

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
COMMERCIAL LIST

Not Restricted

S CI 2017 03328

ANDREW MORRIS ROBSON & ORS  
(as Trustees of the Queen's Fund) (as set out  
in the Schedule hereto)

Plaintiffs

v

THE ATTORNEY-GENERAL FOR THE  
STATE OF VICTORIA

Defendant

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JUDGE: CROFT J  
WHERE HELD: Melbourne  
DATE OF HEARING: 21 September 2017 (by written submissions)  
DATE OF JUDGMENT: 6 October 2017  
CASE MAY BE CITED AS: Robson & ors v Attorney-General for the State of Victoria  
MEDIUM NEUTRAL CITATION: [2017] VSC 585

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TRUSTS AND TRUSTEES – Application for approval of the amalgamation of two trust funds under a charitable trust established in 1887 – Provisions for establishment of a body corporate to be substituted for the plaintiffs as trustees of the charitable trust on the same trusts – *Ballard v Attorney-General for Victoria* (2010) 30 VR 413 – *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753.

TRUST AND TRUSTEES – Power of Court to approve amendments to the terms of charitable trusts – *Trustee Act* 1958 ss 48(1) and 63.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr G. Nash QC	Hall & Wilcox
For the Defendant	No counsel	Victorian Government Solicitor's Office

HIS HONOUR:

**Introduction**

- 1 The Plaintiffs are trustees of the Queen’s Fund, a charitable trust established in 1887. The trust deed requires the capital of the fund to be invested and the income applied “in aid of the women resident in Victoria who might from time to time be in need of relief or help”. The trust deed establishing this trust is exhibited to the affidavit of Sally Margaret McLean sworn on 10 August 2017.
- 2 The nature of the charitable trusts and the identity of those named in the trust deed is a testament to the concern of members of the Victorian community in the latter part of the 19<sup>th</sup> century for those in need and in distressed circumstances. The particular concern which led to the establishment of this trust was, as indicated by its terms, for women resident in Victoria in need of relief or help. The maintenance of the Queen’s Fund and the advancement of its charitable objects for the next 130 years is also testament to the concern of the Victorian community for those less fortunate, particularly women in this position.
- 3 Both as a matter of history and also for better understanding of the matters discussed in the reasons which follow, I set out the provisions of the trust deed in full:

TO ALL TO WHOM these presents shall come We George Higinbotham Chief Justice of Victoria Sir James MacBain Knight President of the Legislative Council and Sir George Frederic Verdon of the City of Melbourne K.C.M.G., C.B. Send Greeting WHEREAS in pursuance of a suggestion made by Lady Loch Wife of His Excellency Sir Henry Brougham Loch G.C.M.G., K.C.B. then Governor of Victoria that a fund should be raised in fitting Celebration of the completion of the fiftieth year of the reign of Her Most Gracious Majesty Queen Victoria which should be a permanent Memorial of such Jubilee Year it was resolved at a public meeting held in the Town Hall of Melbourne on the nineteenth day of May One thousand eight hundred and eighty seven that a fund should be created in Victoria to be called the “Queen’s Fund” the principal whereof should be invested and the interest applied in aid of the women resident in Victoria who might from time to time be in need of relief or help and at such meeting a General Committee was then appointed of which Lady Loch was named the first President for the raising of the said Queen’s Fund and for the purpose of devising and resolving upon a proper scheme for the investment of the principal thereof and the dispensing of the interest and for all and every of the details of the future administration and management of the said Fund AND Whereas at a meeting of the said General Committee held on the third day of June one thousand eight hundred and

eighty seven a Central Executive Committee was chosen and resolutions were adopted setting out the functions of such Committee and the objects and administration of the said The Queen's Fund amongst other resolutions adopted at the meeting it was resolved that the said Queen's Fund be vested in three Trustees such Trustees to be His Honour the Chief Justice Sir James MacBain and Sir George Fredric Verdon AND Whereas it is part of the scheme adopted by the said General Committee for the administration of the said Queen's Fund that all moneys collected for the Fund shall be invested by the said George Higinbotham George Frederic Verdon and James MacBain (hereinafter called the said Trustees) in such manner as they in their absolute discretion shall deem best and that the income only arising from such investments shall be expended on the objects of the Fund and that such income shall be paid by the said Trustees to the said Central Executive Committee AND Whereas a large sum of money amounting in all at the date hereof to the sum of Ten thousand five hundred and nine pounds one shilling and sixpence has now been collected and is held by the said Trustees upon the trusts of the said Queen's Fund and it is expected that further contributions will from time to time be received and added thereto AND Whereas the said Trustees are desirous of declaring the trusts upon which they hold the said sum of Ten Thousand five hundred and nine pounds one shilling and six pence and shall stand possessed of all other sums which may be hereafter contributed as aforesaid NOW therefore Know Ye that we the said Trustees do hereby declare:

THAT we hold and are possessed of the said sum of Ten thousand five hundred and nine pounds one shilling and six pence now invested on fixed deposit with the Commercial Bank of Australia Limited Melbourne and shall and will hold and stand possessed of all other moneys which shall or may hereafter be paid to or acquired by us as such Trustees as aforesaid Upon the trusts of the said The Queen's Fund And in accordance therewith Upon trust to invest the same in and upon such investments as we shall in our absolute discretion deem advisable for the benefit and most advantageous administration of the said The Queen's Fund And from time to time pay the income arising from such investments or otherwise accruing from the said moneys to the said Central Executive Committee for the time being of the said The Queen's Fund for the purposes and objects of the said The Queen's Fund.

IN WITNESS whereof we the said Trustees have hereunto set out hands and seals this First day of February One thousand eight hundred and eighty-nine.

SIGNED SEALED AND DELIVERED by the )  
 said George Higinbotham in the presence of ) GEO. HIGINBOTHAM  
 )

GERALD PIGGOT  
 Associate

SIGNED SEALED AND DELIVERED by the )  
 said James MacBain and George Frederic ) J.W. MacBAIN  
 Verdon in the presence of ) GEORGE VERDON

FREDERICK G. MOULE  
 Solicitor

## Application

4 The trust deed does not permit the expenditure of capital for the trust purpose; and, over time, the income of the fund has become inadequate to provide the relief intended.

5 In March 1967, to enable the continued implementation of the purposes of the trust, an ancillary trust, the Queen’s Fund Revenue Account, was established. A copy of the corresponding trust deed is exhibited to the affidavit of Sally Margaret McLean sworn on 10 August 2017. The critical part of that deed is the following declaration:

THAT we shall hold and stand possessed of all moneys which shall or may hereafter be paid to or acquired by us as Trustees of THE QUEEN’S FUND REVENUE ACCOUNT UPON TRUST to pay all moneys so paid to or acquired by us to the DISTRIBUTING COMMITTEE of THE QUEEN’S FUND REVENUE ACCOUNT to be applied for the purpose and objects expressed herein of THE QUEEN’S FUND REVENUE ACCOUNT.

6 The Queen’s Fund Revenue Account has purposes identical to those of the Queen’s Fund but does not have an inhibition on the expenditure of capital. The trustees of the Queen’s Fund are Andrew Robson, Jay Bonnington and Gail Owen, while the trustees of the Queen’s Fund Revenue Account are Jane McLaughlin (who is the treasurer of the Queen’s Fund), Margaret Allen (who is the secretary of the Queen’s Fund) and Sally McLean.<sup>1</sup> Both funds have Deductible Gift Recipient status under the *Income Tax Assessment Act 1997 (Cth)*.

7 Because the purposes of the two funds are identical but the way in which they can be expended differs, the operation of the funds is unnecessarily complex in respect of administration and accounting; and the differences between the two funds is confusing to potential donors. Difficulties have been experienced by the trustees in keeping the funds separate and in ensuring that donors, who wish to provide appropriate “aid [to] the women resident in Victoria who might from time to time be in need of relief or help”, appreciate the difference between the two funds and the differing effect which a contribution to one or other fund may have. The trustees of both funds are of the view that it is expedient for the two funds to be merged.<sup>2</sup> In

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<sup>1</sup> *Affidavit of Sally Margaret McLean* (18 August 2017), [5]–[6].

<sup>2</sup> See *Affidavit of Gail Ann Owen* (14 August 2017) [18], [21]–[23]; *Affidavit of Sally Margaret McLean*

summary the continued maintenance of the two funds disadvantages the pursuit of the charitable purpose as a result of consequential donor confusion, unnecessary administrative burden and additional costs and expenses.

8 Neither trust deed confers any power on the trustees to transfer assets or to wind up the relevant trust. The trustees are conscious of the need that the capital of the Queen's Fund, which cannot be applied to the benefit of the beneficiaries, be kept separate. They are also concerned that the nature of the trust is such that, in the interests of continuity of administration, it is more appropriate that it be administered by a corporate body rather than by three individuals.

9 The trustees of the fund have, therefore, brought this application under ss 48(1) and 63 of the *Trustee Act* 1958 seeking orders that:<sup>3</sup>

- (a) The Queen's Fund Revenue Account be wound up and that after the satisfaction of all expenses of the winding up any funds remaining in the hands of the trustees or the Committee of the Queen's Fund Revenue Account be paid to the trustees of the Queen's Fund to be treated as income of The Queen's Fund for the year in which such funds are received, and distributed for the purposes of the Queen's Fund by the Committee of The Queen's Fund.
- (b) the trustees of The Queen's Fund may distribute gifts received by them from the date of the Order as if they were income for the Charitable Purpose as defined in the Trust Deed of The Queen's Fund, save for any gift made on terms that such gift or the relevant part of it is to be added to corpus.
- (c) A scheme of administration of The Queen's Fund be settled on the following terms:
  - (i) that a body corporate, The Queen's Fund Limited, be incorporated, having as its constitution a Constitution expressed in identical terms to those set out in the Draft Constitution which is Exhibit 'GO-8' to the affidavit of Gail Ann Owen sworn 14 August 2017 and filed herein;
  - (ii) that upon its incorporation The Queen's Fund Limited be immediately substituted for the Plaintiffs as trustee of The Queen's Fund;
  - (iii) that the Court approve, and direct to be carried into effect upon the substitution of The Queen's Fund Limited as trustee

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(10 August 2017) [12]-[14].

<sup>3</sup> *Originating Motion Between Parties* (18 August 2017).

an administrative scheme as set out in the Schedule to the Originating Motion herein.

- 10 The scheme of administration proposed in the Schedule to the Originating Motion provides, in substance, that the trustee holds the trust fund on trust for the original purposes set out in the trust deed creating the Queen's Fund, but so as to ensure that the original capital of the fund remains undiluted. The trustee, its members and directors may not receive any part of the trust fund, whether directly or indirectly, save that administrative expenses incurred by a director of the trustee may be paid out of the trust fund, although not out of any part of the protected capital.
- 11 Subject to preservation of the original capital, the trustee may decide whether any money is to be treated as capital or income, whether any expense ought to be paid out of capital or income and may also decide all questions and matters of doubt arising in the execution of the trusts of the Queen's Fund. The trustee is given power to invest only in authorised investments, but subject to that qualification has a general power to buy and sell assets.
- 12 Section 48 of the *Trustee Act* 1958 specifically gives the Court power to appoint a new trustee or new trustees where it is "inexpedient difficult or impracticable so to do without the assistance of the court". In the present case there is no way of appointing a new trustee to administer the Queen's Fund or the Queen's Fund Revenue Account otherwise than by an order of the Court. In the interests of continuity of administration it is "expedient" that the Court should make an appointment of a new trustee.
- 13 Section 63 of the *Trustee Act* 1958 provides in paragraph (1):
- Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

14 In *Ballard v Attorney-General for Victoria*,<sup>4</sup> Kyrou J exercised the power under s 63 to permit the amalgamation of two funds, noting that “expedient” in s 63 means “advantageous”, “desirable”, “suitable to the circumstances of the case”, and stating that in the case of a charitable trust the question of expediency “must be determined by reference to the objects or purposes prescribed in the trust instrument”.<sup>5</sup>

15 His Honour there approved an application which involved amendments to the appointment and qualifications of trustees, the term of office of trustees, the quorum, voting powers and procedures of the trustees and the retention and accumulation of income as well as the incorporation of a custodian company, because the existing provisions under which the trusts were administered were considered to be:<sup>6</sup>

...out of date and to detract from the efficient administration of the funds. In the trustee’s opinion, it is desirable for the proposed amendments to be made in order to facilitate the operation of the funds and to “allow better provision of benefits to the numerous charitable organisations which have received donations from the Funds over so many years”.

16 The present application is in like case to the application in *Ballard*. In the present application there is no desire to change the purposes of the trust but, in the interests of efficiency and to ensure proper administration, it is desirable to unite the two trusts and the method of unification chosen appears to be necessary to preserve the original capital donated to the fund in 1887.

17 The New South Wales Court of Appeal in a relatively recent decision, *Re Dion Investments Pty Ltd*,<sup>7</sup> refused an order which sought to give the trustee power itself to amend the trust instrument in future. The Court of Appeal expressed strongly the view that the legislation did not permit the Court to authorise such an amendment.

18 That decision is not, however, authority for any proposition which would inhibit the power of the Court to make the orders sought in the present case. The Court of Appeal did there authorise the amendment sought other than the amendment which

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<sup>4</sup> (2010) 30 VR 413.

<sup>5</sup> *Ballard v Attorney-General for Victoria* (2010) 30 VR 413 at 420.

<sup>6</sup> *Ballard v Attorney-General for Victoria* (2010) 30 VR 413 at 417.

<sup>7</sup> (2014) 87 NSWLR 753.

would have given to the trustee a future power of amendment. The cases cited in the Court of Appeal support the application now made by the Plaintiffs.

19 The application is designed to enable the more efficient administration of the trust funds concerned, and to provide for continuity in the administration of those trusts, without in any way altering their ambit or the purposes which they serve.

20 As contended on behalf of the Plaintiffs, I accept that the authorities support their application for the amendments sought. Moreover, I note that the Attorney-General has indicated that he does not oppose the application.

### **Conclusion and orders**

21 For the preceding reasons, the Plaintiffs' application is granted.

22 In order to expedite the continued operation of the Queen's Fund for charitable purposes, orders as sought by the Plaintiffs were made on 25 September 2017 on the basis that reasons for the making of those orders would be published subsequently. These are those reasons.

**SCHEDULE OF PARTIES**

**ANDREW MORRIS ROBSON**

First Plaintiff

**JAY BONNINGTON**

Second Plaintiff

**GAIL ANN OWEN**

Third Plaintiff

and

**THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA**

Defendant