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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 38/2020
[2020] NZSC Trans 23

BETWEEN **COMMISSIONER OF INLAND REVENUE**
Applicant

AND **THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS TRUST BOARD**
First Respondent

AND **PAUL ROSS COWARD**
Second Respondent

Hearing: 15 September 2020

Coram: O'Regan J
Ellen France J
Williams J

Appearances: H W Ebersohn and C M Kern for the Applicant
R A Green and N B Bland for the Respondents (via video link)

ORAL LEAVE HEARING

MR EBERSOHN:

E Te Kōti ko Ebersohn ahau, kei kōnei māua Kern mō te Karauna. May it please the Court, Ebersohn and Kern appearing for the applicant.

O'REGAN J:

Tēnā kōrua.

MR GREEN:

May it please the Court, my name is Green and I appear for the respondents along with my learned friend, Mr Bland.

O'REGAN J:

Thank you, Mr Green.

Right, Mr Ebersohn, you're aware of our time constraints?

MR EBERSOHN:

I am, your Honour, and for that reason I'll set out very briefly what I intend to cover. But I would be grateful for your Honours' guidance as to the issues which you want me to cover and I can adapt and deal with those issues.

Essentially I intended to make a few introductory comments about the, on the purposive of interpretation and what exactly is being argued by the applicant, very short on that, and then I was going to move across to really just cover the extent to which the issues raised by the applicant has a wider impact other than the facts of this case. And so that was really all I was intending to cover today but I can branch out and do other things as required.

O'REGAN J:

I think that's what we're interested in and, I mean, obviously that's what we're embarking on today is to determine whether the leave criteria are met, we're not going to resolve the issues.

MR EBERSOHN:

The simple proposition is that the *Duke of Westminster* doctrine as it has been applied by a majority of courts in New Zealand is a fetter on the purposive interpretation. It leads to what Lord Steyn – and this was a quote from the applicant's submissions, I think it is 4.4, is the actual quote, "island of literal interpretation" – and Lord Steyn wrote, "Under the influence of the narrow *Duke of Westminster* doctrine, tax laws remained resistant to the new non-formalistic methods of interpretation." And the central submission is that is different to what every jurisdiction, similar jurisdiction, is doing who have put the *Duke of Westminster* doctrine to one side and most cases – and this is the easiest way of demonstrating the difference – most cases decided dealing with gifts, and they listed in the submissions, would be differently decided if they were decided in New Zealand, the result would be different.

Now as a starting point –

O'REGAN J:

We need to first establish that that's what the Court of Appeal did. I mean, if you read paragraph 28 of their decision they do seem to be saying it's a text in purpose exercise.

MR EBERSOHN:

They do but it is very much, they also, it is a text in purpose but then it's reduced to, unless you're dealing with sham or tax avoidance what are the legal arrangements actually entered into? In other word, you can't do or it's very difficult to do or at least there's a presumption against, a strong presumption against, what the Courts, that's in Australia or Canada or the US, would do in the space of a gift, just using this example, to say that what was intended here was not a legal meaning but a more general meaning.

And so I'll give your Honours an example of that where it's very, very clearly set out by the Court and that is – if your Honours have with you the appellant's bundle of authorities, not the supplementary but the main bundle, at tab 8 is a

case from Australia there, the *Leary v Federal Commissioner of Taxation* (1980) 32 ALR 221 (FCA) case. It is –

WILLIAMS J:
Just a moment. I'm looking for my copy of – it seems like it's not here. Just bear with me a second, please. I thought it was open but it's not. So it's your bundle?

MR EBERSOHN:
Yes, that's correct, the applicant's bundle.

WILLIAMS J:
And the case is?

MR EBERSOHN:
It's the bundle of authorities.

WILLIAMS J:
Yes, which case?

MR EBERSOHN:
Tab 8.

WILLIAMS J:
Leary?

MR EBERSOHN:
Leary, that's correct, and this involved a payment to the Order of St John's. It was an unconditional payment but there was an arrangement with the Order of St John's that money that it received, most of it, not all of it but 98% of it, would be passed on to the – to a lender. Now the taxpayer was not a party to that arrangement, the lender being a party who lent the money to the taxpayer in the first place to make the payment, and the condition of the loan with the taxpayer was that the – and this was not a condition of any agreement with St John's to which the gift by itself looked unconditional, but the agreement

between the lender and the taxpayer was essentially that if the loan was sold, sorry, if the donation was made then he could buy back the loan which was for 40 years, repayable in 40 years, at a reduced value.

WILLIAMS J:
Isn't that the same as *Ferguson v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 433 (TC) or similar to *Ferguson*?

MR EBERSOHN:
It's similar to Ferguson, yes.

WILLIAMS J:
But we're not talking about anything like that here.

MR EBERSOHN:
No, but not all of the cases –

WILLIAMS J:
Those are tricks. This isn't a trick.

MR EBERSOHN:
I can talk about the issue of tax avoidance briefly as well, can cover that briefly.

WILLIAMS J:
It's not surprising that the Courts wouldn't treat that as a gift. I doubt whether they'd treat that as a gift here.

MR EBERSOHN:
That's not – I'm just using –

WILLIAMS J:
That's not your point? Okay.

MR EBERSOHN:

That's not the point. I'm just using the case to demonstrate some of the reasoning, bearing in mind that this was not resolved under tax avoidance provision. If you turn the page to – and I'll deal with some cases which are different. If you turn to page 222 which is one page over, there's the judgment of Bowen, the Chief Justice, and in that paragraph about half way down he says: "The question before us is whether the payment by Mr Leary was a 'gift' within the meaning of that provision." Now that provision is the same or very similar provision to that which we find in New Zealand in the current context, and then if you go to the bottom of that he says, at the bottom of the quote: "In law there are various technical rules relating to gifts of particular kinds of real and personal property but this provision is not concerned with such niceties. The word 'gift' is not defined in the Act. The context and the obvious intention of the section suggests that it is used in its ordinary non-technical sense."

Now before I make the point, I just take your Honours to page 237 which is the judgment of Justice Brennan, and at approximately line 13 there's a paragraph starts: "The ordinary notion of gift and 'gift' in its technical meaning have common features: a transfer of a beneficial interest in property by way of benefaction, and an absence of a pecuniary or proprietary benefit passing to the transferor by way of return. But the relevant circumstances in which these indicia may be found are more narrowly confined when the enquiry is as to a gift in the technical sense than when the enquiry is to a gift according to ordinary notions." And then if you jump down to line 20 –

WILLIAMS J:

Sorry, so you're at 227 of the…

O'REGAN J:

237.

MR EBERSOHN:

237, sorry.

WILLIAMS J:
Oh, sorry, right.

MR EBERSOHN:
Sorry, your Honour.

WILLIAMS J:
Just bear with me.

MR EBERSOHN:
If you jump to line –

WILLIAMS J:
Sorry, just give me the line that you – so that's line 12 or something?

MR EBERSOHN:
13 to…

WILLIAMS J:
Good, thank you.

MR EBERSOHN:
19 I've just read, and then starting at line 28: "But an enquiry into the making of a gift according to ordinary notions requires reference to wider circumstances." And then if you miss a paragraph – or, sorry, paragraph, a line – the sentence is: "The ordinary notions of a gift do not pay much regard to the difference between a return to a disponor which he receives as consideration under a contract and a return which is furnished under some other arrangement or understanding," and that is, the reason I've selected that is it demonstrates two things. One is that what the courts are doings is they are not fettering the purposive interpretation by firstly the *Duke of Westminster* principle, doctrine, and, secondly, they're prepared to that in some circumstances accept a wider meaning. If we turn to page 241…

O'REGAN J:

But I just don't know where this is taking you to. Going through detailed analysis of cases is not really helping us that much. We're trying to understand whether there is a major issue here. You're saying the Court of Appeal applied the *Duke of Westminster* approach. They never mentioned the *Duke of Westminster*, they said they weren't applying that approach. You need to convince us that they did and that that issue needs to be resolved.

MR EBERSOHN:

Well, the Court of Appeal judgment, starting at – if your Honours just give me a moment to sort myself out here because – at 26 of the actual judgment the Court sets out Richardson's approach in *Mills v Dowdall* [1983] NZLR 154 (CA). Now in that approach Richardson refers back to *Re Securitibank Limited (No 2)* [1978]2 NZLR 136 (CA), which is based on the *Duke of Westminster.* If your Honours go through that case you'll see it expressly refers to that, it quotes from that, and it goes on, and he sets out the principles, included the following elements that are relevant to the issues before us: "The true nature," and then at 26: "The true nature of the transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. The whole contractual arrangement needs to be considered. If the arrangement involves a series of interrelated agreements they should be considered together." And then at, goes on at 53 to say: "We do not think this case actually engages the jurisprudential controversies that the parties have suggested. As already explained, in *Mills v Dowdall* this Court clearly outlined ascertaining the true legal character of a transactions." So the Court is quite clearly saying that what you have to focus on is the true legal character of the transaction and that, even using purposive interpretation, the Court should not go wider than that other than in terms of understanding the contractual arrangements. It goes on to say: "Conversely, it is important that the approach –

O'REGAN J:

Well, is that right? It's not just saying the contractual arrangements, is it? I mean, what the Court did here was to look at was there a material benefit or not, was there a link between them or not? It dealt with the contractual argument because you made that argument to the Court, it had to deal with it. But that wasn't the basis on which it decided the case, was it?

MR EBERSOHN:

Well, the argument is also made that a contractual arrangement, a contractual nexus wasn't required, that expectation or an understanding would suffice and that was based on foreign case law, and that was quite clearly rejected when we were talking in court and in this judgment the Court is quite clear that the very first reason it at 59 rejects the submission is that "on a narrow construction of the legal arrangements in issue, any benefit does not arise from the payments made to the Trust Board. The payments made by the taxpayers are used by the Trust Board for the purposes of the New Zealand Church", and…

WILLIAMS J:

When you say legal character, "true legal character", cited at 53, do you really mean form over substance?

MR EBERSOHN:

Yes, the legal – well, the legal rights and obligations entered into, so it is a form over substance, yes.

WILLIAMS J:

That's really what you're saying, that the Court of Appeal gave emphasis to the form of the transaction over the substance which was not a gift?

MR EBERSOHN:

Yes, and what we're really saying is that a purposive interpretation doesn't rule out and in many cases, and I can address it if the Court wants, a form approach will apply in the tax context. But that's a result of a purposive

interpretation. It's not something which you introduce as a fetter to a purposive interpretation. In other words – and the foreign case law sets this out in cases where, for example, you have detailed rules and there are lots of those in the tax provision, in the tax statutes. Those cases, a form approach would normally be the result of a purposive interpretation, a literal approach as they would put it, as Lord Steyn would say.

But in other cases where gifts are or where concepts are more open-ended or where there's a clear statutory purpose, and *Ferguson* does discuss this in that case and – but where there's a clear statutory purpose such as an incentive provision or an allowance made to a taxpayer or a benefit given to a taxpayer, there's quite clearly, so if it's to encourage a certain type of investment, for example, there's quite clearly a parliamentary purpose which plays a significant role and can widen or lessen the scope of what qualifies within that provision.

So to say substance by itself is a little bit dangerous because it's substance which flows from a purposive interpretation. It may not be –

WILLIAMS J:
Sure, substance by reference to purpose.

MR EBERSOHN:
To purpose, yes, so it may not be complete substance. It may only be substance of a certain part. In the case of gifts, cases like *Winters* and the like use words such as "in anticipation" and this is in circumstances where although there's no contractual obligation and donations would have been made in a legal sense, there was an understanding of what would happen and it was clearly going to happen, and that is not a tax avoidance case but, yes, it's not a case which would fall within tax avoidance. It was –

O'REGAN J:
But didn't the Court here just find that there wasn't a material benefit because it was only a spiritual moral benefit? That didn't require a form or substance

approach, did it? It was just an evaluation of what actually was being undertaken by the missionary and what benefit the missionary and the family were gaining from it.

MR EBERSOHN:
The Court dismisses it on a form over substance approach but then reverts, does cover some of the other elements. It differs from the High Court but the issue in terms of obtaining leave to want – I mean in terms of that issue, the Court differed remarkably from the High Court's judgment and paid little regard. I know this is not an important point for an appeal, in terms of the public interest issue paid, but just to point out that it, and I think it's 27 and 28 of the High Court judgment, she sets out in quite a significant amount of detail the link which exists between the payment and the benefit received by the missionaries as captured in the actual documentation, so that the documentation says you're contributing for your mission costs essentially.

WILLIAMS J:
Look, for myself, the sense I have is that this is really quite an important question in principle, beaten up by a brutal set of unhelpful facts, in the sense that these are missionaries, right?

MR EBERSOHN:
Yes.

WILLIAMS J:
It does seem to me to be difficult to see them getting any benefit at all, because they're missionaries. The benefit, according to the theory of the LDS Church, presumably, as with all other missions –

MR EBERSOHN:
Undoubtedly.

WILLIAMS J:
– is not to them but to the communities that they proselytize to.

MR EBERSOHN:

Yes. Although it's not the point on which we sought leave, the point is – it's not the point we raised for obtaining leave – the point…

WILLIAMS J:

No, but I wonder whether that's really the key point, that's what distinguishes it from the school cases.

MR EBERSOHN:

Well…

WILLIAMS J:

Because it's not really funding the children, it's funding the teachers.

MR EBERSOHN:

In this particular –

WILLIAMS J:

I know this is substance, but I just wonder whether this is the right case for that principle to be argued, that's my point.

MR EBERSOHN:

The issue which you raise is whether the personal living expenses of the person such as haircuts or food or accommodation over a two-year period can be anything other than personal expenses, and the Commissioner would say that that's inherently personal expenses – I know it's not an issue which is raised directly in terms of seeking leave – and that there inherently is a link. Now I thought the Court of Appeal, the suggestion in the Court of Appeal, was that the payments were voluntary in the sense that you're expected to pay them and everyone had to contribute to what they could according to their means and active in your conscience, but if you didn't pay it it didn't necessarily mean, if you couldn't afford to pay it it didn't necessarily mean the mission was over. And so that was one of the factors.

Now cases like – and that really is a form of, that really is a *Duke of Westminster* issue, because it's basically saying there's no contractual obligation. Cases like *Winters v Commissioner of Internal Revenue* 468 F 2d 778 (2d Cir 1972) and the like, and *The Queen v Zandstra* [1974] 2 FC 254, [1974] CTC 503, are also concerned with cases where people did not receive or weren't required to pay, they didn't have to pay, they pledged that they would pay and they paid according to their moral conscience and they paid what they could afford to pay, and some paid slightly more. So it's not different to those cases. Now –

WILLIAMS J:
But you see, my problem with those cases is they're really about, it seemed to me anyway, whether the people who received the benefit, the children in many cases at schools –

MR EBERSOHN:
Yes.

WILLIAMS J:
– whether that was a quid pro quo in a general moral sense, even if not in a contractual sense. My problem is it's hard to see that transactional approach in this case in any way, because the missionaries are not receiving any benefit, the benefit is not to them, it's enabling them to provide benefits to others.

MR EBERSOHN:
It is, but it is still feeding them and it's still housing them, and that is still –

WILLIAMS J:
That's true, but…

MR EBERSOHN:
I mean, that comes back to the point that I made which your Honour may disagree with, but I do agree with your Honour that the matter can die for the

applicant on that very point. I mean, the proposition has to be, for the applicant to succeed the proposition has to be accepted by the Court that the mission expenses had a personal benefit for the missionaries insofar as, well, if it didn't have any benefit for the missionaries then it would be very hard to say there was any kind of benefit back which would –

WILLIAMS J:
That's true, that takes to the ideas of charity and so on.

MR EBERSOHN:
Yes. So I –

WILLIAMS J:
Given that New Zealand was colonised by missionaries who received benefits from the Church Mission Society that were almost certainly charitable, it would be a little strange if Henry Williams discovered that the gifts that he received to allow him to set up Paihia were taxable.

MR EBERSOHN:
I'm not going to comment on whether the missionaries colonising New Zealand should be treated –

WILLIAMS J:
Well, it's the same. It's exactly the same equation.

MR EBERSOHN:
But I do agree with your Honour that it comes down – that is an issue that is in the appeal. The Crown will simply argue that it's no different to anybody who is engaged in necessary employment, might be in charitable works, receiving funds on which they live. It's still treated as a personal benefit to them. And now it may be that it's more frugal by a fair margin in this case and that they do provide, they are providing charitable service and the like, but the argument will be that it remains, when you're looking at haircuts and food and accommodation, for an extended period of time, we're not talking about

people who are going away for, let's say, a few weeks, but for an extended period of time which effectively that's how you're living, that that is a personal benefit.

ELLEN FRANCE J:

What I'm struggling with, Mr Ebersohn, is why then it's not simply a factual question. Why –

MR EBERSOHN:

Well, yes, I mean I think there are factual issues, your Honour, but I think that we – I would submit that the approach of the Court of Appeal by saying the approach is well-settled, relying on *Mills v Dowdall* in that way in a case which, and it was perhaps clearer in court, it immediately ruled out a consideration of a wider test and the points which the High Court made in terms, and at 27 and 28, in terms of linking the benefit to the payment, or the factual matters which were taken into account, became essentially irrelevant. And so I think that that approach is a legal question which will have significant implications both in terms of gift and in terms of the wider application within the income tax and tax legislation generally.

ELLEN FRANCE J:

Can you just explain why you say that? What's an example of an implication of the test applied here to another situation?

MR EBERSOHN:

If…

ELLEN FRANCE J:

I'm just trying to understand. Are you saying if this test is applied in other situations it will change the approach?

MR EBERSOHN:

Yes.

ELLEN FRANCE J:

Well, what's an example of that?

MR EBERSOHN:

Well, we would say that this is an example but in terms of – let me put it this way. I would argue that cases such as *Winters*, *Zandstra* and in fact the cases listed which were found not to be gifts would all be found to be gifts if the approach in New Zealand was adopted, and the reason for that is that the payments were not based on a contractual or legal right, sorry, the benefit back, but on understanding as to what would happen or what they called a lack of benefaction. In other words, the payment was made to obtain a benefit, not truly for a charitable purpose, and so I will give your Honour an example since I've referred to that several times. The appellant's bundle of authorities at 20 is the US case of *Winters*, but the same case, the same result.

ELLEN FRANCE J:

What I'm trying to understand though is if you're thinking about the approach taken by the Commissioner to gifts and other payments of that ilk, are you saying that this case will change, will mean the Commissioner will have to change her existing practices? Is that what you're saying or are you not going that far?

MR EBERSOHN:

Well, I think that the Commissioner has already changed her practices around gifts based on foreign case law, but I think that as it's worked through with other provisions of the Act and courts consider it there will be changes which will take place, because there will be other provisions where people will look at the provision, or the courts will look at the provision, and decide that in fact what is happening in that case is not within the purpose of Parliament, even though it meets the literal interpretation of the provision, as by way of example, and consequently there will be changes in practice. It's hard to anticipate exactly what they'll be, but there's an article which is at 23, I won't take your Honours to it, on the development of the purposive interpretation

and Commonwealth jurisdictions generally and in Canada in particular, and it goes on to say that simple terms like “interest”, “debt”, “gift”, as well as complex statutory provisions, have thrown up these sort of issues, and that’s at page – if your Honours wanted to look at that separately – is at page 1184 of that.

Then *Ferguson* notes that it often applies in circumstances where it’s to encourage a particular activity, so in other words if that activity is not actually encouraged, and they use, that’s the “gift” case, it uses the term “if there isn’t actually a charitable bounty” at the end of it, for example.

O’REGAN J:
Well, I mean, that’s just a distinguishable case, isn’t it?

MR EBERSOHN:
That is a distinguishable case, but the reasoning of those cases are different, and this case is less distinguishable, I would humbly submit, to case like *Zandstra* or *Winters.* So it really depends on the case which you're picking.

O’REGAN J:
Well, I think we’re going to wrap things up. But what you need to tell us is this isn’t just a one-off dispute about the factual findings made by the Court of Appeal about the nature of the benefit and the lack of a link, and the point, I mean, I think what Justice France was really getting, is, well, why is this point wider than just you being dissatisfied with the outcome of this case in the Court of Appeal?

MR EBERSOHN:
Well, the focus in terms of the appeal is not on the injustice as much as of the public importance, and the public importance and the reason why leave should be granted is that the issue raised goes to the heart of what is a purposive interpretation, what should it be in the tax context, and that has very wide implications.

Unless your Honours have anything further, I will sit down.

O'REGAN J:
Thank you, Mr Ebersohn.

Mr Green, we'll just let Mr Ebersohn organise himself here and then I'll call on you in a second. Right, you go ahead, Mr Green.

MR GREEN:
Thank you, Sir.

If I might start by just summarising briefly the way we see this case as having been presented by the Commissioner. It's been suggested by the applicant that it is necessary in the interests of justice for this Court to hear an appeal –

O'REGAN J:
Sorry, Mr Green, just stop a sec. You're actually booming into the Court so I'm just going to ask the registrar to turn you down a little bit.

MR GREEN:
I don't like to be seen as being a bittern, your Honour.

O'REGAN J:
You go ahead now, Mr Green, I'm sure you'll be more moderating.

MR GREEN:
I'll try and speak softly, Sir.

O'REGAN J:
Oh, can you turn your volume down at your end is what we're being asked?

MR GREEN:
Is that better?

O'REGAN J:
Yes, that's much better, thank you.

MR GREEN:
As I was saying, your Honours, it's been suggested by the applicant that it's in the interests of justice for this Court to hear an appeal, either as a matter of general public importance or as a matter of general commercial significance involved, because the Court of Appeal did not apply the correct approach to the purposive interpretation of a specific statutory provision. We say the approach applied by the Court of Appeal was the very approach to interpretation which is mandated by the Interpretation Act 1999 and by judgments of this Court. Moreover, your Honours, the approach advocated by the applicant as being the correct approach to interpretation has itself been rejected by this Court as being generally of limited use in the interpretation of statutes in New Zealand and, your Honours, that is really the *Ramsay* type principle which is actually applied in *Ferguson* as your Honours will be aware.

Moreover, the issue which the applicant wishes to pursue is in a case which involves a minor provision of one statute, the Income Tax Act 2007, but which would affect the approach of the Courts in New Zealand to the interpretation of all specific statutory provisions. At the same time, having accepted up to this point that the word "gift" in the particular statutory provision has its ordinary and natural meaning, the proposed appeal by the applicant is also founded on the word "gift" having a "general" meaning, the terminology used in the application.

In essence, your Honours, we say the Commissioner is trying to pursue on appeal a complete overhaul of the settled approach to both the interpretation of statutes and, in particular, tax statutes, repeatedly affirmed by this Court and the meaning and application of the term "gift", and the interpretation of the term "gift" and application would affect a broad spectrum of other situations involving payments to charities and other donee organisations, none of which is represented by the particular facts of this case, and your Honours have already pointed out in dealing with my learned friend's submissions that what

would happen to all the statements of the Commissioner which we included in our supplementary bundle about donations to schools, donations to religion and other donations, if that were all, that all had to be re-examined in the context of this approach that's being suggested, a so-called purposive approach which is different from the approach that should be adopted, and as we submit, Sir, and we've done that both in our submissions and also in that brief synopsis we filed, it's a question of whether or not the approach which is adopted by the Court is going to be all-inclusive or whether it is limited to a particular fact situation which your Honour, Justice Williams, in referring to Henry Williams, pointed out that missionary work is quite different from enquiring education services in those circumstances.

Now your Honour, I would propose really to address our synopsis because time is limited and just pick out a few of the points in that synopsis. It is very much a summary of the more lengthy submissions and if your Honours wish to have all the references it's in the footnotes in those submissions which are available to be read.

I would emphasise, as in paragraph 3 of our brief synopsis, the things that are accepted and that is that the payments are payments made to the charity, the Trust Board. Effectively, that Board is a donee organisation within the meaning. Those payments, as is clear from all the background material, are used by the Trust Board and only used by the Trust Board for its purposes. None of the money goes to the payments to any missionary for New Zealand. None of the payments go to the church in the United States. So it is a payment made to a New Zealand charity for its purposes and that is where it starts and finishes, in our submission, and that is where the Court of Appeal determined that effectively if you look at what happens the statutory purpose is met. It is to encourage people to make gifts to organisations which are charitable for their purposes

An equally important point here is that the applicant accepts that the case doesn't involve sham or tax avoidance. Having accepted that particular position, your Honours, I found it interesting that one of the cases relied upon

is *Ferguson*. If your Honours look at the *Ferguson* judgment they effectively say, in sentence 1: “This is a tax avoidance scheme.” Your Honour Justice Williams referred to the fact that *Leary* seems to be very similar to *Ferguson*. The High Court Judge in this case referred to *Leary* as a sham, she was not a person, it did not appeal to her in that particular case.

WILLIAMS J:
What do you say to *Hodges v Federal Commissioner of Taxation* (1997) 97 ATC 2158?

MR GREEN:
So to use a case such as *Ferguson* where the reasoning is very clearly the reasoning -

O’REGAN J:
Just stop, Mr Green, just stop for a second.

MR GREEN:
Sorry, Sir?

WILLIAMS J:
Can you hear me clearly?

O’REGAN J:
Can you hear Justice Williams?

WILLIAMS J:
No.

MR GREEN:
Can I hear…?

O’REGAN J:
Can you hear Justice Williams talking to you?

MR GREEN:

Not very clearly.

WILLIAMS J:

No, all right. Can you hear me…

MR GREEN:

Oh, that's becoming clearer, Sir.

WILLIAMS J:

Right.

MR GREEN:

We're trying to avoid the boom, your Honour.

WILLIAMS J:

Yes.

MR GREEN:

Sir?

WILLIAMS J:

All those points are well made. What do you make though of the *Hodges* case which I think in the Court of Appeal it was argued on all fours with this case and does appear to be?

MR GREEN:

Well, our submission in the Court of Appeal, your Honour, was it's clearly not on all fours, it's quite different and, if one reads *Hodges* and sees what the facts really are, the statement is made that the payment was made so that he could participate, and in this case of course there is no requirement that any donation be made before a person can go and meet the call to serve as a missionary. But the critical point is that in *Hodges* the payment made, the $1,100, was actually the airfare of the person concerned. So it was a payment that was made to a charity for a personal expense of the individual,

which allegedly had two consequences: one, the payment would actually give rise to a tax deduction, the equivalent of our done organisation payments; and, two, the payment would qualify under their age scheme in Australia for a three times subsidy of that amount because it was actually paid to the airline by the charity – by the Apex. So the Judge, I believe, took a view of this case in Australia which said they're getting effectively four times the amount paid from the Government in terms of deductions and taking into account the expenditure. We don't see *Hodges* as being in any way on all fours.

WILLIAMS J:
Well, that was certainly one of foci of the Judge that this scheme meant, purposefully or not, that both ends of the transaction were getting tax credits for the same expenditure. But in this case isn't the donation to the Church which, if not compulsory is at least highly expected and equivalent in sum to the expenses of the missionary in the US in this case?

MR GREEN:
Well, Sir, the payment may, none of the payments may go to the missionary and the payments (inaudible 10:44:20) New Zealand.

WILLIAMS J:
No, I'm not talking – let's just talk about the sums. These aren't random sums, aren't they sums equivalent to the expenses?

MR GREEN:
No, your Honour, it's not, its clear finding of fact is that there is no relationship between the sums paid to the Trust Board and the actual cost of any missionary's mission, that is a clear finding by fact and agreed by the Crown.

WILLIAMS J:
I thought the amount was a rough equivalent, so I'm not talking about whether any money finds its way to the US, but the amount itself was a rough equivalence.

MR GREEN:

Sir, there are two elements to it. One is there's an equalisation programme which didn't apply to New Zealand, and that aimed to try and spread the amount across all of the jurisdictions. In New Zealand the church here set an amount but it is an amount which is determined essentially by ability to pay by people, not by the expenses incurred. So, for example, Sir, if a missionary went to an African country the cost of the mission may be very small. If they went to United States it could be very high. So there is no correlation between that. And if I might just explain to your Honours –

WILLIAMS J:

Can you just tell me what the amounts were? Just give me the numbers.

MR GREEN:

The amounts in this case were about $450 a month, as I recall, in the Coward case. There are two proceedings here, Sir. There's a declaratory judgment and –

WILLIAMS J:

Yes, right, so let's take that and the argument is that that has no rough correlation to actual expense? Has nothing to do with it?

MR GREEN:

It would have a correlation – no. It's an expectation, it's, the underlying principle that is applied here by the Church is that they believe in the principle of sacrifice, and so not only do people sacrifice their time and perform missionary services but they also sacrifice finance to support the Church's missionary programme. And this, Sir, is probably best shown by the *Davis v United States* 495 US 472 (1990) case, the decision of the United States Supreme Court, on exactly the same missionary programme.

WILLIAMS J:

Yes, I've read that. In that case the money was paid directly. What I'm trying to get to is is there an apparently coincidental equivalence between the

amount donors pay to the Board in New Zealand for the Board's purposes and the cost to the missionary paid by US funds out of the US for their living expenses?

MR GREEN:

So there's no – if you look at paragraph – in the agreed statement of facts, your Honour, it says that, as with designate: "The amount solicited in respect of each missionary from New Zealand is the same, irrespective of the location of the mission, and does not bear a direct relationship with the actual costs of a particular mission," that's part of the agreed statement of facts.

WILLIAMS J:

Does it bear an indirect relationship?

MR GREEN:

To the extent to which the number or the world apart from New Zealand is done on an averaging basis, in New Zealand it is a number which is picked to have some relationship to that averaging basis which doesn't apply in this country, because we're not a designated country.

WILLIAMS J:

Right.

MR GREEN:

That's my understanding, Sir.

WILLIAMS J:

Right. So the difference between *Hodges* and this case is that *Hodges* was the actual cost and in this case the money, although it never found its way to the US, was an average cost for mission activity of New Zealand members of the LDS?

MR GREEN:

No, it was actually a payment to the Church for its purposes, including missionary purposes, but not outside New Zealand, and your Honour if –

WILLIAMS J:

No, sorry, you need to listen to my question carefully. My question is was the amount that was paid calculated as the average cost that New Zealand missionaries would pay for expenses in other parts of the world. I'm not raising any question about where the money ends up, just about how the figure is calculated.

MR GREEN:

No, your Honour, it doesn't, as I understand it.

WILLIAMS J:

What does it relate to then?

MR GREEN:

It relates to a number which is suggested as being a sort of likely, like the equalised cost, an average type of cost, but not in relation to a particular missionary.

WILLIAMS J:

An average type of cost for what?

MR GREEN:

For people in New Zealand so that they could afford to pay an amount so they could commit their financial sacrifice for the amount in New Zealand –

WILLIAMS J:

Pay where?

MR GREEN:

I'm sorry, Sir?

WILLIAMS J:
Where is the relevant cost? Is this the cost for missionaries operating in New Zealand or the cost on an average for missionaries operating overseas?

MR GREEN:
It's just an average cost in terms of missionaries generally coming from New Zealand, an appropriate amount that New Zealanders would pay.

WILLIAMS J:
So overseas? Yes, just give me a one-word answer. Overseas, is that correct?

MR GREEN:
Yes.

WILLIAMS J:
Good, thank you.

MR GREEN:
I think I just mentioned, I've mentioned a tax avoidance but there's no tax avoidance but it seems the Commissioner's using cases involving tax avoidance.

The Court of Appeal judgment, we say, adopted a well-settled approach to interpretation statutes and, in particular, specific provisions such as this one, and we make reference to the *Terminals (NZ) Limited v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 case where the statement is made which probably says it as clearly as anything else in any other cases of this Court, and where the Court says in paragraph 40, referring to *Ben Nevis Forestry Ventures v Commissioner of Inland Revenue* NZSC 115, [2009] 2 NZLR 289: "The first inquiry is to assess whether the legal substance of the relevant arrangement comes within the specific provisions of the statute construed purposively," and there is a clear statement in our submission that the New Zealand rules are well established and it is the legal substance of the

arrangement which is governing, and that is precisely what Justice Richardson said in *Mills v Dowdall*, it is precisely what is said in all the authorities of the Court of Appeal, the Supreme Court, which we referred to in footnote 31 of our submissions in opposition, and that is effectively a text and purpose approach.

We also refer in paragraph 6 of our synopsis to other authorities regarding the interpretation statues and we refer to *Terminals*, we also refer to *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 and also to the *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc* [2015] NZSC 59, [2015] 1 NZLR 672 case where your Honour Justice O'Regan adopted the statements made in those earlier cases as to the proper approach to interpretation.

Also of significance, we say, is that recent Court of Appeal authority dealing with the same statutory provision, and that is in the case of *Commissioner of Inland Revenue v Roberts* [2019] NZCA 654, which is in our supplementary bundle of authorities. It didn't involve the meaning of the word "gift" but it did involve whether an amount was a monetary gift in the context of forgiveness of debt. And in that case, which the Court of Appeal in this case paid a great deal of credence to, the Court of Appeal applied the text and purpose approach to interpretation of the standard approach and it also made the comment that effectively the arguments of the Commissioner in that case that forgiveness of debt should not be seen as a gift or in terms of a gift was because of the possible avoidance potential. The Court's answer was quite succinct to that. One, it said, well, the legislature can deal with that in its own terms and referred to the robust anti-avoidance provision, which doesn't apply to these case but now applies to that provision, and also in that case rather than appeal the case the Commissioner sought legislative amendment to say that forgiveness of debt is not a gift. So where there are avoidance issues such as in *Ferguson* and other cases, in New Zealand those aspects can be dealt with by the avoidance provision, be it general or specific. You do not apply – and this is made very clear in *Ben Nevis* and in *Terminals* and all the

other cases we referred to – that you don't get there necessarily by the ordinary section and applying the purposive interpretation to that section.

In our submission there is no basis for revisiting and effectively overturning the majority judgment in *Ben Nevis.* We say the Court of Appeal applied an orthodox and well-settled interpretation approach and determined there was no material benefit, that the benefit was essentially a spiritual or a moral benefit, if there was a benefit at all.

O'REGAN J:
The point the Mr Ebersohn raises is that the Court did look at that in terms of the legal obligations arising and the legal construct applying and he says that that was effectively a form over substance analysis. What do you say to that?

MR GREEN:
We say, Sir, that, as has been said in many cases, the difference between form and substance is a difficult one, somewhat elusive, but the rule as articulated by this Court and as set out in *Ben Nevis* is exactly that. It is the legal substance of the arrangement entered into, taking into account any interrelated agreements and taking into account context. And, as your Honours are aware, in *Ben Nevis* itself, applying that test, which is the New Zealand test, in our submission, it was held that the two premiums concerned, a licence premium and an insurance premium, were deductible under the specific provisions. The Court then went on to look at the anti-avoidance provision, and we say that is exactly what would happen in the cases that have been referred to by my learned friend overseas if necessary. Our submission would be far from saying if the Court of Appeal approach was adopted those overseas cases would be decided differently. We say they would be decided in exactly the same way and they would either get there through the specific provision, purposive interpretation or if necessary in the most egregious cases they could use the anti-avoidance provision, and so we say that to actually suggest that one should depart from the well-established principles in New Zealand where we have a general anti-avoidance provision, there is no need for that to happen and to go to the position as in *Ramsey* and

some of the other cases referred to to my learned friend and it is important, Sir, your Honours, that in the English cases, *Ferguson*, at that point there was no English/UK general anti-avoidance provision.

In the case of *Stubart Investments Ltd v R* [1984] 1 SCR 536 in Canada, the Supreme Court of Canada did not adopt the fiscal nullity, as it's called, cases in the UK point of interpretation. In Australia, in a case in Australia, *John Fairfax & Sons Pty Ltd v Federal Commissioner of Taxation* (1959) 101 CLR 30, the Court rejected that approach where you have a general anti-avoidance provision. This Court in *Ben Nevis* in paragraph 110 equally says there is little room, indeed, if any, I think, if you read between the lines, for that approach in New Zealand. My learned friend's submission is that that approach which has been treated in that way by this Court is the approach that he says was not applied by the Court of Appeal and therefore he should be allowed to have an appeal, quite apart from all the other aspects of whether there's a benefit, a material benefit, and so on.

We also say in our synopsis, your Honours, that the particular facts of this case don't raise the wider implications. They are very limited in the sense that they are a – they involved missionary service. It is not a case where people are acquiring goods and services, such as the education cases, such as the matters referred to in the Commissioner's public statements, where even so he allows donations to schools, to state schools, to be eligible for the donation even though the benefits, general curriculum benefits, are received by the children, and that is really reached by applying what is the arrangement. The arrangement is not for specific education but for general education, and so this case is very – so we would say that this case doesn't raise all of these implications and therefore is not an appropriate case or where there should be an appeal.

If I might say, your Honours, my learned friend in his submission, in his synopsis, refers to the value of the donee credits, some $320 million. I'm informed that the amount of credits in the 2018/2019 year relating to the Ward Mission payments is only $300,000, $400,000, which is 0.1%. Now in the cir

– most of the cases would presumably be involved with religion and with education but certainly not with services as here where somebody is performing services and there's a donation made to support the general missionaries' purposes of the church concerned, and that is the very reason, your Honours, why the IRS in the United States, following *Davis*, after which the church re-organised its missionary programme in the way that this one is, accepted that there was a deduction even though the moneys being contributed to the Ward Missionary Fund was being used for the general missionary purposes and was calculated in the way, Justice Williams, you referred to, by an equalisation amount, and effectively a deduction is still allowed in the US for the reasons we say the Court of Appeal has correctly articulated.

O'REGAN J:
All right, well, we should probably wrap this up. In summary, your position is this is a case that's limited to its own facts and there's no need for this Court to intervene, is that the nutshell of it?

MR GREEN:
That's the first side of the nutshell, Sir. The second side is respectively that to change that requires, on my learned friend's submissions, a total overhaul of well-established and well-settled principles in this country, to statutory interpretation and to the meaning of the word "gift".

O'REGAN J:
That's all you want to say, Mr Green?

MR GREEN:
As your Honour pleases.

O'REGAN J:
Thank you. All right, in reply, Mr Ebersohn.

MR EBERSOHN:

Thank you, Sir. I'll be very, very brief. Just a bit of housekeeping in terms of Justice Williams' question as to how the equalisation, how the contributions are calculated, it is an agreed statement of fact, and I can just read out two paragraphs which set it out.

WILLIAMS J:

We don't have that, do we?

MR EBERSOHN:

No.

O'REGAN J:

Well, perhaps you should give us a copy of it and we'll look at it for ourselves. I don't really want to get into a he said/he said.

MR EBERSOHN:

All right. It's paragraphs 46 and 47, and I can steal my learned counsel's set here.

O'REGAN J:

I'm sorry, just give it to the registrar after the hearing and we'll get a copy of it.

MR EBERSOHN:

All right. Then just briefly on tax avoidance I want to point out that both Australia and Canada have tax avoidance provisions and had tax avoidance provisions and it did not affect, it does not affect the way they apply the purposive interpretation. I also want to just note that on some of the cases there would be tax avoidance and some wouldn't be and I've made that point already.

The fourth point I just want to make, and again it's really just very, very quickly in passing, is that my learned friend points to a number of cases which, sorry, a number of statements of the Commissioner saying that why are gifts allowed

to schools essentially if the Commissioner is going to take this approach? I simply point out that it's worth revisiting paragraphs 27 and 28 of the High Court judgment where the Court sets out – now your Honours don't have the – well, you will now have the agreed statement of fact. It sets out the documentation and it goes on to say, for example, that they must set out: "Indicate how much money (in your local currency) will be contributed per month in support of your mission from the sources below," and so it is aimed at a particular missionary. Now –

O'REGAN J:
Yes, but this is – we're getting into the detailed facts here which is not really –

MR EBERSOHN:
Yes, all I'm trying to say, and it's simply passing over, is that the points that my learned friend is making requires analysis of each case's detailed facts in terms of the Commissioner's statements and the like and shouldn't just be taken at face value.

Then the last point I'd make is simply that my learned friend does agree, seems to agree, that the issue is a matter of public importance insofar as it will have a very wide impact if the applicant is successful, assuming leave is granted.

I have nothing further in reply, your Honour.

O'REGAN J:
Thank you. All right, well, thank you, all counsel. We'll reserve our decision and release it in writing in due course.

COURT ADJOURNS: 11.04 AM