The providing of choral concerts quite clearly is regarded in that language as one of the methods of encouraging and advancing choral singing." A later constitutional provision stated: "The society is established to form and maintain a choir in order to promote the practice and performance of choral works, whether by way of concerts or choral pageants in the Royal Albert Hall or as otherwise decided from time to time." His Lordship regarded that as a mere paraphrase of the earlier language. In his view the society had as its principal aim "the encouragement and advancement of choral singing".

30. In considering the question whether those objects were charitable the Master of the Rolls said at 104:

"It was then said that the purpose for which it was established may be regarded from three points of view: first of all, the purpose of the 10 gentlemen who constitute the society; secondly the purpose from the point of view of the choir which is trained and performs; and, thirdly, from the point of view of the public who go to hear the performances. It was said that, when those are all looked at, the real purpose must be taken to be not one which is educational or otherwise charitable, but one which is of pure entertainment. The public goes to be entertained; the singers sing in order to have the pleasure of singing; and the 10 gentlemen encourage and assist those operations in order to have the pleasure of running a choir and listening to the performances. Those,

it was said, were the real purposes for which this body was established. With all respect to the argument, nothing, in my opinion, could be a greater travesty of the facts. Curiously enough, some people find pleasure in providing education. Still more curiously, some people find pleasure in being educated: but the element of pleasure in those processes is not the purpose of them, but what may be called a by-product which is necessarily there. It seems to me to be turning the facts of this case upside down to suggest that the real object is to provide pleasure and nothing else."

He then emphasised that it was the purpose of the members of the society which was relevant. The choir could be regarded as an instrument by which the performance of the type of music in question is presented to the public. His reasoning led to the conclusion that the encouragement and advancement of choral singing was within the ambit of education. That resulted in him saying at 104-5:

"Dealing with the educational aspect from the point of view of the public who hear music, the Solicitor-General argued that nothing could be educational which did not involve teaching - as I understand him, teaching in the sense of a master teaching a class. He said that in the domain of art the only thing that could be educational in a charitable sense would be the education of the executants: the teaching of the painter, the training of the musician, and so forth. I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become executants, or at any rate executants who can give pleasure either to themselves or to others; but a very large number of people can become instructed listeners with a trained and cultivated taste. In my opinion a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being."

With respect I wholeheartedly adopt all that his Lordship there said. That is an aspect of education which has always



been important, and perhaps is even more critical in this modern age.

31. Finally, in dealing with the judgment of Lord Greene it should be noted that at 106 he recognised that the element of entertainment or pleasure may be characterized either as an inevitable concomitant of a charitable or educational purpose or the real fundamental purpose and education but a by-product. Which was the appropriate characterisation was a question of fact to be determined in each case. The words of du Parc LJ at 109 in this context should always be remembered: "It would be an unfortunate thing if preceptors and teachers in any department were told that they must realise that the moment their teaching was found to be giving any kind of pleasure and enjoyment to those who were under their instruction, they must know that they were failing in their duty."

32. Roxburgh J in *In Re Delius: Emanuel v Rosen* (1957) Ch 299 was concerned with a testamentary disposition "for or towards the advancement in England or elsewhere of the musical works of" the composer Frederick Delius. He concluded that the purpose of the trust was "the spreading and establishment of knowledge and appreciation of Delius's works amongst the public of the world." (305). He went on to note that "as regards all music it must be said that it gives pleasure" but that did not prevent him from holding that it was a valid charitable trust. Roxburgh J observed that he could do "no better in this connection" than to quote passages from the reasoning of Lord Greene. He followed that by saying: "I cannot conceive that anybody would doubt that a trust to promote the works of Beethoven would be charitable." (307).

33. An earlier decision of some importance is that of the Court of Session in *The Commissioners of Inland Revenue v The Glasgow Musical Festival Association* (1926) SC 920. The Association there was formed for the purpose of stimulating in various ways a public interest in music and encouraging members of the public to cultivate such musical

gifts as they might possess. Its particular function for the time being was the holding annually of a musical festival in Glasgow at which choirs and individuals competed for prizes and diplomas. It was held that the objects of the Association were educational and therefore charitable. Lord Clyde at 926 summarised the objects as being "the stimulation of public interest in music, and the encouragement of those members of the public who have musical gifts to cultivate them" and he went on to say that "they aim rather at the promotion of self education in a department of aesthetics than at the provision of any form of instruction, the benefit sought to be conferred being limited neither to the young nor to any particular section of the public." (927).

34. Danckwerts J *In Re Levien: Lloyds Bank v Worshipful Company of Musicians* (1955) 1 WLR 964 had to consider a testamentary bequest to form a trust fund devoted to the making of presentations through a committee to distinguished members of one of the following professions, namely singers, composers of vocal music, writers on the subject of singing, and researchers into matters relating to the human voice. There were other qualifications which need not now be specified. It was held that there was a valid trust for educational purposes, being to confer benefit on the public by raising the standards of vocal and organ music. Again the learned judge relied heavily on the reasoning of Lord Greene. At 970 Danckwerts J observed that it was a trust "really to effect the training of singers for serious music for aesthetic purposes" and: "taking the trust as a whole, it is not intended to be a trust for the benefit of individual singers, but to be a trust to benefit the public by producing better singers and voice production."

35. In this context brief mention should be made of the decision in *Re Lowin: Perpetual Trustee Co Ltd v Robins* (1967) 2 NSW 140. The testator there directed that the residuary estate should be held on trust to provide certain

musical competitions in Australia and Vienna. It was held that there was a valid charitable trust.

36. In New Zealand it has also been held that a trust for the advancement of musical education is charitable: *Canterbury Orchestra Trust v Smitham* (1978) 1 NZLR 787. In that case and also in *Re Lloyd: The Trustees Executors and Agency Company Limited v Zelman Memorial Symphony Orchestra Limited* (1958) VR 523 the court considered that the objects also included some non charitable purposes such as would invalidate the trust but for the equivalent of s.104 of The Trusts Act. In the former case the problem perceived by the court was that trust funds could be expended in encouraging activity in aspects of music which could do no more than amuse. With respect it does seem that the court only gave superficial consideration to that question because in any event the trust was saved by the remedial legislation. In the Victorian case the orchestra had been formed into a company and one of the objects stated in its memorandum of association was: "To do all such lawful things as are in the opinion of the company or the executive incidental or conducive to the attainment of the above objects or any of them." It was held by Dean J that clause allowed the application of property to non charitable purposes and therefore the company was not a charity; the bequest was saved because of the remedial legislation. Interestingly at 527 the learned judge rejected an argument that the trust was not charitable because the orchestra could confine its activities to the musical education of its members and that therefore the necessary public element was lacking; he pointed out that orchestras do not normally exist to give private performances and in any event those who received a musical education from the orchestra would find opportunities for public performance. Essentially Dean J felt constrained to construe the objects clause in question as permitting application of its property to non charitable purposes and that was sufficient to defeat what otherwise he clearly would have held to be a charitable trust. Again one is left with the impression that the court gave minimum

consideration to the question because of the effect of the Statute.

37. In situations where s.104 of *The Trusts Act* does not apply authorities such as *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 are of importance. The following passages from the judgment of Dixon CJ, McTiernan, Williams and Fullagar JJ are relevant for present purposes:

"It is contended, and this contention was upheld by his Honour, that at least two of these objects, those numbered (3) and (4), authorised the Union to expend its funds and therefore the income bequeathed to it by the testator for non-charitable purposes. A gift for philanthropic purposes is not a valid charitable gift... We are prepared to assume that neither would a gift simply for the preservation of civil liberty be such a gift. If the third object means that the Union can use its funds for the promotion of agencies which are simply philanthropic agencies, and the fourth object means that the Union can use its funds simply for the preservation of civil liberty, the Union can carry on activities which are not wholly charitable and it would not be a charitable institution. ... But those objects must be interpreted in the light of the constitution of the Union as a whole. ... We are here concerned with the question whether a particular corporate body is a charitable institution. Such a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable. The main object of the Union is predominantly the advancement of religion. It is a religious institution composed of ministers and members of Congregational Churches combining for certain religious purposes of common interest and a bequest to a religious institution is *prima facie* a bequest for a charitable purpose. ... In a recent case in this Court ... cases were cited in which it was held that an institution is a charitable institution if its main purpose is charitable although it may have other purposes which are merely concomitant and incidental to that purpose. The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose. The same may be said,

*mutatis mutandis*, of the other object, the preservation of civil and religious liberty. The object is to preserve civil liberty so that Congregationalists may worship according to their religious beliefs. ... In our opinion his Honour was wrong in holding that the gifts to the Congregational Union of New South Wales were not valid charitable gifts." (441-3).

38. Though the House of Lords held the association not to be charitable in *Keren Kayemeth Le Jisroel Limited v Commissioners of Inland Revenue* (1932) AC 650 Lord Tomlin in delivering the principal judgment observed at 658: "I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable." (Reference can also be made to *Hunter v Attorney-General* (1899) AC 309 at 324, in *Re Douglas; Obert v Barrow* (1887) 35 Ch D 472 at 487, and *Sinnett v Herbert* (1872) 7 Ch App 232.) That line of authority was analysed by Windeyer J in *Stratton v Simpson* (1970) 125 CLR 138. In particular his analysis of *Oxford Group v Inland Revenue Commissioners* (1949) 2 All ER 537 (the authority relied on and applied by Dean J in *Re Lloyd*) is very instructive and helpful for present purposes.

39. Here there is no doubt that both the musicians comprising the orchestra and the public audience obtain pleasure and perhaps even amusement from the performance by the orchestra of orchestral and choral works. But such pleasure and amusement is but an inevitable concomitant of the purpose of raising the artistic taste and musical appreciation of the citizens of Brisbane - the public - which is a recognised educational purpose. The fact that some of the income may be used to maintain the orchestra and meet its expenses only means in the context that the income may be expended for the purpose of enabling the orchestra to carry out the purpose for which it was formed, namely the musical education of the public. The maintenance of the library is also clearly a charitable purpose being for the advancement of musical education. Its control by a

public orchestra provides the necessary public element. If the clauses in the Deed referring to the use of income for purposes of maintaining the orchestra and meeting its expenses are read in that way then trust funds may not be used for a non charitable purpose. If the funds were so utilized they would only be used for a purpose which was concomitant or incidental to the main charitable purpose. That conclusion can be reached in my view without recourse to s.103 of *The Trusts Act*. But if necessary I am also of the view that s.103 could be relied on to support the conclusion I have otherwise reached. There is no doubt that musical appreciation is a form of recreation or other leisure time occupation and here the necessary public element is established.

40. It may well be that the Queensland Symphony Orchestra was not an orchestra which met the description specified in the trust; it may well be it was not a public orchestra because it was privately owned. If that be correct then there may well have been a breach of trust in transferring control of the library to the Queensland Symphony Orchestra and in making trust funds available to that orchestra for maintenance of the library. But such breaches of trust cannot affect the critical question whether or not the initial trust was charitable.

41. For the reasons given I am of the view that the trust was charitable and there will be a declaration that the trust constituted by the Deed of Declaration of Trusts of 19 May 1924 constituted a valid charitable trust for the benefit of a public orchestra to be called the Queensland State and Municipal Orchestra.