

## THE HIGH COURT

2011 572 SP

## IN THE MATTER OF THE CHARITY KNOWN AS THE CHESHIRE FOUNDATION IN IRELAND

AND

## IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 51 OF THE CHARITIES ACT 1961,

AND

## IN THE MATTER OF AN APPLICATION FOR APPROVAL OF A CY-PRÈS SCHEME

BETWEEN

THE CHESHIRE FOUNDATION IN IRELAND

APPLICANT

AND

THE ATTORNEY GENERAL

RESPONDENT

**Judgment of Miss Justice Laffoy delivered on 28th day of October, 2011.**

1. On this application, the applicant, invoking s. 51 of the Charities Act 1961 (the Act of 1961), seeks an order that the Court frame a scheme for the application cy-près of certain funds held by it, which are particularised in the schedule to the draft scheme put before the Court.

2. The applicant is a company limited by guarantee, which was incorporated on 4th January, 1963. It has Revenue charitable status. Its primary object, as provided in its memorandum of association, is to provide residential accommodation, to be run as far as possible on the lines of a home rather than an institution, for the care, nursing and general wellbeing of people, regardless of creed, who are chronically ill or permanently disabled, especially those of limited means. The charity operates twenty three establishments throughout the State, which are commonly known as Cheshire Homes, which provide a range of services in fulfilment of that objective.

3. The funds which are the subject of this application are held by the applicant on trust for twenty of the Cheshire Homes which it operates and are regarded by the applicant as restricted funds. The restricted funds, which aggregate €2,794,114, come from two sources: testamentary gifts which were specifically bequeathed to a named Cheshire Home or for the benefit of a named Cheshire Home; and sums comprising local fundraising for, and donations to, a particular Cheshire Home. The beneficiaries of the restricted funds, to which I will refer as "the benefited Homes", are beneficiaries of the restricted funds in varying amounts.

4. The position of the respondent, the Attorney General, on whom the proceedings were served, and who entered an appearance, as intimated to the applicant's solicitors by e-mail on 20th October, 2011, was stated as follows:

"It has been indicated to you that the Attorney General is not taking 'an active role' in this matter and hence she will not be represented by solicitor or counsel in court tomorrow."

5. The factual circumstances which have given rise to this application are set out comprehensively in the grounding affidavit of Michael V. O'Mahony, the Chair of the applicant, sworn on 18th July, 2011. In setting out the background to the application, Mr. O'Mahony has averred that the day to day operations of the applicant and all of its services throughout the country are, in the main, funded by the Health Service Executive (HSE), such funding representing in excess of 90% of its annual income. The remainder of the applicant's income used for its operation is derived from charges and rents paid by its service users, from other State sources, such as FAS, and from some local fundraising and charitable donations. Mr. O'Mahony has further averred that, notwithstanding the funding it receives from the HSE, the directors of the applicant believe that the continued financial viability of the applicant and its ability to maintain its services is in jeopardy unless the applicant is in a position to access the restricted funds. The current financial state of the applicant has been demonstrated through the audited accounts for the year ended 31st December, 2009, draft consolidated management accounts for the year ended 31st December, 2010 and the preliminary budget for the year ended 31st December, 2011, copies of each of which has been exhibited in the grounding affidavit. Having analysed the applicant's current financial position, in his affidavit Mr. O'Mahony has averred:

"As I have sought to explain in this Affidavit, the basis for seeking the ability to use some or all of the scheme restricted funds for the general charitable purposes of Cheshire Ireland, without the restrictions currently attaching to them, is that otherwise the future financial viability of Cheshire Ireland will be at risk. Without access to those restricted funds, I say and believe that Cheshire Ireland as the trustee of all funds, restricted and unrestricted, is unlikely to be able to function in the near future, due to the inability to fund fundamental governance and management oversight, critical strategic, financial, human resource and health and safety functions, and clinical support, guidance and direction, at a central level."

6. Section 51(2) of the Act of 1961 provides that where any of the circumstances specified in subs. (1) of s. 47 of the Act of 1961 exists in relation to a charitable gift which is the subject of an application under s. 51, the Court may, if it thinks fit, on such application, frame a scheme for the application cy-près of the property comprised in the charitable gift. Section 47(1) lists five circumstances in which, subject to subs. (2), the original purposes of a charitable gift may be altered to allow the property given, or

part of it, to be applied cy-près. On this application, the applicant has invoked two of the stipulated alternative circumstances: those set out in paragraph (c) and those set out in paragraph (e)(iii) of s. 47(1). As I am satisfied that, on the facts, paragraph (c) is complied with on this application, I do not propose considering the application of paragraph (e)(iii).

7. The circumstances outlined in paragraph (c) are stated as follows:

"where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, having regard to the spirit of the gift, be made applicable to common purposes."

On the application of that provision to the facts, three questions arise.

8. The first question is whether the restricted funds and the general unrestricted funds and assets of the applicant are applicable for similar purposes. In my view, the answer to that question is that they are. The purpose of the bequests and donations which are intended to be the subject of the scheme is, as regards the benefited Homes, similar to the purpose for which the general assets and funds of the applicant are held by it as defined in the objects set out in its memorandum of association. In this connection, it is pertinent to observe that the restricted funds, while donated to, or by reference to a particular Cheshire Home or its location, are not restricted as to the manner of their application. The applicant has not sought to include in the scheme a bequest which was limited to a particular purpose and expressly precluded use of the monies bequeathed for administration purposes.

9. The second question is whether the restricted funds and the general funds of the applicant can be more effectively used in conjunction and to that end can suitably be made applicable to common purposes. In plain English, the question is whether, if the two funds are combined, they can be more effectively used for the purposes which are similar. That is a question of fact. On the evidence, in my view, the answer is that they can. I have already quoted the paragraph from the affidavit of Mr. O'Mahony in which he had explained the basis for seeking a scheme the result of which is to combine the restricted funds and the applicant's general assets. Later in his affidavit, Mr. O'Mahony outlined the consequences which would ensue if the applicant had to be wound up and, in particular, its implications for the individual Cheshire Homes. He expressed the belief that a winding up would lead to a complete breakdown of the present system of care to many people with physical disabilities and neurological conditions with the most complex support requirements under the aegis of the applicant in Cheshire Homes throughout the country. He then averred to what he believes would be the consequences of the Court affording the applicant the relief sought by it as follows:

"In the event that the various restrictions on the use of the scheme restricted funds were no longer to be applicable, the Directors of [the applicant] would intend to make use of such funds in conjunction for the general charitable purposes of the organisation. This would provide the flexibility necessary to address the areas where the current and ongoing financial deficits will impact most. Unfortunately, it will not be possible for [the applicant] to rationalise its affairs in such a way as to deal with the budgetary cutbacks without access to the scheme restricted funds to deal with the financial deficits over recent years and the projected deficit for 2011."

10. The third question is whether, if the restricted funds and the general assets of the applicant were combined with a view to making them applicable to the similar purposes for which they are held by the applicant as trustee, the requirement that regard be had to the spirit of the gift would be complied with. As to what the Oireachtas meant by the expression "the spirit of the gift", is was submitted on behalf of the applicant that the following explanation given by Pennycuik VC in *Re Lepton's Charity* [1972] 1 Ch. 275 at p. 285 explains it succinctly:

"It must, I think, be equivalent in meaning to the basic intention underlying the gift, that intention being ascertainable from the terms of the relevant instrument read in the light of admissible evidence."

In the case of the bequests to the benefited Homes, as no admissible evidence has been adduced as to the intention of the testator or testatrix, as the case may be, the intention must be ascertained from the words used in the relevant clause in the will of the testator or the testatrix. Having considered the relevant clauses, I am satisfied that the intention of the testator or testatrix was to provide funds which would be used to ensure the continued existence of the Cheshire Home named and the services provided by it. As regards the proceeds of local fundraising for, and donations to, the benefited Homes, again, no admissible evidence has been adduced as to the intentions of the donors. However, it is reasonable to infer that the intention of each donor was to provide funds to ensure the continued existence of the Cheshire Home in the locality. Bearing in mind that the basis for the applicant seeking the relief sought is to ensure its future financial viability, so that all its operations, including the continued existence of the benefited Homes, is not put in jeopardy, I am satisfied that, by seeking the framing of a scheme to achieve that objective under which the "ring-fencing" of the restricted funds for the benefit of the benefited Homes ceases, regard is being had to the basic intention underlying the charitable gifts which make up the restricted funds.

11. Sub-section (2) of s. 47 provides:

"Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près, except in so far as those conditions require a failure of the original purposes."

As is pointed out in *O'Halloran's Charity Law* (2nd Ed., 2009) at para. 31 – 39, subs. (2) retains the established common-law requirement that a general charitable intention is an essential prerequisite for a cy-près scheme. I am satisfied that such requirement is satisfied in this case.

12. Accordingly, I propose making the order sought by the applicant subject to one amendment to the proposed scheme. I consider that the definition of "the Trust Fund" should be amended so as to be limited to the restricted funds itemised in the schedule to the proposed scheme. Therefore, that the words "or which may be paid or transferred to the Charity at any time hereafter" must be deleted. Further, for the purposes of the scheme, the "commencement date" will be defined as the date on which the order of the Court is perfected.