IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA69/2019
[2020] NZCA 143

BETWEEN	THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS TRUST BOARD First Appellant/Cross-Respondent	
	PAUL ROSS COWARD Second Appellant/Cross-Respondent	
AND	COMMISSIONER OF INLAND REVENUE Respondent/Cross-Appellant	

Hearing:	17 March 2020
Court:	Cooper, Collins and Stevens JJ
Counsel:	R A Green and N B Bland for Appellants/Cross-Respondents H W Ebersohn and C M Kern for Respondent/Cross-Appellant
Judgment:	6 May 2020 at 11.00 am

JUDGMENT OF THE COURT

A The appeals by the first and second appellants are allowed.

B The High Court's declarations are substituted with a declaration that all payments made to the Trust Board by the taxpayers in this case are gifts for the purposes of s LD 1(1) of the Act.

C The cross-appeal by the respondent is dismissed.

D The respondent is to pay one set of costs to the appellants for a standard appeal on a band A basis with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] The issues addressed in this judgment arise from payments made by taxpayers to a charity, namely the Trust Board of a church in circumstances where the payments are:

(a) voluntary and not refundable;

(b) made either by taxpayers who are performing charitable work (missionary services) overseas on behalf of the church or by taxpayers connected to the person performing the missionary services; and

(c) not applied by the Trust Board towards the missionary services or the persons performing those services. Instead, the missionaries receive financial assistance from entities overseas that are part of the church's global network.

[2] The principal issue is whether the payments made by the taxpayers to the Trust Board are gifts and therefore provide a tax credit under s LD 1(1) and (2) of the Income Tax Act 2007 (the Act).

[3] There are two sub-issues that stem from the principal issue, namely:

(a) whether any of the taxpayers receive a material benefit from the financial assistance received by those performing missionary services overseas; and if so

(b) whether there is a connection between the payments made by the taxpayer and the financial assistance received by the New Zealand missionary serving overseas so that the payments cannot be treated as gifts.

[4] There are two appellants:

(a) The Trust Board of the Church of Jesus Christ of Latter-Day Saints in New Zealand (the Trust Board). It is established by a Private Act of Parliament[1] and is a registered charity under the Charities Act 2005.

(b) Mr Coward, who is a member of the Church of Jesus Christ of Latter-Day Saints in New Zealand (the New Zealand Church). He made payments to the Trust Board when his daughter became a missionary in 2014.

[5] In the High Court Hinton J determined that payments made to the Trust Board:[2]

(a) by a missionary, his or her parents, guardians, or grandparents are not gifts, and are therefore not able to be treated as tax credits; but that

(b) payments made by a missionary's sibling, other relatives such as a cousin, uncle or aunt and members of the Church in New Zealand who are not related to the missionary, are gifts and therefore eligible to be treated as tax credits.

[6] The Trust Board and Mr Coward have appealed the first part of the High Court judgment we have summarised in [5(a)]. The Commissioner of Inland Revenue (the Commissioner) has cross-appealed the second part of the High Court judgment summarised in [5(b)].

[7] When it is convenient to do so we shall refer to all who made payments to the Trust Board as being "the taxpayers". That term encompasses a missionary, a member of his or her family or a member of the New Zealand Church who make payments to the Trust Board in the circumstances covered by this case.

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1 Church of Jesus Christ of Latter-Day Saints Trust Board Empowering Act 1957.

2 *The Church of Jesus Christ of Latter-Day Saints Trust Board v Commissioner of Inland Revenue* [2019] NZHC 52 [High Court judgment] at [127].

Background

[8] The Church of Jesus Christ of Latter-Day Saints (the Church) is an international organisation based in Salt Lake City, Utah. Its New Zealand activities are administered by the Trust Board. The Trust Board holds property in New Zealand on trust for the general religious, charitable and educational purposes of the Church in New Zealand, subject to any specific trust and specific provisions regarding the use of buildings for public worship and other purposes.[3]

[9] One of the roles of the Church is to send missionaries, usually young women and men, into international communities to proselytise, which is a form of missionary service. There are approximately 70,000 young people performing missionary services on behalf of the Church throughout the world. At any one time there may be up to 300 young New Zealanders performing missionary services on behalf of the Church in other countries.

[10] Those who are appointed as missionaries by the Church are expected to make significant financial and personal sacrifices when carrying out the Church's work. Missionary terms are usually for 18 to 24 months and may involve considerable sacrifice and hardship. Missionary service for the Church is voluntary and is motivated by the missionary's spiritual desire to advance the aims of the Church.

[11] In *Davis v United States*, the Supreme Court of the United States held that payments made directly to the account of a missionary of the Church by his or her parents in the expectation that the payment would be applied towards missionary work carried out by the taxpayer's child was not tax deductible under s 170 of the United States Inland Revenue Code 1954.[4] This was because the funds in question were not for the use of the Church, but were to be applied for the benefit of the missionary on whose behalf the payments were made. The Church in the United States responded by ensuring that future payments by a United States taxpayer are made to a "Ward Missionary Fund". Those payments are not applied to the missionary.

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3 Church of Jesus Christ of Latter-Day Saints Trust Board Empowering Act, Preamble and s 4.

4 *Davis v United States* 495 US 472 (1990).

As a consequence, the Internal Revenue Service (the IRS) of the United States now treats such payments as being tax deductible.[5]

[12] In New Zealand there is no separate Ward Missionary Fund. Instead, all payments made by a taxpayer to the Trust Board are intermingled with the Trust Board's funds and applied, at the sole discretion of the Trust Board, towards the activities of the New Zealand Church in a manner consistent with the objects and purposes of the Trust. The payments made by taxpayers to the Trust Board are voluntary and not refundable.

[13] The financial support the Trust Board receives from New Zealand sources is insufficient to meet the costs associated with the New Zealand Church's functions in New Zealand. As a consequence, the Trust Board relies on payments it receives from the Church in Salt Lake City to meet a substantial portion of the costs of missionary work that is carried out in New Zealand, as well as the performance of other activities undertaken by the Trust Board on behalf of the New Zealand Church.

[14] A member of the New Zealand Church who is selected to be a missionary in another country has their basic travel, accommodation, food and mission-related costs met by the Church organisation of the country in which the missionary is serving. We will refer to these costs as the missionary's "basic costs". If the Church organisation in the host country is unable to meet those basic costs, then the Church in Salt Lake City meets the costs associated with maintaining the missionary in the host country. The Trust Board makes no payment towards the costs of a New Zealand missionary serving overseas.

[15] A New Zealand missionary is expected to make financial contributions towards his or her missionary work in a foreign country either through his or her own resources, or through financial support from their family. The Church's handbook states:

> The primary responsibility to provide financial support for a missionary lies with the individual and [their] family. Generally, missionaries should not rely entirely on people outside of their family for financial support.

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5 Internal Revenue Service *News Release* (92-20, 18 February 1992).

> Missionaries and their families should make appropriate sacrifices to provide financial support for a mission. It is better for a person to delay a mission for a time and earn money towards his or her support than to rely entirely on others. However, worthy missionary candidates should not be prevented from serving missions solely for financial reasons when they and their families have sacrificed according to their capability.

[16] The Church has developed a set of guidelines concerning the amount that a missionary, his or her family or a member of the Church should strive to pay to a Ward Missionary Fund. That sum, referred to as a "equalized contribution" does not reflect the actual costs of maintaining a missionary in an overseas posting.

[17] The New Zealand Church is not a "designated country" that takes part in the equalised contribution scheme. Nevertheless, the Trust Board sets a "standard amount" which people in the position of the taxpayers are encouraged to pay. In New Zealand the "standard amount" is currently $385.00 per month. That sum is recalculated on a regular basis and was as much as $475.00 per month from 2011 to 2014.

[18] Most missionaries or their families manage to pay the "standard amount". For example, in 2014, when Ms Coward became a missionary, 655 members of the New Zealand Church were undertaking missionary work abroad. Of that number, 629 were able to fund their missionary work through their own resources or with the assistance of members of their family or other people.

[19] If a missionary, their family and the New Zealand Church cannot meet the amount of financial assistance required, they can be assisted through a fund called the "General Missionary Fund", which is a fund to which church members can contribute and which is administered by the Trust Board.

[20] In summary, all payments to the Trust Board by the taxpayers are:

(a) voluntary and not refundable;

(b) applied at the sole discretion of the Trust Board towards the activities of the New Zealand Church in this country; and

(c) not applied either directly or indirectly towards the missionary work that the missionary performs overseas.

[21] There is, however, an association between the payments made to the Trust Board that are in issue and the financial support that a missionary receives when performing missionary work overseas. That association arises from the fact that the payments that the taxpayers wish to treat as gifts are made because the missionary with whom they are connected is undertaking missionary work overseas, and in the anticipation that the Church in the host country, or the Church in Utah, will provide financial support for New Zealand missionaries who are performing missionary services overseas. We examine the relevance of this association at [64]–[71].

Key legislation and authorities

[22] Section LD 1(1) of the Act states:

> **LD 1 Tax credits for charitable or other public benefit gifts**
>
> *Amount of credit*
>
> (1) A person who makes a charitable or other public benefit gift in a tax year and who meets the requirements of section 41A of the Tax Administration Act 1994 has a tax credit for the tax year equal to the amount calculated using the formula in subsection (2).

[23] Section LD 1(2) sets out a formula for calculating the tax credit that a taxpayer receives from making a charitable gift in accordance with s LD 1(1).

[24] The Commissioner accepts that if the payments in question are "gifts", then all other requirements of s LD 1(1) of the Act are satisfied.

[25] In *Mills v Dowdall*, this Court considered the meaning of the word "gift" in the context of s 10(1) of the Matrimonial Property Act 1976.[6] In his judgment, Cooke J noted that the property transactions in issue in that case could not possibly be regarded as gifts because they were not gratuitous and involved more than minimal consideration. In reaching this conclusion Cooke J said that where an arrangement comprises a number of interconnected transactions "their effect may be looked at as a

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6 *Mills v Dowdall* [1983] NZLR 154 (CA).

whole".[7] Richardson and Bisson JJ issued separate judgments in which they agreed with the conclusions of Cooke J.

[26] Richardson J analysed the common law meaning of a "gift" which "refers to a transaction whereby the owner of property conveys the ownership of that property to another without consideration".[8] He proceeded to summarise what he referred to as the "well settled" legal principles "governing the ascertainment of the true legal character of a transaction". Those principles included the following elements that are relevant to the issues before us:[9]

(a) The true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out.

(b) The whole of the contractual arrangement needs to be considered. If the arrangement involves a series of interrelated agreements, they should be considered together.

(c) Regard should be "had to surrounding circumstances: not to deny or contradict the written agreement but in order to understand the setting in which it was made and to construe it against that factual background having regard to the genesis and objectively the aim of the transaction".

[27] Richardson J said the only exceptions to the principle that the legal consequences of a transaction turn on the terms of the legal arrangements actually entered into and carried out are:

(a) where the transaction is a sham; or

(b) where a statutory provision, such as the tax avoidance provisions of the Act, requires a different or broader approach.

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7 At 157.
8 At 158.
9 At 159.

The Commissioner accepts that neither of these exceptions are relevant in the present case.

[28] The meaning of the term "gift" may arise in a variety of legislative contexts. In *Chief Executive of the Ministry of Social Development v Broadbent* this Court considered the meaning of "gifting" under the now repealed ss 147 and 147A of the Social Security Act 1964 and reg 9B of the Social Security (Long-term Residential Care) Regulations 2005.[10] In *Commissioner of Inland Revenue v Roberts* this Court determined that the forgiveness of a debt owed to a donor by a charity constituted a "charitable or other public benefit gift" for the purposes of s LD 1(1) of the Act.[11] In both cases this Court determined the meaning of "gifting" and "gift" by reference to the text and purpose of the legislation and then applied that meaning by considering all of the arrangements that were actually entered into and carried out. That approach accords with the judgments in *Mills v Dowdall.* It is the approach that we will also follow.

High Court judgment

[29] The High Court decision arose from two proceedings. First, Mr Coward challenged the Commissioner's decision to not allow him a tax credit for the payments he made to the Trust Board.[12] Second, the Trust Board applied under the Declaratory Judgments Act 1908 for various declarations that payments made by a missionary, his or her family, and members of the Church in New Zealand were gifts for the purposes of s LD 1(1).

[30] After setting out in detail the facts which we have summarised at [8] to [21], Hinton J examined a number of cases cited to her in which courts in Australia, Canada, the United Kingdom and the United States have examined transactions to determine whether or not they constituted a gift. The Judge was particularly attracted to the Canadian decision of Miller J in *Coleman v The Queen*, which she said had some similarities to the issues before her.[13] *Coleman* involved financial assistance provided

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10 *Chief Executive of the Ministry of Social Development v Broadbent* [2019] NZCA 201, [2019] 3 NZLR 376.

11 *Commissioner of Inland Revenue v Roberts* [2019] NZCA 654.

12 Tax Administration Act 1994, s 138C.

13 High Court judgment, above n 2, at [55], citing *Coleman v The Queen* 2010 TCC 109.

to students by way of bursaries and scholarships to attend Christian colleges and universities. Students and their parents were required to raise "donations" for a Christian charity. Donations that were made were not refundable and not all students who raised money qualified for assistance. The amount of financial assistance that students received by way of bursaries and scholarships was determined after having regard to, amongst other things, the amount of funds a student and their parents raised for their charity. Students and their families were told how much funding they would need to raise by way of "donations" in order to receive the maximum amount of financial assistance for the charity education programmes.

[31] Hinton J said she considered *Coleman* to be particularly relevant because the Court in that case was considering whether the donations were "gifts" and therefore tax deductible in circumstances similar to the present case.[14] She set out the following principles derived from *Coleman*:

(a) For there to be a gift, there must be a voluntary transfer of property owned by the donor to the donee.[15]

(b) There can be no material benefit flowing to the donor as a result of the donation.[16]

(c) However, a minor benefit or consideration will likely not be sufficient to vitiate the gift.[17] Neither will a "pure moral" benefit.[18]

(d) In examining whether the donor receives a benefit, the following considerations are relevant.[19]

(i) The benefit to the donor need not arise as a result of meeting a legal obligation.

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14 High Court judgment, above n 2, at [64].
15 *Commissioner of Taxation of the Commonwealth of Australia v McPhail* (1968) 117 CLR 111 at 116; and *R v Friedberg* [1991] FCJ 1255, 92 DTC 6031 (FCA) at 6032.
16 *Commissioner of Taxation of the Commonwealth of Australia v McPhail*, above n 15; *R v Friedberg*, above 15; and *Coleman v The Queen*, above n 13.
17 *Mills v Dowdall*, above n 6, at 156.
18 *Coleman v The Queen*, above n 13, at [47].
19 At [42].

(ii) Anticipation of a benefit may be sufficient to deny a gift.

(iii) There must be a connection or link between the donor's payment and the benefit. The cases refer to a "link" or being "hand-in-hand" or "directly related".

(e) The donor does not have to directly benefit from the donation, it is enough that the benefit is indirect, albeit it must be more than a pure moral benefit. For example, there will be a material benefit for a parent or grandparent in ensuring one's children are educated,[20] or if one receives a contractual right to insist on the donee's performance, as a result of the payment.[21]

[32] Applying the principles from *Coleman*, Hinton J reached the following four key conclusions.

[33] First, payments made to the Trust Board by the taxpayers were voluntary.[22]

[34] Second, there was a link between the payments made by the taxpayers and receipt by the missionaries of their basic costs when serving in a mission overseas. Hinton J said that these "donors knew and anticipated that their paying money to the Trust [Board] would enable the missionary on behalf of whom they were paying to go on their mission, and correspondingly to have their [basic] expenses paid by the Church".[23] The Judge was satisfied that the substance of the transaction involved the taxpayer making payments to facilitate missionaries being able to travel and carry out their mission services. Hinton J said that while the transactions did not create contractual obligations, they were nevertheless couched in the clear expectation that the payments were made to enable missionaries to serve overseas.

[35] Third, there were material benefits derived by some of the taxpayers when they made their payments to the Trust Board. In relation to missionaries, they received

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20 *Coleman v The Queen*, above n 13.
21 Like in *Case 76* (1987) 9 NZTC 1,451 (TRA).
22 High Court judgment, above n 2, at [98].
23 At [105].

their basic costs in exchange for the financial sacrifice they had made. Hinton J held that a "payment by a parent or grandparent that benefits a single 'child' will generally also benefit the donor".[24] The Judge said:[25]

> While their primary aim may be to benefit the Church, the parents and grandparents also benefit by seeing their "child", who while no longer a child is still engaged in life education, being able to travel, live overseas, and experience being a missionary abroad. That is a more than de minimis benefit.

[36] Fourth, payments made by other relatives, friends and members of the Church of a missionary are not gifts because they:[26]

> … will not generally feel the same sense of obligation (or any obligation) to assist an applicant, or to ensure their needs are met. Nor do they stand to benefit from the fact the missionary benefits, other than in a minor way. These payments … fall into the category of pure generosity, or provide the donor with a "pure moral benefit".

[37] These four key conclusions led Hinton J to decide:[27]

(a) That Mr Coward's payments to the Trust Board were not gifts.

(b) Payments to the Trust Board by missionaries, their parents, legal guardians and grandparents are not gifts.

(c) Payments by other relatives and Church members unrelated to the missionary are gifts.

Summary of appellants' case

[38] Relying upon *Mills v Dowdall* Mr Green, senior counsel for the appellants, said that the true nature of the transactions in issue was to be ascertained by careful consideration of the legal arrangements actually entered into and carried out. He submitted that the High Court Judge adopted a legal framework that led to an incorrect outcome. Mr Green acknowledged the need to have due regard to the context in which those transactions occurred.

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24 At [117].
25 At [117].
26 At [119].
27 At [128].

[39] Mr Green emphasised that the payments at issue were made to, and unconditionally became the property of the Trust Board to be applied in whatever way it considered appropriate to advance its charitable purposes. No payments were made to those engaged in performing missionary work overseas. Thus, the payments made by the taxpayers to the Trust Board were not a payment for services and met the purposes of being a charitable gift under s LD 1(1) of the Act.

[40] Mr Green drew support from the approach taken by the IRS towards payments made to the Church in the United States. He emphasised the arrangements put in place in the United States following the *Davis* decision, and noted that the federal tax authorities in the United States have confirmed that tax deductions can be made for payments made to the Church in similar circumstances to those that are the focus of this judgment. Mr Green submitted that while decisions in other jurisdictions help inform the task before us, the cases from Canada and Australia that Hinton J found most helpful are readily distinguishable from the circumstances that we are required to consider.

[41] Finally, Mr Green emphasised that there is no distinction to be drawn between different categories of taxpayer.

Summary of respondent's case

[42] The gravamen of the Commissioner's case was that the payments made by the taxpayers to the Trust Board were made to provide financial support to missionaries and are therefore not gifts.

[43] Mr Ebersohn, senior counsel for the Commissioner, said that a nuanced approach was required that examined the substance of the transactions that were actually carried out.[28] He argued that the Court needed to look beyond the simple form of the arrangements.

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[28] *Honk Barges Ltd v R* [2019] NZCA 157 at [88].

[44] Mr Ebersohn submitted:

(a) The judgment in the Canadian case of *Coleman* provides a useful pathway to addressing the issues raised by this case.

(b) There was a clear connection between the payments made by the taxpayers to the Trust Board and the financial assistance that missionaries from New Zealand received through the Church when performing missionary services overseas.

(c) Missionaries received a benefit in the form of having their travel, accommodation, food and other expenses paid while they were serving overseas.

(d) Parents and grandparents also received a benefit in knowing that their child or grandchild who was performing missionary services overseas would receive financial support from the Church.

(e) Other relatives of the missionary and members of the New Zealand Church were not acting out of "disinterested generosity" when making payments to the Trust Board. There was, in Mr Ebersohn's submission, a real benefit to them in having the missionary called to service.

[45] Mr Ebersohn went further when he contended that although there did not need to be a contractual relationship between the taxpayer's payments and the financial benefit received by missionaries, there was in fact an enforceable agreement between, for example, Mr Coward and the Trust Board. Mr Ebersohn submitted:

> If, while Ms Coward was performing her missionary service, and after her father had sacrificed by making the payments in response to his daughter's calling, the Church refused to cover his daughter's personal expenses; a New Zealand Court would intervene on the basis of an existing contract.

[46] In summary, the case for the Commissioner is that none of the payments made by the taxpayers were gifts.

Overseas authorities

[47] Both parties referred extensively to a number of decisions from cognate jurisdictions which they said informed the way we should address the issues raised by this appeal. We will not refer to all of the cases that were brought to our attention because many were decided in circumstances that were vastly different from the facts in this case. We will however, briefly summarise the most relevant cases that were discussed in counsel's submissions. Those cases fall into two categories, namely situations in which the payments in issue were connected to an education benefit and a case in which the disputed payment was connected to an aid project.

Payments connected to an education benefit

[48] In *Commissioner of Taxation v McPhail* the High Court of Australia considered whether payments made by parents to a building fund of a school that their child attended were gifts when those parents who paid into the building fund were billed a lower level of tuition fees than those parents who did not contribute to the building fund.[29] The High Court held that the payments to the building fund were payments that created a contractual obligation and that those parents who made such payments received an "advantage of a material character".[30] The payments made to the building fund were therefore not tax deductible gifts.

[49] The Canadian cases of *The Queen v Zandstra*[31] and *The Queen v Coleman*[32] concerned payments that were connected in material ways to education benefits received by the children of taxpayers. In *Zandstra*, parents made voluntary non-refundable payments to a religious school in consideration for their child receiving an education. Similarly, in *Coleman*, which we have already explained, students and their family members made voluntary non-refundable payments to a religious charity. Financial benefits were then made available to students to assist with the cost of their education. Those financial benefits were linked to the payments made by the students or their parents to the charity. In both *Zandstra* and *Coleman* it was

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29 *Commissioner of Taxation of the Commonwealth of Australia v McPhail*, above n 15.
30 At 116.
31 *The Queen v Zandstra* [1974] 2 FC 254, [1974] CTC 503.
32 *Coleman v The Queen*, above n 13.

held that the payments made were not tax deductible gifts because of the material benefit attached to the payments that were made.

[50] *Winters v Commissioner of Internal Revenue* concerned payments made by parents to a church that were used to support schools attended by the taxpayers' children.[33] The payments were voluntary but were nevertheless encouraged by a pledge arrangement. No tuition fees were payable on behalf of students who attended the church's school. The Second Circuit Court of Appeals held that the "payments were made with the anticipation of economic benefit" namely, free tuition at the church's schools and were not made with a "detached and disinterested generosity".[34] The payments were therefore not deductible. The decision in *Winters* reflected an earlier decision in *Channing v United States*, a decision of the Federal District Court in Massachusetts.[35]

Payments connected to an aid project

[51] *Hodges v Federal Commissioner of Taxation* was said by Mr Ebersohn to be material in all respects to the current proceedings.[36] That case concerned a claim by an Australian taxpayer that a payment made to an aid organisation was a tax deductible gift. The payment was made to offset the costs of the taxpayer's airfares, accommodation and food expenses when participating in an aid project in the Philippines. The Administrative Appeals Tribunal held that the payments were not gifts because inter alia:

(a) they were made to ensure the taxpayer was allowed to take part in the aid project; and

(b) it was applied towards meeting the taxpayer's actual expenses.

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33 *Winters v Commissioner of Internal Revenue* 468 F 2d 778 (2nd Cir 1972).
34 At 781.
35 *Channing v United States* 4 F Supp 33 (MA 1933).
36 *Hodges v Federal Commissioner of Taxation* (1997) 97 ATC 2158.

Analysis

[52] Hinton J's approach focused on the substance of the transactions by emphasising the overarching economic consequences of those transactions.[37] The appellants advocate an approach that is based upon the form of the legal transactions. The Commissioner, however, posits that the distinction between form and substance collapses when the true nature of the transactions is carefully examined.

[53] We do not think this case actually engages the jurisprudential controversies that the parties have suggested. This is because we are satisfied the approach we must take is well-settled. As we have already explained, in *Mills v Dowdall* this Court clearly outlined the approach to ascertaining the "true legal character" of a transaction. This approach considers the legal arrangement in its context. That is not an artificial exercise divorced of the surrounding circumstances. Conversely, it is important that the approach we are required to take is not conflated with the predominantly substance-based approach to transactions that may be shams or tax avoidance arrangements.

[54] Consequently, our focus is on the legal arrangements that governed the payments and the surrounding circumstances. To determine whether the payments constitute a gift, the legal arrangements must be examined in light of the text and purpose of the relevant legislation.

Text and purpose of s LD 1(1) of the Act

[55] The term "gift" is not defined in the Act. It must therefore be taken to bear its ordinary and natural meaning which is "a thing given willingly to someone without payment; a present".[38] Cases have added to this definition, so it is now generally accepted:[39]

> … that to constitute a "gift", it must appear that the property was transferred voluntarily and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return.

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37 High Court judgment, above n 2, at [43].
38 *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2008) at 599.
39 *Commissioner of Taxation of the Commonwealth of Australia v McPhail*, above n 15, at 116.

[56] Parliament's purpose in employing the term "gift" in s LD 1(1) is also instructive. Although the tax benefits associated with payments made to charities have evolved since they were first introduced in 1962,[40] an underlying policy of all manifestations of what is now s LD 1(1) has been to encourage New Zealand taxpayers to provide financial support to charities.[41] Those taxpayers who make payments to charities that qualify as gifts under s LD 1(1) receive a tax credit in accordance with the formula set out in s LD 1(2). Thus, in order to be a gift for the purposes of LD 1(1) there must be no material benefit bestowed on the taxpayer in addition to the tax credit prescribed in the Act.

Is there a material benefit to the taxpayers?

[57] As we have noted, the authorities and the purpose of s LD 1(1) demonstrate that a payment to a charity may not be a gift in circumstances where the payment confers a material benefit upon the taxpayer. This criterion has been variously described as an "advantage of a material character"[42] and a benefit that is more than "nominal".[43] In the circumstances of this case, there is unlikely to be a distinction between the expressions "advantage of a material character" and a benefit that is more than "nominal". We will therefore consider whether the payments made to the Trust Board by the taxpayers conferred a material benefit upon any of them.

[58] There is an element of superficiality in the Commissioner's argument that a person who performs missionary services abroad receives a benefit when their basic expenses are met by either the Church in the host country or the Church in Utah. In our view the legal transactions entered into by the taxpayers in New Zealand when they made voluntary and unconditional payments to the Trust Board are not consistent with the taxpayers receiving a material benefit for the following reasons.

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40 Land and Income Tax Amendment Act (No 2) 1962, s 4 inserted s 84B into the Land and Income Tax Act 1954.

41 Michael Cullen and Peter Dunne *Tax incentives for giving to charities and other non-profit organisations: A government discussion document* (Inland Revenue Department, October 2006) at [1.3].

42 *Federal Commissioner of Taxation of the Commonwealth of Australia v McPhail*, above n 15, at 116.

43 *Mills v Dowdall*, above n 6, at 156 per Cooke J.

[59] First, 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.

[60] Second, the basic costs met by the Church either in the country where the missionary is serving or by the Church in Utah are necessary to facilitate missionary service.

[61] Third, we recognise that the opportunity to participate in missionary service, or to support a family member or fellow church member participating in missionary services could be considered an indirect benefit of the payments made by taxpayers. However, we do not consider that this is a genuinely material benefit because, when serving overseas, a missionary is performing a charitable service. We will return to this point when examining the nature of the association between the payments made and the benefits received. We emphasise for present purposes that the charitable service performed by missionaries is quite different from the "education benefit" cases we have referred to at [48]–[50]. In those cases, students received the very material benefit of an education at an institution chosen by the student or their parents. In addition, the taxpayers obtained the benefit of paying reduced or no fees for the education that was provided.

[62] Fourth, the real benefit to missionaries in serving overseas is the sense of spiritual and moral satisfaction they gain from their missionary services. That satisfaction is, however, the antithesis of a material benefit and dovetails into the purpose that underpins s LD 1(1) of the Act; namely, that gifts made to charities are treated as tax credits in order to foster a culture of charitable donations.

[63] Taxpayers other than missionaries who make payments to the Trust Board also do not receive a material benefit through a missionary having their basic costs met when performing missionary service overseas. At most, the parents, relatives or other members of the New Zealand Church who make payments to the Trust Board gain the spiritual and moral satisfaction of knowing that the missionary is performing a charitable service on behalf of the Church overseas. This benefit is consistent with the charitable purposes contemplated by s LD 1(1) of the Act. Thus, we are satisfied

that no distinction should be drawn between the various categories of taxpayers covered by these proceedings.

The nature of the association between the payments made and any benefit received

[64] Even if the taxpayers in this case receive more than a spiritual or moral satisfaction, we consider there is insufficient connection between the payments made to the Trust Board and any material benefit that missionaries receive through the payment of their basic costs.

[65] We reach this conclusion because there is a clear disconnection in fact and in law between the payments made by the taxpayers in this case and the receipt of basic costs by a missionary serving abroad.

[66] The payments at issue are made to the Trust Board in the context of the Church's broader arrangements for funding missionary services. However, that context does not change the nature of the transactions in issue. The Commissioner's case seeks to link the payments made by the Church (either in Utah or the host country's organisation) to meet a New Zealand missionary's basic costs on an overseas mission with the payments made to the Trust Board by a taxpayer. There is, however, no legal arrangement connecting these two payments.

[67] The Commissioner's case also hinges on the argument that the taxpayers make their payments in the expectation that the church entities would meet the basic costs of a missionary. Even if it existed, that expectation does not negate the effect of the following four points:

(a) as we have already emphasised, the payments made by the taxpayers in this case were voluntary and unconditional;

(b) the payments bear no relationship to the actual basic costs paid to missionaries;

(c) the payments were not made in order to provide financial support to a New Zealand missionary serving overseas; and

(d) the payments made by a missionary, or other taxpayer in this case, were made to the Trust Board knowing that they are supporting the New Zealand Church in carrying out its charitable works in New Zealand.

[68] The points we have summarised at [67] make it very difficult to see how Mr Coward could sue the Trust Board if the Church in the country hosting Ms Coward, or the Church in Utah, failed to provide Ms Coward with the basic costs associated with her performing missionary services. While Mr Coward made payments to the Trust Board anticipating that Church entities overseas would provide financial support for his daughter, there was no agreement between Mr Coward and the Trust Board which entailed the payments made by him to the Trust Board being conditional upon his daughter receiving financial support from a foreign entity of the Church.

[69] We therefore reject the argument advanced on behalf of the Commissioner that payments made to the Trust Board by a missionary or his or her parents or grandparents were part of a contract that involved the missionary receiving financial support from the Church when performing missionary services overseas.

[70] The circumstances of this case are quite different from those in *Hodges* where the taxpayer made payments in order to be:

(a) Accepted to perform aid work.

(b) Knowing that there was a direct connection between the payments made and the expenses that were incurred on his behalf.

[71] There is also no traction in Mr Ebersohn's "fall back" position that the Commissioner can succeed without establishing the taxpayers received a benefit through a contractual arrangement. This is because, for the reasons we have already explained, there was insufficient connection with the payments made by the taxpayer and any benefit that the taxpayer may have received to negate the requirements of s LD 1(1) of the Act.

Summary

[72] We are satisfied that the benefits received by all taxpayers in this case are correctly viewed as being of an intangible spiritual or moral character. We do not think that missionaries who receive their basic costs of travel and living while performing the Church's work abroad receive a material benefit. Even if the basic costs provided to a missionary abroad are viewed as a material benefit, there is insufficient connection between those payments and the payments that are made to the Trust Board by the taxpayers in this country.

[73] The fact that the payments made by the taxpayer to the Trust Board are made when a missionary connected to the taxpayer is chosen to perform the Church's services abroad does not detract from our conclusion that the payments are made to support the Trust Board in the performance of its charitable works in New Zealand and not to provide financial support to a missionary overseas.

Conclusion

[74] Hinton J was correct when she concluded that payments made by a missionary's siblings, other relatives such as a cousin, uncle or aunt and members of the New Zealand Church who are not related to the missionary are gifts, for the purposes of s LD 1(1) of the Act.

[75] The High Court Judge erred however when she concluded that payments made to the Trust Board by a missionary, his or her parents, guardians, or grandparents are not gifts.

Result

[76] The appeal is allowed and the High Court's declarations are substituted with a declaration that all payments made to the Trust Board by the taxpayers in this case are gifts for the purposes of s LD 1(1) of the Act.

[77] The cross-appeal is dismissed.

[78] The Commissioner is to pay one set of costs to the appellants for a standard appeal on a band A basis with the usual disbursements. We certify for two counsel.

Solicitors:
Simpson Grierson, Auckland for Appellants
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