Neutral Citation Number [2009] IEHC 53

THE HIGH COURT
COMMERCIAL

2007 7760 P

BETWEEN

THE NATIONAL TOURISM DEVELOPMENT AUTHORITY

PLAINTIFF

AND
J.P. COUGHLAN, MICHAEL FITZPATRICK, JAMES FLEMING,
LEO MALONE, PATRICK MORIARTY,
DAVID O'NEILL AND D. IVO O'SULLIVAN

DEFENDANTS

JUDGMENT of Mr. Justice Charleton delivered on 17th February, 2009

1. Can a trust can be charitable when its subject matter is a set of scenic golf courses in Killarney? That is the question for decision in this case. The plaintiff promotes tourism in Ireland and owns the shares in the company that holds the land on which this facility is situated. The defendants are the trustees, holding the shares for the benefit of the trust objects. Three golf courses and a club house are the property involved. The documents to which I shall refer make it clear that part of the motivation in founding the trust was to preserve a stretch of countryside, amounting to around 400 acres, free from the short-sighted building programme of bungalows that has undermined the resource for tourism that Ireland's landscape once widely represented. All the parties in this case are genuine. The plaintiff, in its previous statutory form, was Bord Fáilte Éireann and fulfilled the same function as is now apparent from its current name. The defendants are concerned and committed local people who have, on a voluntary basis, heavily involved themselves in the management of the trust. It is beyond doubt that the motivation of the plaintiff in setting up the trust was to have golf course facilities available for visiting tourists, who would be thereby be drawn to visit Killarney and to extend their stay in order to use, and perhaps to reuse, the three golf courses of outstanding quality that are the subject matter of this case. The trust in question has succeeded in preserving a small stretch of countryside. While all of this is clearly desirable, as a matter law, however, it does not necessarily mean that a trust facilitating such objects is charitable in nature.

The Documents

2. Three golf courses are involved here. All are of championship quality with sand based greens that allow them to be played in most weather conditions. They are the Killeen course, the Mahoney's Point course and the Lackabane course. The original course was constructed by the fifth Earl of Kenmare in 1938. Killarney Golf Club Limited ("the company") was incorporated at this time to hold these lands and the earl retained about 75% of the shares in that company. The club was, and is still, actually run by the Killarney Golf and Fishing Club, ("the club") which is an unincorporated association subject to a rule book. In all that follows, the company remains responsible for maintaining the golf courses, the club house and buildings and making all relevant capital investment to maintain and improve standards. Killarney Golf Club Limited amended its memorandum of association in November, 1964 by adding a new objects clause which was:-

> "To provide amenities and facilities at the tourist resort of Killarney and to develop tourist traffic at or to the same resort."

3. In 1968, Bord Fáilte Éireann (the plaintiff, as then named) bought 125 acres of the estate of the Earl of Kenmare from his grandniece and successor, Mrs. Beatrice Grosvenor. The purpose of the plaintiff was to give the lands to the Office of Public Works so as to extend the national park in Kerry and to allow the road to be widened. The substantial part of those 125 acres was then provided to the company to allow a second golf course to be laid out in conjunction with the existing land held by the company. For this purpose a grant of £46,494 was given by Bord Fáilte to the company towards the construction costs of the new course. By inter-mingling the first golf course with the new land, clever design allowed the opening in 1971 of two 18 hole, par 72 courses. Later, a third course was added.

4. There was concern that under its then existing statutory powers, Bord Fáilte did not have the ability to hold shares in the company. Back in 1969, Mrs. Beatrice Grosvenor had agreed to transfer all of her shares in the company, with the exception of ten ordinary shares, to Bord Fáilte for the nominal sum of £360.75. Therefore, Bord Fáilte held around 73% of the shares in the company. Legally, these were held by a named employee on its behalf, Mr. Niall Miller. Concerns began to emerge, on a purely precautionary basis, about staff at Bord Fáilte holding assets on trust for it. Not being able, as it thought, to hold shares itself, Bord Fáilte proposed to dispose of them. Given the benevolent disposition of Mrs. Grosvenor, Bord Fáilte wrote to her to ask her whether there were moral obligations concerning the land which she might feel had arisen. The text of that letter dated 8th November, 1984, includes the following:-

> "We are reviewing our involvement in companies, property, etc. As you know, we have a controlling interest in your Company's shares. What would you and [the board of Killarney Golf and Fishing Club Limited] think about us getting rid of those shares?
> Your views would be particularly relevant because we acquired the shares from you.
> To avoid any misunderstanding I should say that this is not an offer to sell the shares. However, informal consultation with you will help us to arrive at a decision about them. The share transfer took place many years ago, and it would also be helpful if you would say whether, from your point of view, there were any understandings or agreements regarding the future of the shares."

5. Having consulted with the board of the company, Mrs. Grosvenor replied by letter dated 14th November, 1984, in the following terms:-

> "The Directors always understood that when Bord Fáilte held the majority of the ordinary shares, that the Golf Club property in Killarney would be protected permanently from any possibility of exploitation arising from private ownership. I personally unreservedly agreed with these sentiments and transferred my shares to Bord Fáilte for a purely nominal sum. I enclose photo copy of share transfer form herewith. Bord Fáilte representatives at the time in 1968 initiated this transfer of shares for the very reason expressed above . . . .
> After [lengthy] discussion, the Directors agreed that I convey the following points to you. In view of the unexpected suggestion that Bord Fáilte might dispose of their ordinary shares in Killarney Golf Club Ltd., the Directors think that it would be essential that these ordinary shares be held in perpetuity by a type of trust possibly formed by the local ordinary shareholders.
> Therefore, in order to avoid any possible complication that could arise in the future, it is imperative that Bord Fáilte acquire the ordinary shares held by [another shareholder]. Then a transfer of the … shares to the trust referred to

above could be negotiated."

6. There is nothing to suggest that the plaintiff disagreed with these sentiments in effecting what then happened. By letter dated 14th January, 1986, the plaintiff instructed its solicitors to set up a trust that would hold the relevant shares in the company in trust. In part, the letter read as follows:-

> "Because we cannot own shares, they are held, as you know, by Niall Miller. Shares in Killarney Golf Club Limited are difficult to transfer because they must be offered to other shareholders. The shares held by Niall Miller cannot be held by others here. There are two examples of other shares in Killarney Golf Club Limited going to non nationals on the death of original shareholders. It is essential that our shares go from Niall Miller into the hands of a group of trustees that would hold them beneficially on our behalf and subject to a trust document.
> We got the shares when we acquired land in Killarney to preserve it from undesirable development. It adjoined the golf course and we agreed with them to develop a second eighteen holes on it. Consequently, the trustees must undertake not to allow anything to happen to the golf course lands that would interfere with the property being used as a golf course. Specifically, the land must not be sold without the express prior approval of Bord Fáilte. It must be operated as a golf course and for no other use without our express approval.
> Being a company limited by shares, Killarney Golf Club Limited can distribute dividends and, on dissolution, any surplus accrues to the shareholders. We do not want the shareholders to be able to wind up the company; distribute dividends or in any way liquidate the assets without our express prior approval. Particularly, we would not like our trustees to be able to sell their own privately held shares. That requirement may be difficult to accommodate.
> We would like the trustees to be appointed for so long as they continue to be directors of Killarney Golf Club Limited. Their role as trustees should not be capable of being willed or devised in any way. Any vacancy should revert to Bord Fáilte for the appointment of another trustee.
> Should the trust prove impossible to implement, or for any other reason be wound up, then the shares should revert to Bord Fáilte.
> The directors of Killarney Golf Club Limited in their draft document indicated that they wished to purchase our shares from us for a nominal value. An essential point of difference between us that we will not sell our shares. Instead, we are prepared to vest them in directors acting as our trustees."

7. The subject matter of the proposed trust was therefore the shares held, through an employee, by Bord Fáilte, in Killarney Golf Club Ltd., that controlled the land on which the club was and is situated and which included a portion of the lands acquired in 1968 and which were leased to the company by Bord Fáilte by virtue of an indenture dated 31st July, 1975. In part, that reads:-

> "WHEREAS in pursuance of its powers and functions as Tourist Authority, the Bord has contributed, or intends to contribute, grants to the Company of the sum of £46,494 or thereabouts towards the development of the Company's new 18 hole golf course and WHEREAS the Company have agreed to take from the Bord a Lease of certain of the Bord's lands at Killarney when registration of the Bord's title has been completed and WHEREAS the company have agreed with the Bord to enter into a Deed of Covenant and Charge with the Bord with the intent of maintaining the tourism and golfing amenities of the said new 18 hole golf course… the Company doth hereby covenant and agree with the Bord . . . to take out a lease from the Bord of the lands and premises…"

8. These were the assets, therefore, to be held pursuant to the trusts deed which was eventually drawn up on 4th May, 1987, in draft form, but which has, ever since that time, been acted upon as operative. That document records that Bord Fáilte Éireann is transferring its shares in the company to the trustees, whose successors are the defendants herein, subject to the conditions of the trust. In essence, therefore, the subject matter of the trust is the shares held by the plaintiff in Killarney Golf Club Limited. These conditions are set out in the trust deed as follows:-

> "(1) The Trustees shall hold the said shares UPON TRUST to use their best endeavours to promote the present amenities of the Company for its members and visiting golfers in the spirit and manner as now exists and shall in so far as it is within their power ensure that the premises, buildings and courses of the club are maintained to their present high standards and improved whenever and wheresoever necessary.
> (2) To pay and apply any dividends on the said shares or any proceeds whatsoever therefrom and howsoever received for the improvement of the Killarney Golf and Fishing Club being the Club operated by the company or in the event of same no longer being used for the purposes of a golf and/or fishing club to hold such dividends or proceeds UPON TRUST for such tourism objects as the Bord shall direct.

(3) To deal with and hold the shares strictly subject to and upon the terms and conditions as now set forth in the Memorandum and Articles of Association of the Company.

> (4) Not to charge, encumber, alienate or otherwise dispose of the shares or any of them in any manner without the consent in writing of the Bord.
> (5) Subject to condition 4 hereof, not to sell or otherwise dispose of the shares or any of them for any purpose which would cause the assets of the Company to be used for purposes other than those now within the powers of the Company and in particular, not to use the shares or the powers of voting derived therefrom for any commercial or profit making purposes other than those now authorised by the Memorandum and Articles of Association of the company…

(8) In the event of the Company going into liquidation or being otherwise dissolved, then the shares hereby settled and or the proceeds thereof shall revert to the Bord.
(9) The Trustees shall not dispose of any of their personal beneficial holdings of shares in the Company without the consent in writing of the Bord which shall not unreasonably [be] withheld and the intent at all times being that the lands and premises of the Company will be retained in use as a golf club and fishing club for the benefit of club members and visiting golfers.
(10) It is agreed by and between the parties hereto that the principal object of this settlement is to ensure [the] continuity of the present user of the lands and premises of the Company.
(11) It is agreed by and between the parties hereto that any breach hereof or of any of the terms hereof by the Trustees shall be brought to the notice of the Trustees by the Bord together with a request to rectify the said breach within a reasonable time, having regard to the nature of the said breach. If the Trustees fail to rectify said breaches aforesaid then the Bord shall be entitled to apply to the High Court for such remedies and order as the Bord shall deem fit."

9. To these documents two further qualifications need to be made. The first is that on 29th April, 1986, in the course of discussions between Bord Fáilte and its solicitors with a view to drawing up the trust deed, as just quoted, it is recorded that the proposed trustees were uneasy with it being a condition of the trust that the amenities of the golf courses were to be preserved for its

members and, as was then proposed, "tourists". So, that word was to be replaced with the words "visiting golfers and anglers". As it turns out, as the above quoted trust deed makes apparent, only "visiting golfers" were included. Secondly, after the execution of the trust deed the memorandum of association of the company was amended to substitute as objects of the company purely sporting activities, by way of the promotion of golf, tennis, croquet, bowls and badminton, in place of the prior memorandum of association operative as of the date of the trust deed which provided that the objects of the company were "to provide amenities and facilities at the tourist resort of Killarney and to develop tourist traffic at or to the same resort". This was done for a tax advantage by legislation after the date of the trust deed.

10. Briefly, the situation as of the date of the trust deed was as follows. The statutory predecessor of the plaintiff, Bord Fáilte Éireann, had shares in Killarney Golf Club Ltd. and in addition held lands that were leased to Killarney Golf Club Limited. The shares were made the subject of the trust deed, just quoted. The main assets of the company are therefore the courses and buildings associated with golf, of which the main structure is the joint club house for the three courses. This club is run under the rule book by Killarney Golf and Fishing Club. The relationship of the members of the club is with the club, not with the company or the trust. Killarney Golf Club Ltd. permits the club to run the courses. Anyone joining as a golfing or fishing member does not buy shares in the company, but subscribes to the club. This is an expensive step. Anyone waiting to play as a visiting golfer pays a green fee, which is a kind of membership for a day. This is substantial too.

Tourism in Killarney

11. I am satisfied that tourism is the single most important industry in Killarney. This set of golf courses has been a major success in attracting tourists to the region. It has encouraged significant overnight stays in the area. There are about 40 hotels and hundreds of guesthouses in the immediate environs of Killarney and more than 20,000 bed places are available to visitors on any one night. Golf plays a particular role in the attractiveness of Killarney to many visitors. This club, apparently, has more visiting green fee payments than any other club in Ireland. In 1988, there were 35,000 persons visiting. In contrast, I am informed, the club has about 2,000 members. They are restricted as to teeing off times to approximately four hours per day. In 1988, 6,388 visitors were from the United States of America; 2,116 were from Germany; 2,392 were from France; 817 came from Sweden; about 1,000 came from Britain; 1,350 came from other foreign places and about 12,500 visitors were from Ireland. Even before the trust deed was executed, the existing courses had a proud record in hosting important competitions. When air travel became more common in the 1960s, visitor numbers at the course, because there was then only one golf course, caused such congestion of players on the fairways, and in the rough as well I would suppose, that plans were made to develop the facility into what now exists.

Construction

12. The rules of construction for a private legal document can be shortly stated. Firstly, the context in which a document was drawn up is always of importance in setting the scene within which the document is to be construed. This does not mean that extrinsic evidence becomes admissible with a view to contradicting the terms of a trust, contract or will. Rather, as is explained by Keane J. in *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596 at 609 to 610, this is not a matter of evidence reinterpreting the document at all. Context elucidates those surrounding circumstances within which the document to be construed is to be placed. I quote from the judgment of Keane J. in that case:-

> "…extrinsic evidence may be admitted, not strictly speaking as evidence of the intention of the testator, but rather of circumstances existing at the date of his death which he might have had in mind and which accordingly, might assist the court in the construction of the language used in the will. James L.J. in *Boyes v. Cook* [1880] 14 Ch. 53 said at p. 56:-
>
> > 'You may place yourself, so to speak, in (the testator's) armchair and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention.'
>
> Such evidence was admitted, not as direct evidence of the testator's intention, but rather as circumstantial evidence which assisted the court in inferring what the testator's intention was. Under this rule - sometimes referred to as "the armchair principle" - evidence could be adduced as to the testator's knowledge of and relations with the different persons or institutions who claimed to be the object of a gift under his will."

13. Secondly, a court is only entitled to construe a written document according to the intention that is therein clearly expressed. That rule overrides even the most powerful evidence that the settler or testator could not have actually meant what is plainly stated in the document. *In Re Julian* [1950] I.R. 57, the testatrix bequeathed a substantial sum of money in her will "to the Seamen's Institute, Sir John Rogerson's Quay, Dublin". There were two institutions in Dublin which claimed that bequest. One belonged to a Christian denomination shared by the testatrix, but not the other. Moreover, the imparting of religious teaching by the competing clubs for seamen was exclusive. Despite unassailable evidence that the deceased lady knew and visited an institution called the Dublin Seamen's Institute at Eden Quay in Dublin, which shared her religious persuasion, and had no interest in another institute on Sir John Rogerson's Quay, the words she used meant that her bequest went to the institute, as she clearly expressed it, on Sir John Rogerson's Quay in Dublin. Kingsmill Moore J. at pp. 65 and 66 added the following personal note to his judgment:-

> "I regret having to give this decision, for the evidence which I have excluded, if I were allowed to take it into account, would convince me to a moral certainty that the testatrix intended to benefit the Dublin Seamen's Institute… This is by no means the first – and, equally, certainly, will not be the last – case in which a judge has been forced by the rules of law to give a decision on the construction of a will which he believed to be contrary to the intentions of the testator."

14. The rule is, therefore, that in construing a written contract or settlement, the intention of the parties should be ascertained from the words that they have used within the ascertained context. This rule was stated succinctly in *Igote Ltd. v. Badsey Limited* [2001] 4 I.R. 511 at 516, on behalf of the Supreme Court, by Murphy J. in the following way:-

> "At the end of the day the rule as to construction and the context in which it is to be achieved is most succinctly expressed in the judgment of Keane J. (as he then was) in *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55 when he said:-
>
> > 'In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.'"

15. Thirdly, in attempting to find out what the expressed intentions of the testator or settler was, extrinsic evidence may be available to assist the court and such evidence is admissible in the event of an ambiguous construction arising on the terms of the written document. It is this ambiguity that makes extrinsic evidence admissible. Such extrinsic evidence, even if it exists, is not always of assistance since it can never be used to contradict any aspect of the document in express language, save when that language is ambiguous in the context of the document considered in its entirety. Moreover, the task of the court is always to put into effect the intention of the settler or testator as it is expressed in the document, and not to rewrite the document in accordance with what the court might desire to see expressed. This was put by Lord Upjohn *In Re Gulbenkian's Settlements* [1970] A.C. 508 at 522 in this way:-

> "It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlers or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it."

16. Where, on the other hand, that expressed intention does not exist or where the language used to express it may be capable of a number of interpretations, then extrinsic evidence is admissible as a guide to the intention of the settlor or testator.
17. Fourthly, in some contract situations a document is often drawn up in standard form with which the other contracting party may accept in full, or reject. In such cases, situations of ambiguity can give rise to a rule that the document is to be construed against the party drawing it up. This rule operates on the basis that the party which draws up a contract has both the intention to state its terms clearly and the ability to do so unambiguously. In the case of uncertainty as to the meaning of a provision, the court will tend to lean towards an interpretation which is reasonably possible in favour of the party who merely had the opportunity to read and accept the terms without amending them. Clearly, as this case does not concern a bilateral contract, that general rule is of no application here.
18. Fifthly, in documents it can happen that a term of art is used that has a particular meaning for the parties involved. Those who share a particular line of work may use a word within the terms of the meaning that is peculiarly applied between them. "Deep packet inspection" bears a particular meaning between computer analysts, and is different to what at first sight it may seem to mean. That is an instance. It can also be the case that a history of dealings between the parties shows why a particular word or phrase was used and how it was intended to have particular meaning. In this context, it is clear that the reference in Clause 1 of this trust document to "visiting golfers" should be read in the context of Clause 2 which refers to "tourism objects", thereby including tourists who wish to play golf but excluding others who are merely sightseers, hill walkers, or picnickers.
19. Sixthly, it is sometimes said that the court leans in favour of a construction that will give rise to a charitable trust. I doubt that this principle is applicable in these circumstances. In *Commission of Inland Revenue v. Oldham Training and Enterprise Council,* T.L.R. 11th October, 1996, 69 T.C. 231 at p. 249, Lightman J. allowed an appeal by the Inland Revenue against a decision that a training and enterprise council was a charity. The Council gave advice on business skills, business start-up, providing grants in that regard, and giving training to the young and unemployed. According to the report: the litmus test for charitable status was whether that main object, read in the light of that subsidiary object, admitted the application of its funds and resources for purposes which were not charitable.
20. The learned judge concluded that an organisation which had as its objects the promotion of individuals engaged in trade, commerce or enterprise, and providing benefits and services to them, could not be regarded as charitable, regardless of the motive or the likely beneficial consequences for an increase in employment in that town. He, according to the report, added at p. 251:

> "Reliance has been invoked by [Counsel for the body applying for charitable status] on the principle of construction that, where there is an ambiguity, a benignant construction should be adopted in favour of charity . . . [But] the principle only applies where a provision or a gift will be held void and fail unless held charitable…"

21. Moreover, the purpose of this rule is to give effect to an intention which would otherwise be defeated by a deed or will being interpreted against a construction which allowed for a charitable bequest. Objectively, therefore, the document has to be examined as to what intention is expressed in it and even though, as *In Re Julian*, a subjective intention points in another direction, clear words will defeat it. In *Re The Worth Library* [1994] 1 ILRM 161 at p. 193, Keane J. expressed the principle thus:-

> "There is one other principle of general application to which I should refer. The court leans in favour of charities and, consequently, will prefer a construction which gives effect to the testator's desire to benefit a stated object rather than one which leads to a failure of the bequest."

22. Here, it seems to me, the situation is different. If this trust was not set up for a charitable purpose then the interested parties, the Golf and Fishing Club, the trustees and the company will, together with the plaintiff, reorder their affairs. It is not as if the expressed intention of a testator or settler is sought to be overturned in favour of a benefit to residuary legatees or the Revenue Commissioners. In any event, I do not see the principle to be of direct application here.

Rule against Perpetuities
23. A settlement by trust cannot take effect outside the period of the lives in being plus 21 years. A gift to a charity cannot be made to take effect on an event too remote within the rule against perpetuities; *Re McNamara* [1943] I.R. 372. A charitable trust, however, can be set up so as to act in perpetuity. To paraphrase St. Paul, all else must fall away but charity will always endure. The legal rule is that stated in *Hunt v. McLaren* [2006] E.W.H.C. 2386 (Ch) by Lawrence Collins J. at paras. 89 and 91:-

> "The general rule is that a gift on trust must have a cestui que trust and must be for the benefit of individuals, unless charitable. It must have a definite object, and there must be someone in whose favour the court can enforce it. In general, in order to be valid, a non-charitable trust must have an ascertainable beneficiary in whose favour performance of the trust may be decreed: *Maurice v. Bishop of Durham* (1804) 9 Ves 399, 404; *Leahy v. Attorney General of New South Wales* [1959] A.C. 457, 478; *Re Denley's Trust Deed* [1969] 1 Ch. 373. Consequently, trusts for purposes or objects are invalid, for a purpose or object cannot sue, but trusts for charitable purposes are valid because they are enforceable by the Attorney General. . .
> Consequently, gifts to unincorporated associations are subject to (a) the rule against remoteness of vesting, which requires that the interests of the beneficiaries must vest within the perpetuity period; (b) the rule that, for there to be a valid trust, there must be a beneficiary or *cestui que* trust in whose favour performance of the trust may be decreed ("the beneficiary principle"); and (c) the general principle of trust law that the objects of the trust must be sufficiently certain."

Charity
The definition of charity in law differs from that generally applied in the wider community. It may be thought among reasonable people that any disposition that wishes others well is charitable. This is not the sole criterion in construing a charity. As Lord Magnaghten commented in *Commissioner for Special Purposes of Income Tax v. Pemsel* [1891] A.C. 531 at p. 583:-

> "No doubt the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme, and to present a contrast between the two meanings in an aspect almost ludicrous. But still it is difficult to fix the point of divergence, and no one as yet has succeeded in defining the popular meaning of the word 'charity'. The learned counsel for the Crown did not attempt the

> task. Even the paraphrase of the Master of the Rolls is not quite satisfactory. It would extend to every gift which the donor, with or without reason, might happen to think beneficial for the recipient; and to which he might be moved by the consideration that it was beyond the means of the object of his bounty to procure it for himself. That seems to me much too wide. If I might say so without offence, under conceivable circumstances, it might cover a trip to the Continent, or a box at the Opera. . . . How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principle divisions: trusts for the relief of poverty; 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."

24. This trust cannot come under any category except arguably the last one. Here, the defendants plead that the trust allowing the golf course to be used by its members, in circumstances where any profits must be ploughed back into the golf courses and club house, and whereby it is available to those who travel to play golf as a major attraction, has had, and continues to have, a major benefit to the town of Killarney as a tourist facility which brings high spending visitors into the area which otherwise lacks substantial alternative employment. To join this club costs around €7,000; supposing one makes it up the waiting list. Thereafter annual membership is much less. For travelling golfers, the official website indicates green fess of around €100, but counsel tell me, and I have no reason to doubt it, that by booking in advance, or by playing at less busy times, a considerable saving on that may be achieved.

25. A powerful argument has been presented that this trust is charitable because, it is claimed that it was intended to be, and has in fact been, beneficial to the community in Killarney, and far more widely, and that it has resulted in the preservation of a lake vista that would otherwise have been churned up in ugly suburban-style development over the last twenty years. The intention of the plaintiff could only have been, it is asserted, to create a disposition that benefits tourism and the clear intention that emerges in the context of the correspondence between the late Mrs. Beatrice Grosvenor and the plaintiff evidences a marked determination to preserve the landscape.

26. The powers of the Irish Tourist Board which later became An Bord Fáilte Éireann and then the plaintiff were first established in the Tourist Traffic Act 1939. With a legal precision derived from the principle that organs of local government and statutory bodies can only exercise the powers conferred on them, s. 14 provides that the Irish Tourist Board may lawfully do any or all of the following things:-

> "(a) assist, financially (including by way of loan) or otherwise, in the provision, extension, or improvement of accommodation for tourists;
> (b) build, establish, equip, or operate hotels, guest houses, holiday hostels, holiday homes, youth hostels, and holiday camps or assist, financially (including by way of loan) or otherwise, in the building, establishing, equipping, or operating thereof;
> (c) provide or assist, financially (including by way of loan) or otherwise, in providing services, sports, amusements, or other facilities which appear to the Board to be calculated to improve tourist traffic;
> (d) improve and maintain amenities and conditions which appear to the Board to be likely to affect tourist traffic;
> (e) engage in any kind of publicity in connection with tourist traffic;
> (f) establish or assist in establishing any form of agency in connection with tourist traffic;
> (g) provide or assist in providing schemes for the training of persons to do work which is wholly or mainly connected with tourist traffic;
> (h) prepare and publish guide-books, itineraries, time-tables, and other publications for the benefit or assistance of tourists."

27. These powers were amended, perhaps out of an abundance of caution, in s. 5 of the Tourist Traffic Act 1952, to include an ability "to accept gifts and donations" and to "assist, financially and otherwise, in the provision, extension or improvement of facilities and amenities, at tourist resorts and elsewhere, which appear to the Board to be calculated to improve tourist traffic".

28. These statutory provisions underline the problem in this case. While the plaintiff clearly has as its principal object the promotion of tourism, this does not mean that tourism is a class of charitable trust beneficial to the community. Nor does it mean that anything done by the plaintiff to promote tourism, by way of a trust, a grant or a loan, in order to be beneficial to the tourist industry, is necessarily charitable. For instance, a grant to a small remote hotel to reconstruct its bedrooms so as to have bathroom facilities *en suite* may improve the reputation and tourist drawing potential of that area because a good quality hotel is available there. But that gift is not charitable because, as a matter of reality, it primarily benefits the commercial enterprise that runs the establishment. It is not solely for the general benefit of the community.

29. In *Verge v. Somerville* [1924] A.C. 496 at pp. 499 to 500, Lord Wrenbury stated:-

> "To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public - whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot. If this test is satisfied, is it necessary to find, further, that the class is confined to poor persons, to the exclusion of persons not poor? Is poverty a necessary element? In argument it was scarcely pressed that it is necessary, and after the decision in *Goodman v. Mayor of Saltash* 7 App. Cas. 633, it was not possible to maintain the general proposition that it is. A trust or condition in favour of the free inhabitants of ancient tenements in the borough of Saltash, in accordance with a usage whereunder they had the privilege of dredging for oysters, was there held to be a valid charitable trust, and, obviously, some of the inhabitants might not have been poor. The poor are not the only people who like oysters or the profits to be derived from their sale."

30. It can, by times, be regarded as surprising the objects which the law regards as charitable, to the exclusion of others. In modern times the importance of exercise is widely recognised as conferring a benefit to general health. Thus, one would imagine, trusts for sporting objects would be held to be beneficial to the community. That is not how the law has regarded charitable dispositions for the promotion of any particular sport: *Hunt v. McLaren* [2006] E.W.H.C. 2386 (Ch.) at para. 90. The case establishing this is *In Re. Nottage* [1895] 2 Ch. 649. There, a testator bequeathed a sum of money in trust to the Yacht Racing Association of Great Britain, so that every year a cup could be awarded to the most successful yacht of the season, the stated object being "to encourage the sport of yacht-racing". Lindley L.J. at p. 655 stated:-

> "It is a prize for a mere game . . . Now, I should say that every healthy sport is good for the nation – cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now."

31. Lopes L.J. at p. 656, also rejected the argument that the trust could be charitable stating:-

> "It is most difficult to draw a line separating charitable gifts from gifts not charitable; and the only safe course is to say that a particular class of gifts do not come within the definition of a charitable gift. I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public. If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn-tennis, or any outdoor game, were not charitable, for they promote the health and bodily well being of the community."

32. It may be possible that this view might be revised at some stage, though the law on charities is, I understand, in the process of being partially codified by the Oireachtas. For the moment, however, I take these cases as a correct expression of the law. In addition, however, there are other principles militating against the argument of the defendants.
33. Tourism has never been held to be a charitable purpose. In *Travel Just v. Canada (Revenue Agency)* [2006] F.C.A. 343, a travel company applied for charitable status for revenue purposes. Reading the objects of the company it is clear that these were drafted expressly for the purpose of attracting the relevant tax exemption in Canada. They included the promotion of "ethical tourism" and to providing "information on socially and environmentally responsible tourism". While the Federal Court of Appeal of British Columbia did not specifically exclude tourism as a possible charitable purpose, it has not being held to be such in any decided case.
34. With a view to testing what is or is not a charitable trust, it can be useful to have regard to cases that seem to be on the verge of decision making. *In re Crystal Palace Trustees v. Minister of Town and Country Planning* [1951] 1 Ch. 132, a body of trustees controlled a leisure centre and park of some 200 acres for the purposes of education and recreation and the promotion "of industry, commerce and art". Danckwerts J. held that these objects were charitable since the facility, administered under the Crystal Palace Act 1914, reinvested any profit from the modest charges that it made and advanced the welfare of the public, and not just of a defined class such as artists, by its activities. At p. 142 he stated:-

> "In those circumstances, it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees. It appears to me that the promotion of industry or commerce in general in such circumstances is a public purpose of a charitable nature within the fourth class in the enumeration of charitable purposes contained in *Pemsel's* case [1891] A.C. 531, 583."

35. In *Inland Revenue Commissioners v. Yorkshire Agricultural Society* [1928] 1 K.B. 611, the defendant claimed a charitable purpose to its activity in holding an annual agricultural show and in the promotion of agriculture generally. The Court of Appeal held that the improvement of agriculture or the advancement of the industry of agriculture was a charitable purpose.
36. In some of these cases, no import is placed on the fact that membership of an organisation existing for a charitable purpose can be gained by paying a fee and that, in consequence, a small benefit might be obtained by members, such as free entry to the Crystal Palace grounds, or free entry to the Yorkshire Agricultural Society's annual show. The fees in the decided cases, however, are modest. It seems to me that the line shades across towards consideration that a trust is not charitable in purpose the more exclusive a facility is for which that exemption is sought. Then, the wider public is less likely to be benefiting. In the *Yorkshire Agricultural Society* case, the reasoning underlying the decision as I read it is that the more exclusive the enterprise, then usually the less likely it is to have as its sole purpose the betterment of society in general.
37. A perhaps extreme case where a charitable object was found in respect of a trust was *Tasmanian Electronic Commerce Centre Pty. Ltd. v. Commissioner of Taxation* [2005] F.C.A. 439. The plaintiff was incorporated ostensibly to benefit the people of Tasmania through making electronic commerce part of the local economy. The memorandum of association of the plaintiff recorded that the objects of the company were to provide research and development facilities to help the Tasmanian business community to adopt electronic commerce; to liaise with government bodies in the promotion, research and development of electronic commerce; to disseminate information on electronic commerce; and to raise and manage funds for the purposes of the promotion of electronic commerce and to develop facilities that would assist the Tasmanian business community in that regard. In the course of his conclusions, Heerey J. made the following comments at para. 56 to 58:-

> "Once it is accepted that assistance to business and industry can provide a public benefit of the kind which the law recognises as charitable, a proposition which does not seem to be in dispute in the present case, I do not see how the fact that individual businesses may benefit can be a disqualifying factor. On the contrary, if business in general is assisted, it seems inevitable that some firms at least will become profitable, or more profitable, as a result of that assistance. There would be no point in the exercise if this were not the case. It would be an odd result if an institution established to benefit business could only quality as a charity if the recipients of its benefits made losses or did no more than break even.
> Presumably, some farmers in Yorkshire were able to make, or increase, profits as a consequence of the work of the Yorkshire Agricultural Society, but there was no suggestion that this militated against classification of the Society as a charity. Indeed it was common ground that the promotion of agriculture generally would be charitable…; the issue in the case was whether the fact that members of the Society received benefits would lead to a different result. In the present case it was not put that members of TECC, the Tasmanian Government and the University, receive any benefit.
> It seems to me self-evident that benefits to Tasmania's economy resulting in long term economic advantage to Tasmania will be a benefit to the Tasmanian public, and indeed to the wider national public. In a capitalist economy like Australia's, a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families. In a prosperous economy, more money can be raised by taxes to improve education, health and other essential public services."

38. My basic problem in this case is that while a golf course is a nice facility, and can be, and is here, a tourist draw, a golf club is not there to benefit anyone other then its members and those who can afford to pay the green fees as visitors. Incidentally, a very small piece of countryside was also preserved when so much else has been submerged by field destruction and suburban building. In reality, under this payment structure, this facility is far more exclusive than joining in the work of a charity by paying a modest fee. It is also very hard on the case law to see that a golf course as a place for more sport can properly be the object of a charitable trust.

Conclusions
39. On the basis of the foregoing, my conclusions on the issue as to whether this trust enjoys charitable status are as follows:-
(1) The trust was set up by the plaintiff in order to benefit tourism in the Killarney area. This was to be done through having available

in Killarney, a cluster of three golf courses around a club house which would be such a nature that those who travel to play golf, and those incidentally in the area, might be expected to prolong their stay so as to try out one of the courses by way of recreation.
(2) The manner in which the club interacts with the trustees who hold the assets of the golf courses contain elements that hint at a charitable purpose. Under the trust deed, dividends are not payable by the company to its shareholders. Rather, the profits of the club are used for the purpose of enhancing the facilities. In that regard, many improvements have been made in the last twenty years, including better services for playing under inclement weather and much improved club house facilities.
(3) By preserving the land on which the golf courses are situated free from typical Irish rural suburban development, some small portion of the countryside around Loch Lane in Killarney did not become subject to unsightly building and rural destruction that, however it has happened, has markedly diminished the character of much of the Irish countryside and its attractiveness to tourists.
(4) It is difficult to conceive of a trust for the purposes of tourism as being, of itself, of sufficient benefit to the community as to attract charitable status. Were tourism on its own to be recognised in law to be a sufficient basis, then any recreation, activity or attraction that would bring tourists into an area, or keep them there for a longer stay, would thereby assume charitable status. On an extreme level, therefore, if tourism were to be recognised as a category that is charitable because it benefits the community, every trust setting up a casino or a fun park would enjoy the benefits in law of charitable status. Moreover, a tourist enterprise is an economic enterprise.
(5) Sport has never been recognised to be an object of sufficiently wide benefit to the community as to enjoy charitable status. The law has traditionally regarded sport as a form of recreation and, in consequence, trusts and bequests for sporting purposes are not recognised as charitable.
(6) The object of a trust has to be exclusively for charitable purposes to determine its status as charitable. Almost any economic enterprise can be of benefit to the community. The fact that a community is gainfully employed; the fact that an enterprise, like a factory or hotel, is successful; the fact that people are in a position to pay their taxes, all have direct and indirect benefits for neighbourhoods and for the nation. Among the *indicia* of a charity, however, are that it is disinterested in commercial return for investors, is of genuine benefit to the community at large and, finally, that whatever benefit it dispenses is widely available to the community in the sense that it does not need to be bought into at exclusive levels of finance.
(7) Some bequests and trusts for charitable purposes could benefit tourism through their activities effecting good within the wider community. Thus, trusts preserving land as a park or as a landscape vista, or one setting up a fund whereby an annual attraction might be held that is of benefit to the community from the point of view of science, education or the advancement of industry generally, might be examples of this. Clearly, both the plaintiff and Mrs. Grosvenor foresaw what would happen to this land should it fall into private ownership and be exploited for commercial suburban development. That cannot be separated from their clear intention to use it as a golf course, as opposed to a public area, a matter specifically excluded by ensuring through the wording of the trust document that those who wished to wander the land or take refreshments on it were to be denied entry.
(8) The fact that a particular organisation controls a charitable trust is not necessarily an indication against, or in favour of, its charitable status. Nor is it detrimental to that status that for a modest membership fee, some aspects of the charitable activities of the trust would be immediately accessible by being paid for in advance. Examples of this include an annual membership fee which might allow access to annual agricultural show; membership of an organisation that allows free access to and free borrowing of scientific books from a hospital library; or an annual membership that dispenses with a small fee that otherwise might be paid each time a public park, or a large national park for preserving a rural vista, is accessed. It is clear from the case law that exclusivity, in the terms of the benefit to be conferred, is an indication against charitable status. The more particular the benefit the less likely it is that an enterprise is charitable.
(9) It does not help an argument in favour of charitable status that a facility is open to tourists for a high fee, or that tourists may travel to use it. A hotel may be open to those who choose to pay to stay there and its quality may be such, and its facility so lavish, and so famous, that tourists are widely attracted thereby to the area in which it is situated.

Result

40. Applying these observations to the current case, I fail to see the activity being carried on by the defendants as being anything other than sport and recreation. There is no question but that all parties are decent people who were at all times motivated towards the betterment of our society. Nor is there anything to suggest that the golf club, and the directors of the company, have done anything other than keep strict faith with their obligations. That, however, is not the issue. The subject matter of this trust is a golf course. That cannot be the subject of a charitable trust under ordinary circumstances; an exception that might arise could be the setting up of a trust for the use of a golf course by members of the army or by people with disabilities. Membership is, on the standards that are not defined but are clearly indicated by the case law, exclusive. The golf club certainly benefits the community and attracts tourist traffic but, no matter how it is analysed, it is still an ordinary golf club which you may join in order to avoid green fees and which, if you are visiting, whether from America or another part of Kerry, you may use in the ordinary way through paying a substantial sum in green fees by way of joining as a daily member. For these reasons, therefore, this trust cannot be a charitable one.