

IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 2/2005

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **JAROD PETER HESTER AND
OTHERS**

Appellant

AND **COMMISSIONER OF INLAND
REVENUE**

Respondent

Hearing 21 April 2005

Coram Elias CJ
Tipping J

Counsel W Akel for appellant
B Corbett and B Keith for respondent

APPLICATION FOR LEAVE TO APPEAL

Elias CJ Thank you Mrs Corbett, Mr Keith. Right. Yes Mr Akel.

Akel Yes, may it please Your Honour as I was saying to my friends just before your Honours arrived I'm feeling somewhat outnumbered and I had difficulty in persuading any of my colleagues to come and join me on a tax case and I tried to tell them that this is actually not a tax case, it raises interests of human rights interests and in particular issues with regard to the manifestation of religion under the New Zealand Bill of Rights Act.

Elias CJ It might have been a better submission to say that it was a tax case Mr Akel, we hear nothing but human rights cases.

Akel I saw how totally superficial I am and so this is a very interesting tax case, and in my submission going to the heart of the application it does raise matters of general public importance for this Court to consider, in

particular firstly tax relief as relates to the advancement of religion, secondly how a Church manifests its religion through employment coupled with the concept in this case of Temple Worthiness. Now central to employment of Church members by the Church is a concept of Temple Worthiness and being able to obtain a Temple Recommend, and where that comes important is how its pleaded in the second amended statement of claim.

Elias CJ Which I don't think we have.

Akel No you don't have your Honours but if I could just briefly refer because it summarises the concept and in my submission the evidence certainly established this, and I might just say that really there is very little dispute if anything on the facts of this case. The only area that my friend and I have discussed that she raised in her submission was the concern that I had in my written submission confiscated a fact of whether callings were performed during the course of employment or as a condition of employment. We've clarified that and I can say that its common ground that callings are not performed during the course of employment but they are a condition of employment, in other words for a Church member to be employed by the Church they must carry out callings. But all employees, that is at the Church College, the Administration Centre and at the Temple must be members of the Church and follow its Christian beliefs. They are required to uphold the standards of the Church and those standards are referred to in a document which is called a Temple Recommend which again was produced in the evidence and the issues that arise in a Temple Recommend are 'do you have faith and testimony of God the Eternal Father, his son Jesus Christ and the Holy Ghost'. The Mormon Church is inherently a Christian Church. 'Do you have testimony of the atonement of Christ and of his role of Saviour and Redeemer' and then it goes on to raise other issues that are perhaps more temporal 'are you honest in your dealings with your fellow men, are you a full tithe payer'? That's not so temporal. 'Do you keep the word of wisdom'.

Elias CJ A full time what?

Akel Tithe payer.

Elias CJ Oh, tithe payer.

Akel Tithe payer. What happens is with tithes and there is to a certain extent a misconception with regard to tithes because tithing is 10% of income but that tithing goes to the Church's charitable purposes to provide members of the Church with social services and the more needy members of the Church and it must be and sometimes its overlooked with the Mormon Church which tends to get a bit of a bad press is that most of its members, 90,000 members in New Zealand are Maori and from Pacific Island families, most of them are in the what would be called the lower socio-economic group. Most of the pupils at the

college at Hamilton are from families that are from country areas, a lot of them are Maori and what was produced in evidence is that that College has done extremely well and that despite the fact that it is in the lower decile group it got an exceptionally good ERO report and that's referred to in the judgment of Justice O'Regan, but it rejects all Government aid. It turned down aid of a million dollars, so another one is do you have financial other obligations to a former spouse or children and if yes are you current in meeting those obligations. So those are the issues that arise in what's called a Temple Recommend and all employees must have been adjudged Temple Worthy by Church leaders before being employed by the Church. Temple Worthiness is a condition of continued employment and Temple Worthiness is an employment standard for all employees of the Church world-wide, Temple Worthiness is the accepted standard for ecclesiastical conduct and maybe linked to the requirement that only those with clean hands and a pure heart from Psalms 24 should be invited to attend the House of the Lord or do his business and the same standards of personal conduct are expected of Church employers and Ecclesiastical Leaders. Temple Worthiness is a condition pristine to a member obtaining a Temple Recommend from Church Leaders. Temple Recommend is the formal invitation provided to a member by Church Leaders which enables the member to gain access to Church Temples and only those members who hold a current Temple Recommend may enter Church Temples because of the sacred and spiritual significance of the Church Temples. And finally, Temple Worthiness and the issue of Temple Recommendations are determined by local Bishops according to a Church-wide set of personal standards which I have just referred to, and Christian values approved by Church Leaders. So, in my submission, the Church in this case manifests its religion through its employment and that in my submission the determination of whether, ah whether.

Elias CJ If that's so why is there a difference between employment and callings?

Akel Everyone is obliged to do the callings, that is all members are obliged to do callings, but to be a member, sorry, to be employed then you must as a condition of that maintain your calling.

Elias CJ Yes, I understand that, it's really just your submission that the Church manifests its religion through employment. Presumably there are many who are subject to callings who are not actually employed by the Church.

Akel Yes. Yes. Well the manifestation of the Church's beliefs is in my submission not only at a spiritual basis but putting it in a colloquial term at an administrative basis as well, and that's the comment that Justice Donovan referred to in the **Grand Lodge** case that if you make a distinction in a Church between its, sorry, in that case between Freemasonry between an office that administers it and the beliefs itself

that is not a division that is appropriate and in my submission even exploring that issue raises an issue of public importance.

Elias CJ Where did the Judges in the lower Courts indicate that only Ministry was required for religious purposes? I mean the problem you have Mr Akel is convincing us not of the merits of your substantive argument but that this is an appropriate case for leave, and you need to address the matters that have been raised that there are settled legal principles that no one's actually challenging in this case and really what you're concerned about is application of that to the facts, which is not the sort of area that we normally grant leave on.

Akel With respect Your Honour, my submission is that both Courts adopted the approach that the Presbyterian case was with a fair amount of scepticism and it's quite clear from the judgments in the Court of Appeal they actually say that what they say with regard to that is auspicious with regard to my argument. Now having then approached it and said well in essence we don't agree with Presbyterian, but we're going to let lie as it is because it would be too hard to unpick at this stage, therefore in those circumstances they then turn around and say well anyway we distinguish it on the facts. Now in my submission firstly that distinction is artificial because the Courts, both Courts, had approached the whole issue of giving tax relief to Church superannuation Plans with real doubt that that really was correct and secondly with regard to fact distinctions, in my submission any case that is going to deal with discrimination has as its very basis fact distinctions. Policy decisions are invariably made on and attempts are made to justify because of the different facts situation. Are we going to allow this person into the Club because they may be Jewish?

Tipping J Could I just ask a question at this point Mr Akel? Is your case that you fit within Presbyterian properly applied or is it that you seek an extension if you like, or an expansion of Presbyterian so as to accommodate this case? Because that for me is getting close to the heart of the point of the Chief Justice. I don't quite understand you see the restriction as you put it of Presbyterian by the Court of Appeal or the foreshadowed it doesn't matter because they say you don't come within Presbyterian anyway.

Akel Well well, it's really both what I'm saying. I say that I fit within Presbyterian and that the factual distinctions, and those are not true findings of facts there application of facts, or inferences to be drawn from facts, there's no dispute on credibility issues in this case.

Tipping J No, so one you say you fit within Presbyterian

Akel Yes.

Tipping J But two, what's your.

Akel Two is your second point, that in essence if not in Presbyterian should be extended, and its what Justice Murphy said in the **New Faith** case, he said “in essence the Court can’t be seen to be making distinctions and determining what the tenets or the different way Churches operate. The Courts have got to operate and the Government or the State has got to operate when it comes to religious issues like this in one in all in”. That’s the exact words that he uses.

Tipping J I don’t quite understand how you argue that you fit within Presbyterian anyway, because for better or for worse the distinction in Presbyterian drove very clearly off the idea of Ministry didn’t it? So your Church has got nothing that quite resembles that and I’m not making any criticism I’m just saying as a matter of fact don’t you need some sort of extension of Presbyterian to bring you home or the argument that Presbyterian is too narrow, far from being too wide, it’s too narrow.

Akel Well, thank you Your Honour, but in Presbyterian the fund extended to non-Ministers. It extended.

Elias CJ Widows and.

Tipping J Widows, yes.

Akel Widows and theological students and people like that and that’s based very much on Baptist Union and Baptist Union are described as Missionaries, now often my Church members are described as Missionaries. We are all used to them knocking on the door.

Tipping J I’m trying to find for you, and I’m not batting for either side, I’m simply trying to isolate in my own mind what you say is the important question of law here, because with great respect it didn’t shine very strongly off your papers.

Akel Oh!

Tipping J I think I understand what it is but I want you clearly to articulate it.

Akel Well my, my submission is this Sir, firstly, yes we do fit within Presbyterian.

Tipping J Well that’s a question of fact.

Akel Well not with respect, not necessarily so Sir, because if there was a disputed issue of fact then I could understand yes this appeal wouldn’t be a goer, but where we have inferences being drawn from established facts my submission is that it is quite it is it is quite proper to have those issues dealt with by a superior Court.

Elias CJ But Mr Akel, your argument would mean that in all cases where say Human Rights is raised this Court would have to grant leave because

on your argument application of those principles to the facts is everything.

Akel I haven't turned my mind to all the ramifications of every issue dealing with Human Rights issues, but where you have a case that has as its very heart the determination of privilege going to some Churches and that privilege not going to another Church because of supposed fact distinctions.

Elias CJ Well I don't know that you can actually on the judgments in the lower Courts make a submission as bold as that because they weren't excluding your Church, they were saying the range of beneficiaries goes wider than a charitable range. That's really what the decision was.

Akel Mm, yes, yes, but that, but that.

Elias CJ You could regroup, you could set up another Trust which would come within the parameters.

Akel Yes, well we're dealing of course with the one year in question, and that is possible but if certain Churches have the benefit of tax relief in that one year because they have paid Clergies and a traditional structure.

Elias CJ But you've got a structure somewhere I read that there are a whole lot of levels of people. It's just that what you seem to be arguing is an intention to benefit, or a structure that benefits all members of the Church, because all have to work their way up through Temple Worthiness and Temple Recommend that is charitable.

Akel Because all members are manifesting the Church's religion in their, and using this term

Elias CJ In their lives

Akel No no no, in their employment, there's no.

Elias CJ But one would hope, well, but it's not employment because you say that it's a condition of employment that they have a calling but the calling is.

Akel Performed outside the.

Elias CJ Yes and the calling applies to all members of the Mormon community. Now in other Churches one would hope that the members of the Church also are living the beliefs of the Church, are maintaining witness, all of those sort of things, but none of the cases suggest that all members of a Church are a charitable object for the purposes of taxation.

- Akel But the two cases that we we have, Baptist Union and Presbyterian, are not limited solely to to the Ministers involved in those Churches.
- Elias CJ Well it's Ministers and their dependants and those in training, it's that sort of area. Well here perhaps you should take us to the level of different functions that get performed as part of calling. I can't remember where it was but some were wardens some were something or other else.
- Akel Oh in the, in the submission at para.2.7 I say "if the roles provide for by callings are not fulfilled".
- Elias CJ Examples of callings are Bishop, High Priest, Sunday School President and then you go on down through. Well perhaps I could, just correct me if I'm wrong, all members of the Church have to have callings.
- Akel Yes.
- Elias CJ Yes.
- Akel And it, and so it's not just the employees that carry out the callings and that seems to be at the heart of the distinction made by both Courts below to say there's a fallacy in that argument. But it also overlooks the argument that is, that the Church Administration Centre and the Church College and the Church Temple are also manifestations of the Church's religion and belief and if I can take your Honours to para.25 through to.
- Elias CJ Of what?
- Akel Of the Court of Appeal judgment through to 35, they describe, the Court of Appeal describes what is done at each of the Church Administration Centre, the Church College and the Church Temple and at 26 it refers to its overall administration of the Church's operation in New Zealand and has responsibilities which include and all those responsibilities are related to the advancement of this Church's religion. They may be seen as administrative but no distinction should be made in my submission between the administration of the Church and the actual spiritual side of the Church, the Sunday preaching side of the Church. All of those jobs are in some way advancing the religion of the Church.
- Tipping J I wonder if I could assist by suggesting to you Mr Akel what might, and I say no more than that, might be arguably an important question of law which this case fairly raises and it's this, is the decision in this case consistent with the underlying charitable purposes test as it should be administered in the modern non-discriminatory world, or something like that, because unless you can bring it within something like that and suggest that there is an arguable case for the Court of Appeal being

wrong within that sort of broad level of importance, I don't see you're going to get anywhere, speaking purely for myself, irrespective of the intricacies of all these facts.

Akel Well, if Your Honour's formulations are going to get me somewhere then then obviously that was the point that I.

Tipping J I don't know whether it will but for me anyway it's got to be at that sort of high level because otherwise we are just dabbling in individual instances of a fairly well known juris prudence. You have to show that this is of sufficient general importance in some way or another to invoke the attention of the Supreme Court not just because your clients are miffed at this particular decision.

Akel Well, with great respect, I have obviously in my formulation of the questions I've tried to get that point home that in essence what has been applied by the Court of Appeal is contrary to the Bill of Rights issues. Now.

Tipping J I'm not sure about the Bill of Rights issues, it's contrary to what the Court should see as the modern correct application of the Charitable Purposes Test. The Bill of Rights might inform that but the Bill of Rights in a vacuum we hear about it not only daily but by every minute as the Chief Justice's rather mentioned earlier and we have to get some sort of precision into this.

Akel Alright, I won't mention the Bill of Rights again.

Tipping J You can mention it but for heavens sake lets mention it as relevant to something that is of a high level of importance in the community and I wouldn't take a great deal of persuasion that something along those lines might emerge from this case. I've got a completely open mind but I can tell you this much it's got to be at that sort of level rather than just nibbling around the edges of what all these people do and so on.

Akel Well I suppose I was by nibbling around the edges I was trying to help the Court in some way in trying to understand some of the concepts that are involved and as I said in my written statement.

Tipping J We've read it all, and I understand exactly what your case is driving at that you shouldn't have too narrow an ambit of employee. That it's quite unreal in the modern world to confine it as the Presbyterian case appears to, albeit it goes a little bit beyond Ministers, but that may be a point of some importance generally. How far should the concept of permissible employee go in this area?

Akel Well it is, obviously I haven't phrased it as well as Your Honour has but I do say at 5.3 "further who is to be regarded as the Minister of religion. Does it extend to a Church to Lay Preachers? The Court of Appeal decision makes the title used that as Minister of Religion

almost determinative”. So obviously I haven’t put it as well as Your Honour has with respect but that was the point that I was.

Elias CJ But what do you say though that the test should be, what is the test for charitable purposes that the Court should have adopted?

Akel Well the test I put forward is that with regard to the advancement of religion it can’t be confined in any way to just the temporal part of the advancement of religion. It’s got to be involved to the much more administrative side as well. It’s very.

Elias CJ Well your coming here to ask us to approve a point that’s worthy to be considered by the Supreme Court. Really its incumbent on you to come up with what you say your going to ask the Supreme Court to focus on and why the Court of Appeal got it wrong.

Akel Well Your Honour I did, the issues that I put forward at 4.1 of the submissions were at (C) “should the principles of Baptist Union Presbyterian case have been applied to the present case and in particular is there a sufficient nexus between the benefits provided to the employers of the Church by the Plan in the Charitable activities of the Church” and then (D),” raising the issue of the Bill of Rights” which I said that I wouldn’t refer to and in my submission although it has not been put as concisely as His Honour Justice Tipping has done, I have raised those two issues, is that the, are those the issues that really, is there an advancement in religion why the sufficient nexus of the Plan and the charitable activities of the Church?

Tipping J The sufficient nexus I think is a phrase used in one of the judgments isn’t it as I vaguely recall?

Akel It’s used in both Baptist and Presbyterian.

Tipping J Yes, well however one frames it your clients wish to argue both that they come within Presbyterian and Baptist Union properly applied and if necessary that those two cases are too restrictive in their approach to the nexus issue or the width of the employee concept.

Akel Yes, yes and without backtracking what happened at the Court of Appeal was the appeal was set on the basis and the High Court decision was set on the basis that Presbyterian was good law, and then half way through the, oh not half way through it, the beginning of the hearing, the Court of Appeal made it clear that they wanted to argue and hear argument on whether Presbyterian was in fact good law. And that’s why we had all sorts of submissions made on behalf of the Anglican Church. Now at the outset of this hearing when it comes to the factual distinction that is why I said that the factual distinctions that were made were to a certain extent artificial because they were in the background and the Judges really saying we don’t agree with Presbyterian so therefore when one looks at factual distinctions it’s

almost in a position of well even regardless of this, this is how we are going to look at it and there is almost a dismissive approach to the position of the Church.

Elias CJ Is the question something along these lines is support of employees who are Church members who further the charitable activities of the Church, is support of employees who are Church members who further the charitable activities of the Church, is that a charitable purpose? I mean I'm just trying to get a feel for what you're saying. You're saying these employees all further the charitable activities of the Church in some way.

Akel Yes, yes, yes. Could Your Honour just repeat that question again? That's a.

Elias CJ Well it's probably not very well put in fact I'd rather Justice Tipping had a go at it.

Tipping J Well that puts the wood on me Mr Akel.

Elias CJ Leaving aside what is the Church and how it compares with other Churches, because the Judges haven't purported to say this doesn't fit within our notion of a Church and if the question (D) that you posit well if the Court had decided that well of course there would be a point of importance to be determined but that isn't what they've decided, so it seems to me that you really have to go back to the charitable purposes test and look at what this Trust does and ask the question whether that is charitable purpose within the meaning of the Income Tax Act.

Akel Yes Your Honour but this argument with regard to the Bill of Rights was very much put before the Court of Appeal

Elias CJ Well of course it's part of the reasoning, it's part of the argument, but I'm trying to identify what the principle or point of law is and it seems to me that what your contending is that employees who are Mormon Church members and who further the charitable activities of the Church are charitable purposes.

Akel Yes, yes or is that.

Tipping J Would this come somewhere near it Mr Akel and I couldn't resist rising to the Chief Justice's challenge. This may not get it but is the Planning used to support the relevant employees within the scope of the charitable purpose test because it's the income off the Plan isn't it, it's income, income from the Plan which is used to support these various employees of the Church. The question is whether or not that income is, is it derived, or whatever the word is within the charitable purposes test there would be a sufficient encapsulation of it. That actually sharpens what I said earlier a little bit to the specifics of this

case. Because it's that money that is said to be free of income tax and it is presumably relevant as to where the money comes from and in particular what it's used for. Probably the latter significantly more than the former.

Elias CJ And then you will have to indicate why it was that the Court of Appeal didn't approach that task properly.

Akel Well, the question put forward by his Honour Justice Tipping has the potential to then weather the charitable purpose test within the confines of Baptist Union or Presbyterian.

Tipping J I wouldn't worry about that, they're either right, wrong or half right or half wrong, I mean we're not bound by that. Surely if we're going to examine the law in this area properly we don't want to be fettered in the question by whether it's consistent with Baptist Union or anything else. Our job is to get the correct law for modern times. I wouldn't introduce if I were you any issue as to how consistent or lacking in consistency it was with anything. The question is it is within the statutory test. That gives you, and I'm not arguing your case, the greatest width of argument and we wouldn't want to go into this with our hands half tied behind our back.

Akel Well I'm obliged Your Honour.

Tipping J That's speaking for myself.

Akel Well I am, I am, I say that sincerely, I am obliged Your Honour because you're quite right if I do bind myself or have some references to Baptist Union or Presbyterian then.

Tipping J You see certain members of the Court of Appeal didn't think much of Presbyterian and certain members of this Court might think it's great and that it should go further. I'm not saying anything, I'm just saying there's no point in having it come to us if it's not open for us to do whatever we think is correct. Now the other side is saying this is not a proper vehicle for such a wide-ranging inquiry at all and we'll hear what they say, but that's the nub of the matter. You say it is a proper vehicle for a higher level inquiry into the modern application of the charitable purposes test in the context of religions in New Zealand. They say it's not today. They say it's not. Well, we shall see. I am sympathetic to the view frankly and I'd want to hear from the other side on this that it seems to me distinctly arguable that on your first point that you do fit within Presbyterian if we confirm it as a correct approach to the law. That because certain Judges didn't like Presbyterian they had a disposition if you like to find that you weren't within it. That's putting it rather more bluntly the rather more tactful way you put it. I do think there could be force in that. Because if you're going to say well look we're not going to overrule this case but by golly we don't like it and we're going to make jolly sure that there's

not a squeak of an extension, it would perhaps tend to throw your thinking a little.

Akel Well it did and and that's why I said that the, and perhaps untactfully, that the fact distinction was artificial in my submission. I mean the first question that I was asked in the Court of Appeal as soon as I stood up was "are you prepared today to argue why Presbyterian is good law?" And I said no because that's never been an issue in this case.

Tipping J Well the Court of Appeal have in a sense put that issue onto the agenda and that helps you because it creates a much higher level issue than if it had simply been everyone accepts that Presbyterian's fine, do you fit within it?

Akel Well I am obliged Your Honour for the reformulation.

Tipping J You see our task when we give leave, if we give leave, is to, we are required by the rules to articulate very precisely, not over precisely, but with some degree of precision the approved ground as the rule puts it. That's why we have been tediously sort of gibbing you on this Mr Akel.

Akel Oh, it's not been tedious Sir, it's just that I, no hearing in front of Your Honour is tedious, I've learned that from many years experience. That's Sir why, I mean I had thought that I had hopefully got there in 4.1(C) and a combination of (D), but clearly if I can have a blank canvas without the fetters of Baptist Union and Presbyterian that is clearly better from my point of view.

Elias CJ Because one of the arguments on this formulation you will have to meet is that the Bill of Rights Act and the Human Rights Act don't permit favoured treatment for religious organisations at all, so that is one matter you will have to meet.

Tipping J That's not all good.

Akel No no, I am not oblivious to the argument, I mean one of the arguments about s.11 of the Bill of Rights is that that is in essence a non-establishment clause put another way another established religion.

Elias CJ Well it just may mean that those aspects of Churches which are charitable may need to be charitable in the non-religious sense may need to be separated out.

Akel Well the case is getting bigger with respect Ma'am by the moment because that's going to take us right back to Pemsel and whether or not Pemsel now is good law. I hope I'm not going to be confined to 20 pages of.

- Elias CJ Well I'm worried about the parties before the Court and why in this case I wonder whether since you're not arguing it seems to me about the legal tests applied. Whether this is an appropriate case to raise these very wide ranging issues, because on one view this is just a question of fact but if the wider questions of the extent to which Churches in themselves are to be regarded as charitable purposes in modern law is going to be ventilated then there are an awful lot of people affected by that.
- Tipping J That would depend to some extent, if not largely on the stance the Commissioner took.
- Akel Well its invariably the case that cases involving definition or application of charities for the advancement of religion involve the revenue in some way. That's invariably how they arise, they don't really arise with regard to education in this country. Your Honour the Chief Justice dealt with a case in an immigration-type case some years ago but the point is that most of the cases that arise in this area do involve a challenge by a Church to some revenue provision, and that's consistent, or a Sunday trading case as in **Drug Mart**, but a lot of the US jurisdiction, and whether or not that has any applicability in New Zealand is certainly in the context of revenue cases, so the point that's raised with regard to is will there ever be a proper case where that bigger issue is argued is likely to be in the context of a narrow, a much narrower issue.
- Elias CJ Yes, the problem is that on the big issue that we're now discussing we don't have the advantage of a considered judgment of the Court of Appeal. I would have thought that the Commissioner if wanting to open matters up to that extent there must be some case stated process that can be.
- Tipping J I don't know the Commissioner will necessarily in this case wish to go quite to that level of high ground and if that were indicated then I would be surprised actually, so although the question has got to be of general importance it doesn't have to sort of strike at the whole foundations of the law for 300 years. The pillars of the Temple might collapse Mr Akel.
- Akel No that's alright I was concerned about going right back to the Pemsel test but I mean from this case's point of view we do have a situation whereby there've been at least five other mainstream Churches and in fact ten, five we know of and ten acknowledged by the Commissioner, who have favourable tax treatment based in essence on Presbyterian or what went before it. Now with regard to the Anglican Church, the Anglican Church put an affidavit before the Court of Appeal and said that on the basis of Presbyterian Church they have had tax relief in other jurisdictions, so it has got much.
- Tipping J You mean in other parts of the world?

Akel In other parts of the world.

Tipping J I didn't know Justice Heron's writ ran so far.

Elias CJ Not his writ but his persuasion.

Tipping J Sorry, his persuasion.

Akel So as Mr Millard said in his memorandum submission to the Court, also reliant on the Presbyterian case, the Anglican Church has claimed charitable status in overseas tax jurisdictions. The prospect of having to confess it was not entitled to such status and to deal with the tax consequences is truly alarming. And he referred to the affidavit that was put before the Court. Now the Court said we're not going to give leave but they did consider the submissions, so the issue is already quite a big one and I put before in my bundle of documents, I put the commentary to the new Charities Bill and the Committee has said that they prefer the test that's been adopted in **Latimer** by the Privy Council to what was originally proposed for the Bill, that is the natural probable consequences test rather than the direct consequences test, but there's no suggestion and indeed in the commentary there's no suggestion that there shouldn't be tax relief for Charities. So the way the legislature is looking at it is really no change to charity laws. So that may be a submission that becomes important. But excuse me if I have concentrated in my written submission with regard to Presbyterian and Baptist Union, but certainly those are the only two cases that deal with this particular point.

Tipping J One of the points I thought you could make, and you probably have made it in effect is that, and I'm not expressing a view, but it is arguable that the Court of Appeal having de-stabilised Presbyterian this Court should clearly state whether Presbyterian's right, wrong, or whatever.

Akel In a broader picture.

Tipping J Well in a broader picture, but also of itself. That might have elements of the hypothetical vis a vis the fact that you didn't even appear to get within it so it doesn't really matter whether it's right or wrong. But anyway I think for myself I understand fully where your clients are coming from Mr Akel.

Akel Well, I'll sit down then unless there is anything further I can say.

Elias CJ No, no I think that's very helpful, thank you.

Corbett Ah, rather than go through all the submissions I'd intended to make, a lot of those have been covered already and are really based on my written submissions so I'd rather go to the heart of the points raised by

the Court with my friend. Ah, Justice Tipping raised a general question that he thought may be raised as a matter of law and that question was whether the income of the Church is derived for charitable purposes.

Tipping J Income from the Plan.

Corbett Income from the Plan, thank you, that's the point I wanted to make.

Tipping J I may have said something different but my note was Plan income.

Corbett No, I take your point. It was derived from charitable purposes. The first point I want to make on that, that is exactly the question that was before the Courts in the Courts below. That is the tax question in the case, whether the income of the Plan is derived from charitable purposes, and the law to date relating to the income tax cases and the application of charitable purposes is to apply the Pemsel tests and in particular the case focused on the advancement of religion. On advancement of religion Your Honour mentioned whether there could be an argument generally made whether as I understood it the advancement of religion is a charitable purpose at all.

Elias CJ Yes, yes.

Corbett The broad argument. That is an exceptionally the broad argument and in my opinion raises the very question of is this case an appropriate vehicle to do that, and that same question is also raised by His Honour Justice Tipping's point about whether this Court should settle "I will use my words once and for all the instability caused by the Court of Appeal by doubting the Presbyterian case, distinguishing the Baptist Union and doubting the Presbyterian case". Again that again raises the problem whether this is the appropriate vehicle for that and just a little a bit of background on the tax scheme here, how it works. This case was a challenge to an assessment. What happens is the Commissioner of Inland Revenue makes an assessment and a taxpayer has a right to challenge that assessment. This is one such case. The Presbyterian Church was in the old procedure but similar that Commissioner made an assessment and they had an objection to that assessment. So considering the Presbyterian case or the correctness of the Presbyterian case in this Court will necessarily involve the tax affairs of the Presbyterian Church. Deciding that the case was right, well obviously not, but if the case decides the case was wrong, then the Commissioner in applying the law, it will be necessary for him to make an assessment of the Presbyterian Church. The problem with that is the Presbyterian Church hasn't been heard in the main on that point and we've got another proceeding raising that exact same point starting at the lower Courts. It can of course start at the Taxation Review Authority unlikely to do that here.

Elias CJ So what is the other.

Corbett Taxation Review Authority.

Elias CJ No, no the other challenge.

Corbett The other challenge would be the Presbyterian Church challenging its assessment, which it has a right to do, if the Commissioner made an assessment of the Presbyterian Church.

Elias CJ Oh I'm sorry, you're not saying that there's an existing challenge.

Corbett No, no.

Elias CJ I see, sorry, I misunderstood.

Corbett But the Commissioner, if this Court decided that the case of the Presbyterian Church was wrong then in effect what would have happened is the Presbyterian Church's tax affairs would have been decided without having a chance to present its case, because the Commissioner would make an assessment of the Presbyterian Church and of course.

Tipping J How would the Court ever be able to say that an earlier tax case was wrong without hearing the taxpayer in that case. That seems a rather awkward situation. Would you have to join them in order to hit them over the head?

Corbett I think at the lower Court, I think at the lower, where it's left at this moment is the Presbyterian Church is doubted but the Court has held it as good law, so the Presbyterian Church continues to enjoy the tax advantages as a result of the finding of the Church in the Courts earlier on. The Anglican Church of course intervened in the Court of Appeal and the Court refused leave to intervene but did accept the submissions of the Church but one of the reasons that the Court refused to overrule the Presbyterian Church in my submission was taking into account these very varied points that if the Court said if leave had been given to intervene to the Anglican Church, it would have thrown up estoppel issues. If the Anglican Church of course had again had an assessment the Court had found the Presbyterian Church was wrong, the Commissioner had assessed the Anglican Church, then they've already been heard on the matter in the Court of Appeal and it would throw up estoppel issues. What I'm saying in a nutshell I suppose really is that the statutory scheme of the tax assessments is that each case stands on its own. Each case has the opportunity to make the argument. The Presbyterian Church, if it was assessed, would have a chance to make the argument it needed to make.

Tipping J But say, just testing, I understand your point but say I'm a High Court Judge and I'm hearing a tax case and an authority is cited to me involving the affairs of another taxpayer, and I think crumbs I can't

accept the reasoning in that case and I think the Judge in the previous case, or say I'm in the Court of Appeal might be simpler, that reasoning is just wrong, and my duty then according to my oath is to say so, but your saying I can't really say so because at least not without hearing the taxpayer in that other case.

Corbett No Sir, I'm not going as broadly as that. What I'm saying in that case there would be a case of conflicting authorities. There would be, you would be making a finding that you didn't agree with.

Tipping J Well subject to any other authority the decision of the Court of Appeal would prevail. If I'm sitting in the Court of Appeal I agree that if it was two High Court judgments, but if I'm in the Court of Appeal and the whole Court of Appeal decides that the High Court authority is wrong, it's an authority not in this case but some other case, the law would never be able to move then would it, at least not without hearing the taxpayer in the earlier case?

Corbett Ah, if there was indeed two conflicting authorities that would be exactly the kind of point that would be, should be, if I submission raised for this Court with conflicting authorities on the point. But there are no conflicting authorities in this case, there is a case of a distinguishing. Also the Court of Appeal in deciding it wasn't a suitable vehicle.

Tipping J Just pause would you. I regard this as quite important juris prudentially if nothing else. A High Court Judge faced with a Presbyterian type case you say at the moment must follow Presbyterian because the Court of Appeal though doubting it has said that it's not going to be overruled. I personally regard the situation as pretty unsatisfactory at the moment because the Court of Appeal have in fact said they are not going to overrule it but they don't think its right. I mean where does that leave everyone?

Corbett Well the Court of Appeal did refer to two authorities when it did discuss whether it was going to overrule. The Anglican Church Pensioner Funds submissions dealt a great deal with whether the case should be overruled and there was argument on that point. It was written argument there was no oral argument on those latest submissions and the Court of Appeal did refer to two cases of the Court of Appeal, the **Manson** and the **Smelt** cases. That's referred to in para. 93 and these were the reasons the Court decided not to overrule it. Justice Hammond also referred it not to be overruled because Parliament was at present looking at the Charities Bill and that's found at page 12 of the Decision, but in para.93 the majority said "the fact that the Commissioner did not appeal the Presbyterian Church Fund case and the extent to which it had been acted on and ways would be hard to unpick, we now think it would be wrong to overrule the decision and the report also refers to the considerations referred to in Re **Manson Public Trustee** and the **Commissioner of Inland**

Revenue and Smelt against the **Commissioner of Inland Revenue**. Now I'm sorry I don't have a copy of those cases here. I should have perhaps put them in the case book, but those two cases make the point that these cases, and they were revenue cases, were purely revenue cases and that's what they refer to, purely revenue cases, and if the Court has misunderstood the intention of Parliament then Parliament can put the matter right. And those cases really do sort of tie in with what Justice Hammond was saying that the matter's being looked at by Parliament at this time with the charities being closely looked at.

Tipping J But what about the present intending appellant? If, and it's a big if, they're entitled to this charitable view, it's pretty rough for them to be told that for all these reasons that you've been articulating very clearly that the Court is not going to intervene. Every litigant is entitled to the correct application of the law to their affairs and the Mormons are being told that because it would be embarrassing for the Presbyterians we won't actually go into it. Forgive me for speaking colloquially.

Corbett No I wouldn't have taken it that far Sir. What I would say is that the correctness or not of the Presbyterian Church case is one matter the test is as Your Honour put it is whether the income of the Church is derived for charitable purposes are much broader

Tipping J Of the Plan.

Corbett Of the Plan. Sorry. I'll cross that Church out. Is a much broader case and would.

Tipping J But it involves surely, it will necessarily involve if that were the question that came before the Supreme Court, it would necessarily involve a fairly close attention to Presbyterian and a number of other cases no doubt. You couldn't just sort of pretend that Presbyterian didn't exist.

Corbett But, I agree that you couldn't pretend it didn't exist but this was the exact point that the Churches looked at. They've looked at the facts, they looked at all the different facts, and my friend made quite a lot of the point that they carried out the employees furthered the Church through their employment, within their employment. There were considerable findings on the point that the work was done outside the furthering of the Church's religion, the advancement of religion, and the callings was outside of employment. These were employees who were gardeners, clerical people and the Court didn't have much truck with the argument that this was advancing religion.

Tipping J Well it may well not be.

Corbett There's a factual basis to the case in argument and it's strong factual basis to this case.

Tipping J Well I suppose at one level you can say that a Church gardener who keeps the Church grounds beautifully tidy is not advancing religion but there's an equal basis where you could say that that is advancing religion. I think it's a very difficult and interesting point as to how wide the people should go. So far it seems to be that its going as far as Ministers but the Court of Appeal doesn't really like it going even that far, hence their doubting Presbyterian.

Corbett They were looking Sir at some of the solutions that I had made on the point as to the correctness of the Presbyterian Church, and it was more a question in the case as whether the fund exhibited the altruistic factor necessary for a charity. That's of course the bottom line of a charity, it must have an altruistic flavour and the Court was looking at that and was saying well we think there's a difficulty here with the Presbyterian Church. What happened was in effect the employer of the Church, I'll say that in adverted commas, the employer of the Church contributed the employer, in adverted commas again, contributions and the Ministers and members of the clergy) it was not very good it was just the theological students as I recall and there may have been one other person contributed their part and it was contractual payments really. So what you have there really was whether this fund exhibited that altruism and the Court had doubts whether that it did. This wasn't really a focus on the Ministers or not the Ministers. That's where their doubt arose and I'll take you to that point on the judgment. At para.82 of the judgment where I was making submissions on the merits of the Presbyterian Church Fund case, I made two that the Court did not accept, but it was the third and fourth ones that the Court did accept, and I was exploring cases where the benefit to the Clergy, I went back through the early cases and considered all the cases where there had been benefits to the Clergy, and in those cases whether the gifts have been for the benefit of the Clergy they had involved outside bounty and in the Baptist Union case the vast bulk of the funds to the society came from outside donations and in that case of course the Ministers and contributors to the fund in that case hadn't paid donations for many years. In contra distinction in the Presbyterian Church Fund a very significant portion of the funds of the superannuation scheme came from the members of the fund and in relation to that proportion the members were fact investing their own funds for their own benefit. And the next point which is (D) of para.52 on this last aspect of the case Justice Heron was wrong to treat contractually required employer contributions made by the Presbyterian Church as being in substance donations. Those were the two submissions that I made and the Court said in para.84 "if we were to approach the case purely as a matter of principle, we would be inclined to see the Baptist Union cases defenciful primarily on the basis that funds came overwhelmingly from donations, and that's the point.

Tipping J This is the source of the funds argument isn't it?

Corbett Yes, the source of the funds. If those donations had been made directly to the Church invested by it and then distributed the investment return derived by the Church, pecking distribution would have been exempt from tax. In that context it might seem hard to treat the fund as subject to tax merely because of the form of the legal structures which were adopted. And this is the important point. On the other hand in the Presbyterian Church Fund case an appreciable portion of the funds held by the scheme came from contributions made by members as well “employer contributions made by the Church essentially is a matter of contract and is part of what loosely be described as an employment package offered to Ministers are not easily equated with donations in the request which were in the issue in the Baptist Union case. This notwithstanding that the stipends paid to Ministers were paid from funds which were originally donated and it is hard to see the Presbyterian Church fund as having the altruistic features which in the end moved Justice McDermott to hold that the Baptist Union fund was a Trust for charitable purposes. Those were the points that led the Court to say on that basis it may well be open to question whether the decision of Justice Heron and the Presbyterian Church fund case was correctly decided. That was the basis for the doubting in my submission.

Tipping J But this was a, forgive me if I’m wrong, but in the source of the funds argument diverts attention away from the way in which the funds are used, doesn’t it, which traditionally has been the more dominant consideration hasn’t it? You’ll know far more about this than I do Mrs Corbett I’m sure but just as a matter of impression.

Corbett There is of course in the income tax the two limbs. Whether the Trust was derived or the income was derived in Trust for charitable purposes and of course the other test whether it was established I can’t recall the exact words but the Court does consider that for the.

Tipping J But traditionally surely if you’re going to look at it from an income point of view you’re concerned with the purpose to which the income of the fund is put aren’t you? Rather more than with how the fund has been built up or produced. I have to say that when I read this I had a slight frisson of both anxiety and interest because it seemed to me to be shifting the focus quite substantially and this is another one of the reasons why I just think that this decision has left things in a potentially quite difficult situation.

Corbett Sir, I’ll just mention a couple of points on that. First of all the amounts derived by Trustees in Trusts, s.CB41© of the Income Tax Act.

Tipping J CB41©, yes.

Corbett And that’s referred to in para36 of the Court of Appeal’s decision, that’s cited there, CB41© makes, makes, there’s two limbs. Incidentally I got my new 2005 Tax Act TCH yesterday and looked up

the provisions now and noted that the new provision is taken into account the decisions of the Privy Council in the **Latimer** case on whether the private pecuniary profit of any individual is included within it and clarified the point that there are two clear limbs and there's two tests. The first one is 'any amount derived by Trustees in Trust for charitable purposes', that's the one of course that we have here. The second one is 'or any amount derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual'. We don't have that one here of course, and that second limb really is where a lot of the cases in my submission have, I'm not really prepared for this, I'm just talking off my head on this but a lot of the cases have looked at why and as I recall it, the **Latimer** case did this as well, why a particular society or institution was established. Was it established for a charitable purpose and is it necessary then to look at the objects of the particular society.

Tipping J That's the more frequent if you like isn't it?

Corbett Yes, and that's where the focus is very much on what are the objects of this one, are they charitable?

Tipping J Quite.

Corbett But the first limb it just says 'an amount derived by Trustees and Trusts for charitable purposes'. It was in my examination of the cases referred to and the Baptist Union case, and many cases actually going back on religious advancement of religion for many right back into history. What we had in all those cases was the case of a particular person making a donation to the particular body, it might be a donation for Church dinners or a donation for a fund, and that's in fact what the Baptist Union was, a donation made by an outside donor and that was the thing that I thought was in common in all those advancement of religions and we really didn't have it in the Presbyterian case and that was the submission that persuaded.

Tipping J But I must say with great respect you are very persuasive because if you just look at the words, the focus is on the purpose for which the income is held, there is no focus on the original source of the capital. It is what the Trustees are going to do with the income and quite how the Court of Appeal would no doubt with skilful assistance from you Mrs Corbett, got themselves into this business where the capital came from.

Elias CJ Well I can see that the purpose for which the income is held is coloured by the donation in many cases because it is donated for a purpose so it's held for that purpose.

Corbett And it was a charitable, it was an altruistic gift.

Elias CJ Yes.

- Corbett To people for their Church dinners or for something else, but in a case here the members of a fund contribute for their own benefit and their employer “contributes under contract” then I submitted that altruism. So at that level, whether they were Ministers.
- Tipping J Well it’s not so much the employers, it’s the question of whether the beneficiaries, because the employer, the Church’s money is presumably held generally for charitable purposes and if they choose to put it into this fund. I regard this as a very interesting, difficult and quite important point quite honestly and the only question for me is whether or not this is the right vehicle to have it properly and fully examined at the highest level. This is a sort of tangential point if you like from the main point as to whether you should be driven to the extent that the Court of Appeal were by the source of the funds. They may well be right, but it’s important.
- Corbett With respect they didn’t overrule the case allowed it as good law but they doubted it on that basis.
- Tipping J Yes, well I don’t know where that leaves everybody. What’s going to happen the next time round? I mean the thing has been de-stabilised. If they’d simply said yes Presbyterian splendid, yeah, but we’re not going to extend it for Mr Akel’s clients that would all be very very simple and straightforward but maybe wrongly Mrs Corbett I just think this has left the whole situation in an undesirably elusive state.
- Corbett Ah, there’s two points I would like to make on that and it raises the point you discussed with my friend do they argue that within the Presbyterian Church case or do they believe it should be extended.
- Tipping J Well that.
- Corbett I took it that in my submissions of course that it was extended because one of the fundamental points in the Presbyterian Church was the inter-relationship between the Ministers and the Church. The Court held in the case that the Ministers’ activities were essential to the Church and the Ministers in their turn had a financial dependence upon the Church, they continued with their ministry and pastoral duties even after they retired of course and an income was paid to them even after they had retired, so they gave lifetime commitment to the Church and in return the Church gave them some financial security albeit as was raised in the judgment, not a lot though there was some financial sacrifice made by them, so there was this particular inter-dependence between the two. Now my friend and in the Courts below extracted what was said to be principles from this case, like lifetime commitment, encouraging recruitment and these broad principles and the appellants argued they were within those principles. But of course the fundamental point is the principles weren’t really principles, they were just developed points made of the particular inter-dependence between the Church and the

Ministers, a lifetime commitment and in return the financial sacrifice and really if you apply those principles that my friend raised like easier recruitment, then a lot of them will apply to just about any superannuation scheme and it broadens it as the Court of Appeal noted very broadly, you could say advancement of education for teachers, doctors and nurses carrying on charitable works. The flow-on effect from this kind of analysis would have a huge impact on the tax base. Another point of course to do with the inter-relationship between the Ministers and Presbyterian Church is that they were actually specially trained to carry on, they were ordained Ministers and they had special training to carry on that ecclesiastical role, and the Courts found in this case as a matter of fact that this didn't apply in these cases, that these employees could transport, take their skills anywhere. They could go from a gardener at one place to a gardener somewhere else. So they could be carried on also by contracted staff or employees who were not Temple Worthy and they considered the Courts below and Justice O'Regan in his distinguishing factors at para.69 which were endorsed by the Court of Appeal in 107 said in many cases the activities of the employees could be carried out by contracted staff for employees who were not Temple Worthy. In that regard the activities of the employees cannot be said to be essential to the operation of the Church. This is a hark back to that inter-relationship. Now my friends have taken issue with that finding in their submission para.1.3K of their application when they say the non-ecclesiastical activities of the Churches' employees cannot be carried out by contracted staff. Well this of course is finding the fact and there are concurrent findings of fact on the Courts below and I would like to refer Your Honours to para.69 of the High Court decision, sorry para.95 where the Court refers to the appellants' counsel taking them through the evidence that Justice O'Regan was wrong to assume in many cases activities could be carried out by contracted staff. That was quite an important factual point in the case whether other people could do this, how could it be said then to have this inter-relationship that was within the Presbyterian Church. This is not dependent on Ministers' argument, it's this inter-relationship, and the Court after going through the evidence with my friend finds that the factors relied on by Justice O'Regan amply justified in distinguishing the case and this is one of the factors in para. 69A. So I take some small issue with my friend when he says that the facts are not an issue. That fact is an issue and my friend has taken issue with that finding of fact.

Tipping J You're saying essentially that the distinguishing of Presbyterian turned on matters of fact not law?

Corbett Yes.

Tipping J Is that the nub of the argument?

Corbett Yes, it completely is Sir. My friend has already made the point that the employees do not do the callings as Your Honour pointed out. Only all

members of the Church do callings as well, but they don't do it in the course of employment. That is quite an important feature because.

Elia CJ It's a qualification that seems for employment that you have to be somebody subject to calling but there's their employment work and there's their calling work.

Corbett Yes. And their employment work was very secular and transportable. These are factual bases on which the Court distinguished this case from the Presbyterian case. I've already mentioned the point that it isn't a case of conflicting authorities in the Courts below. The Baptist Union case and the Presbyterian Church case also turned on their own particular facts. These cases all turn with respect on their particular facts, and there is no issue of discrimination in the case in my submission and I think it's important to recall that this is not the Church we are talking about, the Church has got a tax exemption, the LGS Church has a tax exemption as does of course the Presbyterian Church and through these Churches they can manifest their religion whatever way they wish. This is about a Plan or fund for the benefit of certain people one step removed from the Church and if one looks at the Baptist Union case, the Presbyterian case, and this case, each of those Plans or funds depend on particular facts in those cases. Most factors do not include any assessment of or reference to the Church or their doctrines, and they don't have charitable status because of the Church or the doctrines, they relate solely to the particular factual circumstances of the particular Plan or fund and on this point I would submit it's important to note that the Court of Appeal in para.102 of its decision did look at this question of discrimination and did say and I quote here "it would not be right for the tax system to operate in a way which provides preferences for mainstream Churches and not for other Churches", and in that statement it's consistent with the Supreme Court of Canada and Gruenke which I've replied there. They're looking at it in a completely non-denominational way. They're just looking at the facts relating to this Plan. And the Court of Appeal held that this Plan, the Church's LDS Plan in this case, didn't have charitable status because of the factual distinctions in that case, and as Your Honour mentioned they do have options. There's options to fall within and these are the ways you could fall within it, and in fact in my understanding that's what happens, you know there's quite often dialogue with the revenue for example and taxpayers - would this fall within a charitable exemption, no it doesn't cover this, and there's dialogue that goes on in that respect. It's not discrimination, it's certainly not discrimination by the revenue, they are looking at simply this case and its facts, and in my submission it is also not discrimination by the Courts, in fact its not discrimination or denying a right to manifest religion or belief in any form.

Tipping J No, it's simply the consequences for tax purposes in the way in which you choose to formulate your Plan.

Corbett Yes Sir, precisely.

Elias CJ Well Mrs Corbett, would it be convenient to take a short adjournment at this point?

Corbett Yes.

Elias CJ Thank you.

Corbett There's only one further point I wanted to make and that's the outstanding issue relating to the associated employers' point that was made in the Court of Appeal and of course the High Court. Now my submission, even if this case were to get leave and even if it were to be decided on the broad charitable purposes or any of the points advanced or discussed till now, it could still on the facts fail for another purpose which renders the broad principle for charitable purpose. A little bit of a waste of time if it can fail on this small point and that point was referred to in para.109 of the Court of Appeal's decision and refers to the submission I made drawing attention to the position under the Plan deed of those employed by an associated employer.

Tipping J 109?

Corbett Yes, 109. This is where the Court discusses the argument. Now the Plan deed allowed employees of an associated employer to be beneficiaries of the fund.

Elias CJ We don't have the Plan deed in front of us do we.

Corbett No, that was in the case, but there is no dispute that it did allow that.

Tipping J It would be quite interesting to see the whole deed as we're being asked to say whether the income; see what are the classes of beneficiaries, what are the expressed purposes and so-forth.

Corbett Yes, I had thought perhaps I'm delving just a little bit too much in the merits when I'm discussing this. I'm really just pointing out that the submission was made in the Court of Appeal that this associated employer provision meant that it could not be said, relying on **Latimer**, that the application of the income was exclusively for charitable purposes because these could be a local fruit shop, or stationery supplier, they weren't members of the Church and that's perhaps the argument encapsulated and of course this was as my friend has said, this is one tax year and it is the only and one particular tax year we're looking at the particular Plan and that associated employers' provision was in, in that tax year and then it became an argument as to whether it was relevant that there were any members of associated employers as members of the Plan in that year and my friend took the point well no there weren't, so it was irrelevant and I took the point no on the

Latimer decision the fact that it could be there was enough to mean that it was.

Tipping J Well that's classic charity, the fact that something can go outside the circle defeats it unless it's so trivial, so incidental as being enemies almost.

Corbett That was the point I made Sir and the Court was attracted to that when they say in para.114.

Elias CJ It seems strange that they expressed in those terms given what I understood to be the nature of the law, in other words what's just been put to you that you're looking at the scope of the Plan, aren't you?

Corbett Yes.

Tipping J What could happen and if you've got one beneficiary outside the class, that defeats.

Corbett Yes, yes and um or potential beneficiary and that therefore cannot be said to be exclusively charitable and the Court said "the point made by Mrs Corbett may be technical but we're inclined to the view that it may be sound. But given that we're against", and they say this in 16 and discuss how Trusts are set up in a more general way in para.15, how it can be known to be set up for one purpose and other introduced at will, but they say importantly, "given that we're against the appellant on the primary issue in this case, there is no need for us to make a definitive finding on the issue and in my submission it was fatal for the year in issue that provision was fatal. It is still outstanding and it would be a matter that of course would be before this Court because it is the tax affairs of this particular Plan, the LDS, that is before the Court, whether they should pay tax or whether they are entitled to a tax exemption in that tax year, 2001 year and that's all unless there are any questions.

Tipping J Could you just help me Mrs Corbett, is there anything in any of the judgments below which clearly describes the class of beneficiaries capable of receiving distribution from the Plan.

Corbett They are the um, yes, um.

Tipping J The second judgment.

Corbett Yes, in the Court of Appeal.

Tipping J I'm just looking at Justice O'Regan's actually, in para.12 he describes.

Corbett They are essentially employees of the LDS Church.

Tipping J Employees, that's how the class is described is it?

Elias CJ Do you have the deed here? Can you give us the objects?

Tipping J It was in evidence I presume? Somewhere.

Corbett Oh yes. Ah, perhaps para.14 is of assistance in the High Court judgment where Justice O'Regan says that Plan deed provides not only for contribution by employees under a defined benefited part of the Plan but also for volunteer contributions, and he discusses that it's the employees and para.15 where he says members of the Plan are Church employees and he says there is a provision for admission to the Plan of an associated employer and that's where that was discussed.

Tipping J And does that bring in employees of the associated employer.

Corbett Yes, yes it does, and I have got, they are employees of the associated employer. I'll just see if that is covered in here. I certainly do have.

Elias CJ Can someone identify what I should be looking at for the objects.

Akel Perhaps I can help Your Honour. In the amended Statement of Claim which I can hand up it did set out the key issues.

Elias CJ So this is really quite useful I think, just looking at the recital of the contents. But the Statement of Claim.

Akel In the amended statement of the claim I have set out the specific definitions.

Elias CJ Thank you.

Tipping J I presume there's a definition of employee. Employee means any person who is engaged at work or works under a contract of service or apprenticeship with a participating employer. A participating employer is presumably both. Yes, it includes any associated employer.

Corbett Yes.

Tipping J So it's anyone who is engaged to work or works, so it's everybody working for an employer whether by way of manual labour, clerical or professional work or otherwise, and in respect of whom the participating employer in its sole discretion deems to be in its fulltime and permanent employment. Well that's actually a bit of a problem too, the deeming provision.

Elias CJ Shall we get a copy.

Tipping J I think we should have a copy of the Act.

Elias CJ Mr Akel if you could let us have a copy both of the amended Statement of Claim and the Trust Deed. I'm sorry it's quite a lot of photocopying for you but I think we'll take time to think about our decision in this matter and we would like to see that.

Tipping J And I think there may be cross-references to other deeds. I think there's a reference there for the third deed I noticed so it would be necessary to have everything.

Akel I'll get all the relevant documents that were put before the High Court. It's quite a complex document.

Tipping J Indeed. So you say that the associated employer/employee inclusion in the class whether there was actually someone under that description or not is fatal to the Charitable Trust.

Corbett Yes, I submitted that on appeal.

Tipping J Well they seemed to think you might have had a point, but they didn't need to decide it.

Corbett Yes, so it could render an appeal if this Court agreed with that.

Tipping J Yes, quite. Well you say you're going to win anyway on that point so there's no point in getting to all these other matters.

Corbett Well I would like to say that, yes.

Tipping J Well, that has to be your submission doesn't it?

Corbett Yes, that is it.

Elias CJ Good, thank you Mrs Corbett. Thank you Mr Akel.

Akel With respect, my friend made a lot of the fact that Baptist Union could be decided on the basis that the fund there was contributed to by voluntary donations and that that really was a major distinguishing point between that and Presbyterian. Now that submission was made before Justice Heron in page 375 of his decision, lines 8 to 15, and the decisions in the casebook there. His Honour said "Mrs Corbett would distinguish Baptist Union on the basis that the fund there was contributed to by voluntary donations, ignoring the employers' contribution which were solely funded by congregations, she said they were to be regarded as employers' contributions irrespective of their source. The evidence was that the funds as well as paying the stipend pay the employer contributions and are almost entirely funded by parishioners. Directly or indirectly all contributions to the fund derived from voluntary donations. Mrs Corbett has isolated direct donations to the fund in making that submission but that would be to ignore the substance of what has occurred". The fact that the donated funds are

directed to employer contributions does not change the essential nature of them as donated funds, so for whatever reason Justice Heron was seeing the funds in that case as donations and if one looks at it any contribution by an employer to a fund has really, it's a gift, it is a donation. It's in that nature.

Tipping J It's not a donation to the fund, it derives from money which was donated to the Church.

Akel Yes but Sir the point I'm making is this is that any outside contribution that is made by anyone to any fund not pursuant it must be in the nature of a donation. That's the very nature of it.

Elias CJ Wouldn't there be employment law requirements that prompt such payment in these cases? Contractual or something of that sort.

Akel Yes, I suspect so Your Honour, but no matter whether it's pursuant to a legal obligation to do so, it is a fund that is contributed in the nature of a donation or a gift to top up the superannuation. That's the very nature of it.

Tipping J I don't think with great respect that (a) it matters, or (b) that you've fully got the force of what Justice Heron was saying. I don't think it matters because what the Judge was saying was that the original source of the funds with which they made the also called 'gift' to the Plan was donated funds, therefore it didn't matter in the end. It was a contractual payment to fund but the source of the money was a donation to the Church. Isn't that what the Judge was saying?

Akel Yes, that's what the Judge will say, but it can't be the case that Presbyterian is different from Baptist Union on the donation point and that's the point that the Court of Appeal says, we will distinguish if we have to back this union, on that simple basis, and that can't be the case. My friend also said and I'm not going to respond to all the issues on facts, but my friend makes a lot on the fact that she says "the Commissioner's decision is no reference to the Church's doctrine, so therefore discrimination doesn't come into play but in fact the decision of the Court of Appeal goes to the very heart of the most basic doctrine of the Church in this particular case which is no paid Ministers and no structural religion. Now if the Court of Appeal's turning around and saying we accept that there are factual distinctions to be made here therefore we do not apply Presbyterian, that factual distinction goes clearly to the heart of how this Church manifests its religion. It's one of its key tenets that they do not have.

Elias CJ But, sorry, I might have missed what you were saying there but I didn't pick that up from the Court of Appeal determination that they were saying only if the Church had paid Ministers would the objects be charitable.

- Akel Well it must be that Your Honour because they're saying we're only going to confine Presbyterian to clergy and their dependants. Well if a Church.
- Elias CJ But you can have lay clergy. I mean it's all to do with what function is being performed. You were boggling at the secretaries and gardeners.
- Akel Well I, well I mean that's going into the factual issue which is what do they do? I mean the submission could easily be made that a person who is a gardener tending the Temple is of much advancing religion as the person who is administering secretarial work. To a lot of people that would be what the very nature of true Christianity is about and what the concern that has been expressed in the cases is as soon as the Court start getting into how the Church.
- Elias CJ Well what are you saying, in my Church the women who do the flowers at the Church are on a voluntary basis, and on your argument they could become employees of the Church and subject to the fund.
- Akel Well they're not employees, obviously not employees.
- Elias CJ Well that's just a question of how it's structured.
- Akel That's right but they're not employees of the Church but to many people the argument would be that they are just as much a part of the advancement of religion as the Minister.
- Elias CJ Well they might be, but where's any authority which says that promoting religious purposes which is recognised to be charitable goes as far as that.
- Akel Well there's not because the authorities are to the effect that the Court doesn't get into that distinction and it was the point made by the US Supreme Court in accepting it different juris prudence may be different here but in the **Amos** decision the Supreme Court said where an employer was dismissed because he didn't have a Temple Recommend , the Court said we're not going to go into how a Church operates otherwise we're entering into that issue of what is a bone fide Church or, sorry, we're making determinations as to what is good and bad and what we approve of and don't approve of.
- Elias CJ But we're not getting into how the Church is organised. We're only dealing with whether the purposes of this fund are charitable within the meaning of the legislation of the case law.
- Akel To a certain extent we have to look at the organisation of the Church and it's administration to determine that to see whether or not those people are advancing religion.

- Elias CJ It just strikes me Mr Akel that ultimately it has to be a question of degree and the two Courts below have looked at this and said this fund goes too far.
- Akel Well, the basic premise that the Courts below look at is “it goes too far because you’re extending it to”, as Justice Hammond said, “to the gardener.” The other people were there. Well that overlooked that the gardener in fact carries out other services as well, he was the equivalent of the Sunday School Teacher
- Elias CJ No, but you don’t need to go into the particular people, you’re looking at what’s available under the deed and there’s no limitation there, they’re simply employees, and they can be clerical employees or manual employees or any other sort of employee.
- Akel I understand, I’m not oblivious to the points that Your Honour is making, what I’m trying to submit is that when you look at this particular Church and its structure, the employees are quite different from other employees because of the close alignment to the religion, to the.
- Elias CJ Most Churches depend on a huge amount of voluntary support but I don’t see that the organisation is so very different in quality. The question is how much of that support is properly characterised as for religious purposes?
- Akel Yes, let’s come at another angle. In the traditional Church structure the Minister of the local Parish would most probably be involved in where are we go to sight the Sunday school, or where we go for some town Planning issue that may arise with regard to a modification to the Church, as well as obviously tempering to the flock and all other things and Sunday Service. In this Church those factors, that is where the new Chapel is going to go, town Planning issues, maintenance of the Chapels is all done at the Administration Centre because there is no Minister who does that.
- Elias CJ Well I must say my experience is that it’s not the Ministers who do those things it’s all the voluntary people who are associated with supporting Churches. Anyway, I think I understand.
- Akel The third point with regard to the associated employer, as I’ve said in para. 3.13 *William Young & Chambers JJ* were inclined to the view that the associated employer provision was fatal to the appellants’ case. However they saw no need to make a definitive finding on this issue. But as Justice O’Regan said at para.78 “the fact that there was no such associated employers in 2001 makes the issue moot. Now the situation here is quite different from the potential for the ultimate payment of the income to be made to the Crown in **Latimer** some time in the future. If there are no associated employees, that is what Justice O’Regan said, that should be the end of the matter.

- Tipping J I'm not at all sure that that's right as a matter of charity law where you look at the potential class, everyone within the class has to be within the test. If you've got people outside the test within the class then doesn't that defeat the whole, that's **Diplocks** case in the blue pencil rule and the reason why they amended the Charities Act to allow modifications to be made etc, etc. With great respect to Justice O'Regan I'm not at all persuaded at least at first blush that he says that the fact that there isn't anybody actually in existence at the relevant time saves the day.
- Akel Well that would, that would seem to place the greater emphasis, or too much of an emphasis on what is actually said in the Trust Deed whereas in the other areas in **Latimer** one's not looking at the direct consequences of the Trust Deed but at the natural and probably consequences of the Trust Deed.
- Tipping J Well it's clear law that if you have a discretionary Trust some of the objects of which are charitable and some aren't it's not a Charitable Trust so I can't see the difference here. You might never intend to distribute to the non-charitable ones but the fact that you have the power to do it defeats it, so I really can't see a great deal of difference. But anyway I don't think you're going to fall if you're going to fall at all on this point Mr Akel.
- Akel Well, I would hate to have come all this way to hear.
- Tipping J Well to be quite frank I think it is a point of considerable force. That once you have someone within the class who doesn't qualify, my understanding is that that destroys them but the point's there, it's been foreshadowed and you can no doubt not say much more about it.
- Akel Yes, and I can't but as I've said I studied carefully the **Latimer** case because obviously that became an issue in the Court of Appeal, but
- Tipping J It's nothing to do with the **Latimer** case it's to do with basic principles of charity law I would have thought.
- Akel Well my friend relied very much on that.
- Tipping J Well may be she did but I'm saying it to you that I think it goes far far wider than the **Latimer** case. **Latimer** is a manifestation of a wider principle.
- Akel Anyway, I don't think there is anything else, I think I've covered the major points that have been raised by my friend. As I said I don't really want to get into going over the factual issues again, not that I'm saying.

Tipping J Do you accept that the class is no narrower and no wider than employees? We'll have to look at the deed for ourselves, but that's your understanding is it Mr Akel?

Akel Yes, oh yes.

Tipping J Employees of both the defined employers and the so-called associate employers.

Akel Yes, that's it and that there were no associated employers and all employees are that group at the Administration Centre in Takapuna, the Temple.

Tipping J But if there were an associate employer you accept that his employees are within the class.

Akel Yes, under the deed.

Elias CJ Thank you Mr Akel, as we indicated we will need time to think about the submissions. Thank you all counsel. And if you could arrange for us to have that material that would be very helpful Mr Akel.

Akel If there is anything else of assistance or may be of assistance I'll converse with my friend and see if there's just anything else in the crucial document.

Elias CJ I can't think that there would be Mr Akel. I think it's simply the Trust Deed and I would find it useful to see the Statement of Claim but if there's anything more we'll ask the Registrar to contact you. Thank you.