IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-001650
[2019] NZHC 52

BETWEEN	THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS TRUST BOARD Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

CIV-2017-404-001559

BETWEEN	PAUL ROSS COWARD Plaintiff
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing:	25 June 2018
Appearances:	W Akel, N Bland and K Teague for the Plaintiffs H Ebersohn and C Kern for the Defendant
Judgment:	1 February 2019

JUDGMENT OF HINTON J

This judgment was delivered by me on 1 February 2019 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
William Akel, Special Counsel, Auckland
Simpson Grierson, Auckland
Crown Law and Inland Revenue – Litigation Management, Wellington

[1] The issue to be determined in this case is whether donations made to the Trust Board of the Church of Jesus Christ of Latter-Day Saints by a missionary, their family and others, in connection with the missionary's application, are charitable gifts under s LD 1 of the Income Tax Act 2007.

[2] The Church (referring to the international body) is based in Salt Lake City, Utah, but has a world-wide presence, including in New Zealand. One of its more prominent activities is sending young men and women to proselytise in different countries to obtain converts to the Church's mission. Young members of the Church in New Zealand apply to be missionaries overseas. When they do so, they commit to paying or raising a "standard amount" towards supporting the Church's missionary work. The issue is over the deductibility of these payments. This money is not paid towards their mission overseas, but rather towards funding expenses of other missionaries in New Zealand. The missionaries sent overseas from New Zealand have their expenses paid by the country where they proselytise.

[3] This judgment addresses two proceedings, which were heard together, both involving the Commissioner of Inland Revenue as defendant.

[4] The plaintiff in the first proceeding is the Trust Board of the Church of Jesus Christ of Latter-Day Saints (the Trust). It is established by a Private Act of Parliament: the Church of Jesus Christ of Latter-Day Saints Trust Board Empowering Act 1957. The Act sets out the terms on which the Trust operates, including the purposes for which it holds its assets on trust. From now, when I refer to the Trust, I refer to this entity. When I refer to "the Church", I refer to the Church as a whole, not just the New Zealand "branch", as it were.

[5] The first proceeding raises the broad question of whether the Trust can issue donation statements to any of the categories of people making the relevant payments.

[6] The plaintiff in the second proceeding is Mr Coward, a member of the Church. His daughter was a missionary for the Church. Mr Coward made the standard payments for his daughter's application. This proceeding relates to whether the Trust can issue a donation statement for those payments.

[7] The precise issue I must determine is whether the payments associated with a missionary's application, made to the Trust by the following classes of people, are gifts under s LD 1, so entitling the donor to a tax credit:

(a) a missionary;

(b) a parent or legal guardian of a missionary;[1]

(c) grandparents of a missionary;

(d) siblings of a missionary;

(e) a more distant relative of a missionary, such as a cousin, uncle or aunt; and

(f) a church member unrelated to the missionary, such as a friend of a missionary or a member of the missionary's local ward.

[8] It is accepted that the payments comply with s LD1(1) in all respects, except as to their being gifts.

[9] The Commissioner, as a matter of practice, has allowed all claims for these payments up until 2015. Since 2015, the Commissioner has disallowed claims by a missionary and their immediate family, but not (to date) by more remote family, or members of the local ward, or stake.[2]

[10] Neither party takes issue over the form of the proceedings, or the jurisdiction of the Court to make the declarations sought. And both parties consider it would be of assistance to have answers to the wider questions posed in the first proceeding, rather than the narrow question of the status of payments made by Mr Coward.

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1 Being the issue in Mr Coward's proceeding.

2 A stake is the local district of the Church, and a ward is a subset of a stake.

Background

[11] For the purpose of these proceedings, the parties have helpfully been able to agree on a set of facts upon which I am to determine the issues.

The Church's missionary programme

[12] Young people in each country apply to be missionaries,[3] and submit to a process concluding with a determination by the First Presidency in Salt Lake City, Utah, as to their "worthiness". Usually they will be sent to a designated country overseas, for 18–24 months' mission service.

[13] There are approximately 70,000 young church members currently undertaking proselyting missionary service around the world. New Zealand has close to 300 church members undertaking such service overseas. Approximately 450 missionaries from various countries are undertaking such service in New Zealand.

[14] The Church pays for a missionary's costs of travel, in-location travel costs in connection with the mission, and basic accommodation and food costs. The Church also pays other essential expenses, such as personal grooming items, laundry, cleaning supplies, haircuts, and postage for weekly letters to family. All other expenses are covered by the missionary.

[15] For missionaries from New Zealand, these essential costs are met by the relevant Church-related entity in the country where the mission takes place. The Trust does not pay any of the missionary expenses for people travelling from New Zealand, but pays for missionaries who come here.

Payments to support a mission

[16] It is an important principle within the Church that missionary service involves personal sacrifice. For this reason, it is expected that missionaries and their families should financially sacrifice to pay for a mission.

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[3] Specifically, single men aged 18–25 and single women aged 19–39.

[17] Because of the principle of sacrifice, as part of their application, a missionary is expected to commit to raising a "standard amount" fixed by the Church. This amount should come from a missionary and their family. If that is not possible, a missionary should seek assistance from their ward. At the time Mr Coward's daughter was called to service, the amount was $475 per month, or NZ$5,700 per annum. Mr Coward paid the full amount in response to his daughter's call to service.

[18] In an application, the applicant is required to list the funds available per month from several specified sources: the applicant, his or her family, and his or her local ward. An applicant must then specify the total to be paid per month, and the currency. This will ideally meet or exceed the standard amount set in New Zealand.

[19] The standard amount is not paid to the missionary, nor does it bear any direct relation to the actual costs incurred in relation to that missionary. The Church sets an international "equalised contribution" amount for missionaries whose home wards are in "designated countries". That is set by estimating the average cost to the Church of proselyting missionary service undertaken by missionaries throughout the world, expressed as a monthly cost figure. New Zealand is not a "designated country". The standard amount in New Zealand is an assessment made by the Area President, taking into account the equalised contribution set by the Church internationally and the circumstances in New Zealand.

[20] If a missionary does not raise the standard amount sought, the local bishop will encourage the particular missionary and their family to consider contributing more. If this is not possible, the bishop may invite members of the ward to contribute. It is also possible to have assistance from the General Missionary Fund, which is controlled by the Church, not the Trust. The plaintiffs say this is a notional fund only, and money attributed to it is normally only used to effectively "top up" regional Ward Missionary Funds as needed, rather than helping individual missionaries with their fund-raising.

[21] The continuation and completion of a missionary's service is not affected by whether or not any these payments have been paid by those who committed to do so.

[22] I am advised that in New Zealand, the standard amount is either invariably, or almost invariably, entered in the application form and paid, typically by the missionary or their immediate family.

Ward Missionary Fund Payments

[23] The payments made in support of a missionary are termed "Ward Missionary Fund", or "WMF" payments. This is terminology used by the Church internationally, and the Trust. The Church guidelines, extracts of which are reproduced below, contemplate that these payments go into a separate fund in each country, to be used to support missionaries from other countries who are proselyting in that country. The arrangement is effectively a global "tit for tat" arrangement. None of these WMF payments are refundable, even if the missionary is unable to complete the full term of their mission. Once a WMF payment has been made, the funds belong to the relevant Church-entity for use in its discretion. This is made clear in the form when the prospective missionary makes their application.

[24] In New Zealand, there is no separate "Ward Missionary Fund". All WMF payments go into a general account held by the Trust. This is the same account it uses to receive grants and tithes from the members in New Zealand. The Trust applies the funds in this account for the Church's work in New Zealand, as the Trust sees fit. This being said, the Trust does keep records of the amount of WMF payments it receives, and to which missionary's call to service the payments can be attributed.

[25] The Trust does not remit any funds overseas. Its expenses outweigh its income. It relies on substantial grants from the Church for assistance to meet the costs of missionaries serving their missions in New Zealand, as well as to run its missionary training centre in Manukau. Further, under the terms of the Empowering Act referred to above, it may only apply its funds for the purposes of the Church in New Zealand.[4]

[26] The parties have produced relevant extracts from documents received by an applicant, and from the Stake Presidents and Bishops 2010 Handbook. The Handbook is not publicly available, nor is it available to applicants.

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4 Church of Jesus Christ of Latter-Day Saints Trust Board Empowering Act 1957, s 7(i).

[27] The following are extracts from documents provided to a prospective missionary:

(a) The Request for Supplementary Financial Assistance form, which is part of the application, provides:

> A major principle of missionary service is sacrifice. Missionaries and their families should pay all mission expenses. If assistance is needed, local quorums, wards or stakes should be asked to provide it.
>
> Assistance may be requested from the General Missionary Fund only after families and local Church organisations have provided all they can.
>
> Every missionary requesting assistance from the General Missionary Fund must have some funds committed from local sources.

(b) The Education and Service of Missionary Candidate form, which is part of the application, includes the following:

> Source of funds: Indicate how much money (in your local currency) will be contributed per month in support of your mission from the sources below.

(c) The General Instructions Checklist, which forms part of the application pack, states:

> Those responsible for providing your financial support should make sure that the required amount is donated to the ward or branch missionary fund each month.

[28] These are extracts from the Handbook, which are not available to a prospective missionary, and are used to inform the decision-maker as to whether to recommend a person for a mission:

(a) The Church's Handbook 1 – Stake Presidents and Bishops 2010 provides:

> The primary responsibility to provide financial support for a missionary lies with the individual and the family. Generally, missionaries should not rely on people outside of their family for financial support.
>
> 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 missionaries should not be prevented from serving missions solely for financial reasons when they and their families have sacrificed according to their capabilities.

(b) The criteria to obtain support from the General Missionary Fund include:

> The missionary, parents, other family members, and ward and stake members are contributing according to the guidelines established by the Area Presidency. (Using these guidelines, stake presidents and bishops work with missionary candidates and their families to establish a specific financial support commitment, based on appropriate sacrifice by the missionary and the family.)

(c) The Bishops and Branch President's Checklist for a missionary application provides:

> Do not request assistance from the General Missionary Fund until the missionary, the family, and the ward or branch and stake or district have committed themselves to provide all the financial support they can.

The issue

[29] Section LD 1 is in the following terms:

> **LD 1 Tax credits for charitable or other public benefit gifts**
>
> *Amount of credit*
>
> 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).

[30] The issue in this case is whether the payments made to the Trust by the classes of people described above are "gifts". The Commissioner accepts that the payments comply with s LD 1 in all other respects.

[31] The plaintiffs say the WMF payments are gifts because they are gratuitous payments that are made by Church members to the Trust to support the Church's charitable work. They are dispositions of property without consideration.

[32] The Commissioner says that the WMF payments are made to meet the costs of that missionary's mission, and are not gifts because they are not gratuitously made to the Trust. The Commissioner says they are payments made so that the Church will pay the essential personal expenses of the missionary while on a mission.

[33] I am, therefore, required to determine whether WMF payments to the Trust, paid in response to a particular missionary's call to service are "gifts".

[34] The burden is on the plaintiffs.

What is a "gift"?

[35] An apparently easy question does not have such an easy answer.

[36] The word "gift" is not defined in the Income Tax Act 2007.

[37] Furthermore, attempts to define a "gift" for purposes of the Act seem to be more exclusive than inclusive.

[38] While I endeavoured to have counsel agree on a definition, or at least an approach to defining the word "gift", they were reluctant to do that.

[39] Both parties were agreed, however, that the "ordinary meaning" of "gift" should be significant.

[40] The Concise Oxford English Dictionary defines "gift" as including a "thing given willingly to someone without payment; a present …".[5]

[41] Both counsel also referred to and relied on the Court of Appeal decision of *Mills v Dowdall*, which I am advised is the leading authority in New Zealand on the meaning of "gift".[6] Cooke J, as he then was, said that a gift was something truly gratuitous, although it was possible that nominal or small considerations may not prevent a transaction being classed as a gift.[7]

[42] Although relying on *Mills v Dowdall*, Mr Ebersohn for the Commissioner, made the point, which I accept, that the Court of Appeal did not need to go further in their consideration of what constituted a gift because it was a very different case to this one. It was not a case about deductibility of a gift under the Act. The Court was

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5 *The Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011).
6 *Mills v Dowdall* [1983] NZLR 154 (CA).
7 At 156.

considering the very different question of the meaning of "gift" under the Matrimonial Property Act 1976, where gifted property was in general the separate property of the recipient spouse.

[43] Both counsel argue that I should look at the substance and reality of what has taken place, rather than the form. I note, though, as again pointed out by Mr Ebersohn, that in *Mills v Dowdall* the Court actually focused on the form of the transaction rather than the substance, at least in terms of the judgment of Richardson J.[8] In any event, nothing turns on this. Counsel agree that I should consider the substance of the transaction in this context, and I accept that is correct.

[44] They both, however, submit for very different "substances".

[45] The need to not apply a rigid test, but rather consider the substance of the whole set of circumstances was discussed by Deane J in the Federal Court of Australia's judgment in *Leary v Federal Commissioner of Taxation*.[9] In determining whether there was a gift, Deane J stated:

> … The solution to the problem whether a transfer of property constitutes a gift for the purposes of s 78(1)(a) is not to be found by any rigid test or description, but has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a common sense appreciation of all the guiding features which must provide the ultimate answer. In the obvious case that lies away from the boundary, it will be easy to decide whether or not a particular transfer is a gift. The line of distinction between what does and what does not constitute a gift may, however, prove difficult to draw in the borderline case and conflicting considerations may produce a situation where the answer turns on questions of emphasis and degree. A Court required to resolve the question is entitled to look to the substance or reality of the whole of the relevant transaction …

[46] The facts in *Leary* are not comparable to the present case. The transaction there was clearly not a gift. It was clearly a sham. This was one of the "obvious cases" referred to by Deane J. The taxpayer borrowed money from a finance company, which he used to make a "donation" to a charity. The charity passed 98.8 per cent of the

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8 *Mills v Dowdall* [1983] NZLR 154 (CA) at 159–160.

9 *Leary v Federal Commissioner of Taxation* (1980) 32 ALR 221 (FCA). See also *Re Klopper v Federal Commissioner of Taxation* (1996) 96 ATC 2,020 (AAT).

money it received from the taxpayer back to the finance company, keeping the balance for itself. When the finance company received the money from the charity, it effectively wrote-off that amount of the taxpayer's loan.

[47] Mr Ebersohn also referred me to another Australian case, *Re Klopper*, where payments were made to a charity to effectively meet an indemnity obligation on the part of the donor, arising out of the America's Cup.[10] Like *Leary*, the circumstances were glaringly such that there was no gift.

[48] The High Court of Australia considered the definition of "gift" in *Federal Commissioner of Taxation v McPhail*:[11]

> But it is, I think, clear that to constitute a "gift", it must appear that the property transferred 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…
>
> (emphasis added)

[49] *McPhail* involved a payor who paid $15 to his child's school's building fund, in return for which the payor received a discount of approximately $14 on his son's school fees, and did not have to pay a further $3 "special charge". The Court found that this was not a gift, because the payor had received a material advantage in return.

[50] The same test referred to in *McPhail* was applied in *Hodges v Federal Commissioner of Taxation*.[12] I agree with the Commissioner that *Hodges* is in material respects similar to the current proceeding. The taxpayer was a member of a work party which donated time and skill to carrying out projects in developing countries that were approved by Australia's aid programme, AusAID. Members of the work party contributed the value of their airfares, food, and accommodation by paying the aid organisation APEX, and they claimed income tax deductions for the amounts they paid. APEX also received from AusAID A$3 for every A$1 APEX raised for its projects. Work party member contributions to APEX therefore attracted public revenue/tax benefits for both the work members and APEX. The amounts paid by the

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10 *Re Klopper v Federal Commissioner of Taxation* (1996) 96 ATC 2,020 (AAT).
11 *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111 at 116.
12 *Hodges v Federal Commissioner of Taxation* (1997) 97 ATC 2158 (Administrative Appeals Tribunal).

taxpayer were held not to be gifts. The Court took into account that money was paid to APEX to ensure the taxpayer was allowed to take part in the project; the taxpayer's knowledge that the money would be applied to off-set his expenses, and that the taxpayer placed value on his participation in the project and was prepared to pay for it.

[51] There is also helpful authority from Canada that discusses the definition of gift: *R v Zandstra, R v Friedberg,* and *Coleman v R*.[13]

[52] In *R v Zandstra*, parents pledged amounts to enable a Christian school to be able to operate. In the 1967-1968 proposed annual budget, the parents' pledges were projected to be $390 each. The evidence from the parents was that the school operated on the basis that members would pay what they could, based on their own consciences and ability to pay. They said it was a moral rather than a legal or contractual obligation. Heald J nonetheless found that the payments made by the parents were not payments made without consideration and could not therefore be considered gifts. He said:[14]

> The rationale of the *McPhail* case applies equally here. Even accepting the evidence of the defendants in these cases that subject payments were voluntary and not pursuant to a contractual obligation, it seems clear that each parent here received a consideration, i.e. the Christian education of his children.

[53] These cases make it clear that the lack of a contractual obligation does not necessarily lead to qualification as a gift. The cases seem to turn more on whether there is a corresponding benefit or not.

[54] In *R v Friedberg*, the Federal Court of Appeal discussed the definition of "gift" under the Canadian equivalent to our LD 1. The facts of the case are not analogous to the present, but the Court identified three elements for a payment to constitute a gift:[15]

(a) property owned by the donor;

(b) a voluntary transfer of that property to the donee; and

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13 *R v Zandstra* [1974] 2 FC 254; *Friedberg v R* (1991) 92 DTC 6031 (FCA); and *Coleman v R* [2010] 3 CTC 2311 (TCC).

14 *R v Zandstra* [1974] 2 FC 254 at [19]–[22].

15 *Friedberg v R* (1991) 92 DTC 6031 (FCA) at 6032.

(c) no benefit or consideration flowing to the donor.

[55] In *Coleman*, a case which also has some similarities to the present, in order to qualify for financial assistance to attend particular Christian colleges and universities, students were required to raise "donations" for the relevant Christian charity. Donations were not refundable, and not all students who raised money qualified for assistance. Five to 10 per cent did not. The amount of the bursary or scholarship a student was entitled to receive was determined having regard to, among other things, the amount of funds a student raised, tuition and other fees, the cost of books, and living costs. Students, their parents, and family, were advised how much funding they would need to raise in "donations" in order to receive the maximum amount of financial assistance. Payments were made by parents and grandparents. They did not have any control over the charity's use of their donation, but they knew within reason what the charity would do, if they made the "donations".

[56] Miller J adopted the *Friedberg* definition of a gift.[16] He found that the first two elements were satisfied (property owned by the donor, transferred voluntarily). The issue was with the third element, whether there was benefit or consideration flowing to the donor. His Honour went further, after a review of other cases (including *Zandstra*), and adopted three propositions relevant to whether the donor received a benefit:[17]

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

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

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

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16 *Coleman v R* [2010] 3 CTC 2311 (TCC) at [36].
17 At [42].

[57] Earlier, Miller J said, and I agree, that the author of *Canadian Taxation of Charities and Donations* succinctly identified the conundrum presented by a case such as the present:[18]

> The fact of the matter is that most, if not all, donors to charities get some benefits or advantages from making a contribution. Also, linked to that factor is the undeniable truth that people are more likely to make a contribution to a charity which is doing something they approve of, or which may eventually be of benefit to them or to their friends or family, even if the benefit simply is to make their locality a better place to live.
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> One distinction, of course, is that the benefit is not direct enough to disqualify the gift, but this in turn is a subjective test.
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> While there will be some obvious cases where there is clearly a quid pro quo between a donor and a charity and no receipt can be issued, there remain many grey areas where individual decisions will have to be made.

[58] That quote, it seems to me, is particularly apposite to consideration of whether there is a benefit to the donor.

[59] Miller J said that the first step of identifying a personal benefit is not an onerous one and I agree it was not on the *Coleman* facts. The full passage from the judgment is as follows:

> [47] The first step of identifying a personal benefit will not be an onerous one: it must be distinguished from pure moral benefit. In the case of *Curlett v Minister of National Revenue*, the donor of funds to the Salvation Army (to be used specifically for two people in need of help) received no personal benefit, but did receive a moral benefit. As intimated in *Burns*, pure moral benefit will not be sufficient to vitiate a gift. Where the only benefit from a donation is for pure moral benefit, it is unnecessary to proceed to the second stage of enquiry, as by its nature there is no substantive personal link between a donation and the resulting pure moral benefit. We give to the Haitian Relief Fund to benefit those in need: there is no personal element to the benefit.

[60] I should add here, I agree with Cooke J in *Mills* that there does not have to be "no" personal benefit for there to be a "gift", but rather no material personal benefit.[19] That is consistent with the passages from the judgment of Miller J cited above.

[61] His Honour concluded that objectively the parents and grandparents' overriding intent was to fund the family member's Christian education. There was a

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18 At [34].

19 *Mills v Dowdall* [1983] NZLR 154 (CA) at 156.

clear benefit received by the donors. The parents and grandparents all saw real benefit in a Christian education. It was the children who directly benefited, but the parents and grandparents also benefited by significantly reducing the responsibility of paying tuition and other university-related expenses directly to their children or to the university. And there was a connection between the donors' payment and that benefit. Although the charity was not contractually bound to provide a bursary, Miller J found it was sufficient that the donors had good reason to anticipate receiving a benefit, and made the payments on this basis. The payments were not, therefore, gifts.

[62] In the United States, the primary focus appears to be on whether the payment was truly gratuitous in the sense of what the payor anticipated to be received in return. In *Winters v Commissioner of Internal Revenue*, the payments were made to a fund that was established and maintained by a church to which the taxpayers belonged.[20] The fund was used to support schools at which the taxpayers' children were enrolled. Neither the church nor the association that operated the schools required the taxpayers to pay tuition fees. Nor were the taxpayers under any compulsion to contribute to the church or the fund. They were, however, encouraged to contribute, and signed pledge cards indicating the amount they expected to pay. The United States Court of Appeal, Second Circuit, considering the substance of the transactions, held that these payments were not gifts. Judge Hayes said:[21]

> Clearly here, … the parent taxpayers both anticipated and received substantial benefits from their payments; the payments did not come from a "detached and disinterested generosity". *Commissioner of Internal Revenue v Duberstein, supra*. Instead, the record shows that the taxpayers' payments were made with the anticipation of economic benefit. The record indicates that the appellants realized that they had to pay in order to keep the schools in operation and that the amount of their contributions to the education fund was determined, at least to some extent, by what they believed to be the cost of educating their children.

[63] Finally, to conclude my discussion of the case law, I return to New Zealand and the Taxation Review Authority's decision in *Case J76*.[22] That case involved a taxpayer who assisted a number of disadvantaged children, who were no relation to him, by paying their school fees. In return, the school provided the children with food,

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20 *Winters v Commissioner of Internal Revenue* 468 F 2d 778 (2nd Cir 1972).
21 At 781.
22 *Case J76* (1987) 9 NZTC 1451 (TRA).

board and education. The taxpayer claimed these payments as donations to a charitable institution, as he personally received no benefit from the payments. The Authority held, however, that the payments were not gifts. This was because the payment gave rise to a contractual obligation on the part of the school to educate the children. In other words, the benefit to the taxpayer was the contractual right to insist on performance.

[64] Considering these cases, I adopt the following propositions on the meaning of "gift". I consider *Coleman* to be particularly relevant, because the Court was considering "gift" in a tax context, the case has some factual similarities to the present, and both parties accepted it was a key decision in terms of principle.

(a) For there to be a gift, there must be a voluntary transfer of property owned by the donor to the donee.[23]

(b) There can be no material benefit flowing to the donor as a result of the donation.[24]

(c) However, a minor benefit or consideration will likely not be sufficient to vitiate the gift.[25] Neither will a "purely moral" benefit.[26]

(d) In examining whether the donor receives a benefit, the following considerations are relevant:[27]

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

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

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23 *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111 at 116; and *Friedberg v R* (1991) 92 DTC 6031 (FCA) at 6032.
24 *McPhail*; *Friedberg v R*; and *Coleman v R* [2010] 3 CTC 2311 (TCC).
25 *Mills v Dowdall* [1983] NZLR 154 (CA) at 156.
26 *Coleman v R* [2010] 3 CTC 2311 (TCC) at [47].
27 At [42].

(iii) There must be a connection or link between the donor's payment and the benefit. The cases refer to a "link" or "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,[28] or if one receives a contractual right to insist on the donee's performance, as a result of the payment.[29]

[65] Having come to a workable framework, I will turn to analysing the current facts to determine whether the payments are gifts. However, before doing so, I must address two further points: the administrative practice of the Commissioner regarding gifts, on which the plaintiffs place considerable emphasis, and the approach of other jurisdictions to WMF payments to the Church.

Relevance of administrative practices of the Inland Revenue

[66] Mr Akel relies heavily on the administrative practices of Inland Revenue. In particular, he points to the specific guidance from Inland Revenue that payments described as school fees or donations, paid to state schools by parents, which go into a general fund[30] are "gifts" for tax donation purposes. The argument is that the payments here are analogous, having also been paid into a "general fund", and should therefore be categorised as gifts, or that factor should carry considerable weight.

[67] Mr Ebersohn makes three points in response. First, this example of administrative practice is too removed from the current set of facts to be a helpful analogy. Second, in any event, Inland Revenue's position in regard to school donations and their position in this case are both consistent with the law on donations.

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28 *Coleman v R* [2010] 3 CTC 2311 (TCC).

29 Like in *Case J76* (1987) 9 NZTC 1451 (TRA).

30 General, in the sense the fund is used to support the school generally, rather than individual students.

Third, Inland Revenue's administrative practices provide little, if any, assistance as an aid to statutory interpretation.

[68] On the first point, in the context of education, Mr Ebersohn argues that Inland Revenue's stance is effectively a policy call. Under the Education Act, parents are entitled to free education of their children.[31] Payments made by parents are therefore not viewed as being for the provision of enrolment in education. So, they effectively need to be treated as donations or gifts. Although it was not put this way by Mr Ebersohn, it could be said that the right to free education creates in effect a presumption that moneys paid by parents to a public school are donations. This makes it an unhelpful analogy to the present case, argues Mr Ebersohn. I agree with this submission.

[69] Secondly, Mr Ebersohn argues persuasively that, his first point aside, the Inland Revenue's position on school donations, and to the payments in this case, are not inconsistent. He points to the proviso in the Inland Revenue guidance that payments made by parents claimed as a donation must not be for tuition fees, school trips, or other specific disbursements.[32] In terms of the definition of a gift, another way of putting this is that payments made in these circumstances cannot be on the understanding that there will be a benefit to a specific child in return. What the Commissioner is asserting in the present case is that there is a benefit being received in return. They submit, in effect, that the situation here is somewhat analogous to payments for specific school disbursements, which would not be deductible as charitable gifts.

[70] I agree for the above reasons that the administrative practice relied on by Mr Akel is not applicable or relevant to the present case.

[71] I also agree with Mr Ebersohn's third point that there must be limited circumstances in which administrative practices would be relevant to statutory interpretation. I do not consider it necessary to examine this point in detail. Here the

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31 Education Act 1989, s 3.

32 Inland Revenue *IR 3 Guide: Question 33 – Donations rebate* (Inland Revenue, Wellington, 1999) at 58.

administrative practice is so removed from the particular case that there is no need for me to develop the interpretation point further.

[72] Further, at a number of points in the plaintiff's discussion, they argue various other jurisdictions' approaches to gifts are "incompatible" with the approach in New Zealand, because of our "well-settled" approach to gifts in the context of school donations. I do not agree: for the reasons above, I consider the position regarding school donations in New Zealand to be peculiar to that context. I also make the point that the particular New Zealand administrative practice is only in respect of State school fees/donations.

Approach to missionary payments in other jurisdictions

[73] The plaintiffs also seek to rely on administrative practices of tax authorities in other jurisdictions, and two United States cases in relation to missionary payments. In many instances, these seem to allow deductions for WMF or similar payments.

[74] The defendant's position is that the practices of foreign tax authorities are unhelpful as a guide to interpreting New Zealand statutory provisions. I agree that they have very little authoritative weight. However, it is useful to see how other jurisdictions deal with similar questions, especially where the law may be more developed. This is especially the case where the foreign jurisdiction has a similar regime to New Zealand. I will briefly discuss the law in the jurisdictions cited to me.

United States

[75] In the United States, § 170(a) of the United States Revenue Code allows a taxpayer to claim a deduction for a "charitable contribution".[33] "Charitable contribution" is defined in §170(c) as "a contribution or gift to or for the use of …" certain entities, of which the Church is one.

[76] It seems that the practice of the Church in the United States, prior to 1992, was for supporters of missionaries to pay money to them directly. But in 1990, the United States Supreme Court in *Davis v United States* held that such "donations" were

[33] Internal Revenue Code, 26 USC § 170.

not deductible under § 170, as they were not made "to or for the use of" the Church.[34] Subsequently, in 1992, the Church shifted to the "equalised funding program" referred to earlier, where donations were co-mingled for the use by, and at the discretion of, the Church. Because of this, the Inland Revenue Service (IRS) began accepting payments to this fund (WMF payments) as tax deductible. For this point, the plaintiffs cite an IRS Revenue Ruling from 1962, where the IRS were asked whether contributions by a parent of a missionary to a fund earmarked to support missionaries in their work were tax deductible under § 170.[35] I produce the substance of the answer in full, as it is illuminating to the current discussion:

> … unless the taxpayer's contributions to the fund are distinctly marked by him so that they may be used only for his son or are received by the fund pursuant to a commitment or understanding that they will be so used, they may be deducted by the taxpayer …

[77] This does seem to show that the IRS will accept WMF payments as deductible, at least in 1962. I am assured by the plaintiffs that this is still the case. The parties have also produced a "Litigation Guideline Memorandum" by the IRS, which was published post *Davis*.[36] It specifically considers the case of the Church's "equalised funding" regime. It concludes in the following way:

> Although not free from doubt, we have also concluded, that contributions made after December 31, 1990 [post *Davis*], under the "equalized funding approach" qualify for deduction under section 170 because the control test of Rev. Rul. 62-113, appears to be satisfied. Nevertheless, it is cautioned that an examination of the Church has not been undertaken and that if an investigation should uncover facts which affirmatively establish that the Church does not control the expenditure of the donations or that a commitment or understanding exists at the time of contribution that the funds will be spent for the benefit of a particular missionary, the opposite conclusion would be warranted.

[78] While the examination itself is similar to that I have to undertake here, the law and focus of the examination appears materially different. The IRS guidance focuses on whether the moneys are "for the use of" the Church, rather than whether they are gifts, and focuses on who has control of the funds. Neither of these is particularly

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

35 Internal Revenue Service "*Revenue Ruling 62-113"* (1 January 1962).

36 Internal Revenue Service "*Litigation Guideline Memorandum: Re Mormon Missionary Cases"* TL-34 (23 April 1993).

material here. I therefore do not consider the guidance to be helpful in interpreting the definition of "gift" in New Zealand.

[79] The age of the IRS guidance also diminishes its relevance. The plaintiffs say that the position is still effectively the same, but I do not know if that interpretation has ever been challenged. This is the problem with relying on administrative practice: it is interesting to see how an authority deals with certain questions, but only the Courts may definitively interpret the law. For that reason, any administrative guidance or practice is suspect unless it has been challenged and approved of by a competent judicial body.

[80] The plaintiffs also point to two older cases in the USA, which they submit assist them: *Peace v Commissioner* and *Winn v Commissioner*.[37] These cases both relate to payments for missionaries of different churches.

[81] *Peace* involved a taxpayer who donated to a common pool of funds, which was used to support missionary work (of a different church). Donors to this pool typically specified that their donation was for the support of particular missionaries. The IRS asserted the donations were not deductible because they were made for the support of certain individuals, rather than for the "use" of the church generally. Judge Dawson, of the Federal Court of Appeals, found, citing the Revenue Ruling referred to above, that the relevant test was whether the organisation has full control of the donated funds, and discretion as to their use. His Honour found on the facts of that case that the donors knew and intended that their funds would go into a common pool to be distributed only as the church itself determined. He therefore found for the taxpayer.

[82] *Winn* involved a taxpayer who donated to the missionary work of a woman in South Korea. The relevant church raised money for her mission. Any money raised was transferred by the church to the missionary's personal account. However, in this case the taxpayer paid the funds directly to her account, rather than via the church, as he did not want the church siphoning funds for other projects. The missionary was the taxpayer's first cousin. The issue before the Court was whether these funds were

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[37] *Peace v Commissioner of Internal Revenue* 43 TC 1 (1964); and *Winn v Commissioner of Internal Revenue* 595 F 2d 1060 (5th Cir 1979).

donated for the use of the church. The Court held that the substance of the transaction was a donation for the use of the church, effectively because the church would have applied the funds to the missionary's account anyway.

[83] The same point that applies to the US guidance applies to these cases. In both of these cases, the issue was whether the funds were for the use of the relevant church. As I have said, this is a different approach to that taken in this jurisdiction as to whether something is a "gift". They were not focussed on whether there was a gift, and more particularly, whether the taxpayers received a benefit from the donation.

[84] The plaintiffs argue that these cases show that the US Courts consider it self-evident that payments to a general missionary fund, even if marked for a particular beneficiary, are gifts. That may well be so, but again, it is unhelpful, because it does not tell me why. The cases do not discuss whether the donations were a gift. They seem to assume that is the case. It seems that because of the additional requirement of "use", the US Courts focus on that aspect. US law is not authoritative, but it is also not persuasive in these cases. Further, I note that decisions of US Courts are not overly relied upon in this jurisdiction, especially given the dissimilar donation regimes.

[85] I note also that in *Peace*, there is no suggestion that the donor was related to the particular missionaries. That further distinguishes it from the present case, at least in so far as this case concerns payments by missionaries themselves, or their family members. I note that *Winn* did involve donations by a first cousin, but the Court did not consider the significance of that relationship. Further, I find the outcome in *Winn* to be strange, given the guidance issued by the IRS and the decision in *Peace*, which both seem inconsistent with the result in *Winn*. It is also seemingly inconsistent with the later decision in *Davis*.

Canada

[86] In Canada, s 118.1 of the Income Tax Act allows an individual to claim a tax credit for an "eligible amount" of a "gift" to a "qualified donee".[38] I have already discussed several cases from Canada, namely *Friedberg, Zandstra,* and *Coleman.*

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[38] Income Tax Act RSC 1985 c 1 (5th supp), s 118.1.

However, none of these consider payments by missionaries or their families. So, while these cases have been helpful on the law, they are not direct analogies to the current facts.

[87] The plaintiffs do, however, contend that the Canadian Revenue Agency allows WMF payments to be deductible, and it seems they submit that the New Zealand Courts should therefore do the same. They cite the Canadian Revenue Agency's (CRA) *CRA Policy Commentary*:[39]

> For example, where a missionary, who agrees to travel abroad on behalf of the charity, agrees to make a gift to the charity to cover his/her airfare and accommodations. The travel arrangements include a return ticket at the economy rate and accommodations at a bed and breakfast for two weeks. Since the amenities provided to the volunteer are reasonable and the purpose of the travel relates to the charity's work, the amount donated to the charity to cover the travel expenses can be considered as a gift to the charity and therefore, receiptable.

[88] The plaintiffs do not submit any further on the Canadian practice. As I have said, I do not regard administrative practices, in New Zealand and particularly overseas, by themselves, as particularly persuasive. While it is somewhat noteworthy that the CRA regards a payment to cover flights and two weeks' accommodation as a donation, I do not have their reasoning as to why. Without more, I do not find this overly helpful.

United Kingdom

[89] In the United Kingdom, under the "Gift Aid" provisions in Pt 8, Ch 2 of the Income Tax Act 2007, a charity is able to reclaim the basic rate tax (20 per cent) that a donor has paid in respect of the donor's qualifying donation to the charity. For example, if a donor donates £100 to a charity through gift aid, the charity is able to claim an extra £25. If a donor's income is high enough that they pay more than the basic tax rate on their income, then the donor may also claim the difference (i.e. if their tax rate is 40 per cent, they may claim 20 per cent of their donation).

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[39] Canadian Revenue Agency *CRA Policy Commentary CPC-025: Expenses incurred by volunteers*, 26 February 2003.

[90] In order to qualify for this tax concession, the payment made must be a "gift" to the charity. The definition of a gift seems similar to that in New Zealand.[40]

[91] Section 416(7) of their Act provides that a "qualifying donation" is one which does not have any benefits associated with it. An associated benefit is defined in s 417 as a benefit received by the donor, or a person connected with the donor, in consequence of the donor making the gift. Effectively, the definition of gift in the UK is similar to ours, albeit based in statute in this context. The plaintiffs put forward a publication by HM Revenue and Customs (HRMC) giving their view of payments in support of missionaries:[41]

> HMRC takes the view that donations to cover the costs incurred by a charity such as a missionary society in supporting the relative of the donor, as a missionary, can qualify under the Gift Aid Scheme provided the missionary society is not merely channelling a donation to the donor's relative.

[92] So, say the plaintiffs, WMF style payments are eligible for gift aid in the United Kingdom.

[93] It is interesting that HMRC does not view accommodation and flights as a benefit. However, I have the same problem with this submission as I do with the Canadian practice: I have a conclusion, but no reasoning. Foreign administrative practice will only be helpful in so far as their reasoning informs my own. Their conclusions have no authoritative weight by themselves. The regime in the UK is also dissimilar to ours, where the focus is more on charities receiving the benefit from a donation, than on the donor, and in addition, their regime is much more prescribed by statute.

Australia

[94] In Australia, a taxpayer may claim a tax deduction for a gift to a "deductible gift recipient".[42] The Church is not, however, a "deductible gift recipient" in Australia. So there is no administrative guidance on WMF payments. It seems the Church

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40 See *Halsbury's Laws of England* (5th ed, 2014, online ed) Vol 52 Gifts at [201].

41 HM Revenue and Customs "Charities Detailed Guidance Notes: Chapter 3 Gift Aid" (updated 26 April 2016) Gov.uk<https://www.gov.uk/government/publications/charities-detailed-guidance-notes/chapter-3-gift-aid>.

42 Income Tax Assessment Act 1997, division 30.

consequently faces a bigger battle in Australia. There is Australian case law on the definition of gift, such as *McPhail*, but I have discussed this above.

Conclusion on foreign jurisdictions

[95] It does seem as though WMF payments are accepted as charitable donations in the USA, Canada and the United Kingdom. However, I only have various guidelines issued by their equivalents to our IRD. The plaintiffs assure me those payments are accepted, and they are likely in the best position to know. I do proceed in the knowledge that competent, well-resourced tax authorities in other jurisdictions have concluded a person making a WMF-style payment does not benefit, and so they are deductible gifts. This is certainly a point in favour of the plaintiffs. However, this can only have limited relevance, given the plaintiffs cannot point to a case where this issue has been expressly considered.

[96] Administrative authorities like the IRD are not bound to give legal reasons for their conclusions. Such organisations can adopt administrative practices for all sorts of reasons that are irrelevant in a Court proceeding. For example, the cost of pursuing donees, political pressure not to pursue the Church, or even just that no one has put much attention to the issue. I am not saying these are factors that are engaged, only that they could be, and I have no way of knowing. It is for this reason, as well as others that I have already mentioned, that I find administrative practices mostly unhelpful.

Analysis

[97] I turn now to analyse the current facts under the framework I came to above.[43]

[98] In terms of the first element of a gift, it is arguable in the present case that the payments, so far as made by the missionary, are not voluntary, at least not once the admission form is signed and that on that basis alone, a payment by the missionary is not a gift. However, the signing of the form itself is entirely voluntary. This is not a

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43 At [64].

situation such as *Leary* and *Re Klopper*,[44] where the payments were quite clearly not voluntary. Also, I would not consider payments by parents or other donors to be involuntary, given the Church does not have any legal power to insist on payment. This is reinforced by the Church's statement that a lapse in payment by a missionary or their family will not cause a mission to end.

[99] I consider this case turns on the question of benefit or consideration to the donor. So, I proceed on the basis the payments are all voluntary and turn to consider whether there is a benefit to the different categories of donor.

[100] I consider the question of benefit in two steps, in the following order:

(a) Is there a sufficient link between the standard payments and the payment of a missionary's essential expenses?

(b) If so, is there a benefit to the different categories of donor as a result of payment of those expenses?

[101] I note I am considering these factors in a different order than Miller J did in *Coleman*. But I consider my approach better fits the present situation.

Is there a link between the WMF payments and payment of the missionary expenses?

[102] There is some overlap between questions of a sufficient link and individual benefit.

[103] Although Mr Akel's arguments were very thorough and persuasive, I have concluded that there is a clear link between the payments made as part of the application to be a missionary, and receipt by the missionary from the Church overseas of their essential expenses.

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[44] *Re Klopper v Federal Commissioner of Taxation* (1996) 96 ATC 2,020 (AAT). Where payments were made to a charity to effectively meet an indemnity obligation on the part of the donor arising out of the America's Cup.

[104] Mr Akel points to a number of aspects which the plaintiffs say mean there is no clear link, including:

(a) The fact that the funds paid to the Trust become the property of the Trust and are not refundable. (A related fact is that the Trust can use the funds for any purpose it chooses.)

(b) The funds paid to the Trust were in respect of "equalised contributions", or a similar type of target established by the Church, and not the actual amount the Church was required to pay for expenses.

(c) The Trust cannot enforce payment on the pledges. Similarly, in some circumstances, WMF payments may theoretically not be made.[45]

[105] I do not consider that any of these matters affect what seems to be the clear substance of the arrangement. I find that the donors knew and anticipated that their paying money to the Trust would enable the missionary on behalf of whom they were paying to go on their mission, and correspondingly to have their expenses paid by the Church.

[106] In my view, the substance of the transaction is that the missionary, his or her family and members of the ward are making payments to facilitate that missionary being able to travel and carry out their mission. There is no legal obligation on any of these parties, but there is a clear moral obligation on the Church, and a strong understanding on the part of the donors that their payments would enable a missionary to go, and to have their expenses met. That is how the scheme operates in fact. The fact the WMF payments cannot be traced through to the expenses, or are not the same as the expenses, does not alter the link between the two.

[107] I do not suggest that the arrangement is a sham or subterfuge, which was clearly the case in *Leary*. If anything, the present case is even more marginal than a case like *Coleman*. I agree, however, with the Commissioner that there are close parallels in terms of a factual comparison with *Hodges*. I note that the plaintiffs dispute that this

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45 Albeit, I was not provided with an instance where this occurred.

case is analogous, saying in effect there was a much clearer link in *Hodges* between the payment and the donor receiving a benefit than in this case. I accept the link was stronger in *Hodges*, but I still regard the case as a close analogy. The plaintiffs also argue that *Hodges* was not necessarily correctly decided, but their arguments in that respect are effectively the same as they make in this case.

[108] I agree with Mr Akel that the primary requirement for acceptance of a missionary is that the missionary must demonstrate worthiness, but that does not detract from the very high level of expectation to which I have referred, and that in my view is sufficient to establish a link.

Is there material benefit to the individual categories of donors?

[109] The finding of a clear link alone is not sufficient to vitiate a gift. There still has to be some material benefit to the individual donor.

(i) Benefit to the missionary

[110] I take into account that a nominal benefit is not sufficient to vitiate a gift. I accept that here the missionary works hard and has little down-time. The mission is rigorous, as Mr Akel describes it. A missionary is expected to remain in the chosen foreign country for 18 months to two years. It is part of the agreed facts that they are expected to work full-time, six days per week, in exchange for payment of very basic living costs. There is no provision for any holiday. The amount paid obviously does not reflect the actual costs incurred by them, although it might do so in some countries. It clearly does not provide them with any income, despite their working full-time. The missionary service is conducted in very restricted conditions and circumstances.

[111] This is not a situation where a person claiming a tax deduction travels overseas and performs a small amount of work for a charity, but predominantly has a holiday.

[112] Many would consider a missionary does not "benefit" from being able to travel and live so barely in such circumstances. There is unquestionably much sacrifice involved. But the analysis needs to be at a higher level, and Mr Akel did not appear to argue strongly that there was no benefit to Ms Coward on the basis of the terms of

work, rather on the basis that the payment received is only service-related, as opposed to the education cases.

[113] I have to accept the Commissioner's argument that Ms Coward, and any other individual missionary, benefits from their essential expenses being paid, for similar reasons to the Court in *Hodges* where the payment received was service-related. The missionary wanted to have the experience and knew to get that they needed to pay.

[114] So, I further accept that any payment made by an individual missionary (not applicable in the *Coward* case, but relevant to the second proceeding before me) benefits the missionary. The benefit of having travel, accommodation, food and other personal expenses paid is not nominal.

[115] I note here that Mr Ebersohn volunteered in oral submissions that travel costs might be distinguished as not providing a benefit, on the basis the missionary has to travel to carry out the charitable work. He said that was not the case with other costs that were clearly costs designed to benefit the missionary, being their basic living and related costs. I do not consider there is any distinction, and I note that Mr Akel did not adopt this distinction.

[116] I therefore find that payments by the missionary are not gifts.

(ii) Benefit to parents and grandparents

[117] Just as the missionary (who, while not a child, is still a relatively young person), benefits from the payment, so do their parents and grandparents.[46] A payment by a parent or a grandparent that benefits a "child" will generally also benefit the donor. This is illustrated by *Coleman*, admittedly in relation to tuition and other university-related expenses, where parents and grandparents might be said to have a greater obligation, or responsibility, or direct interest. The present case is more marginal, but I consider the same can be said here. 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

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46 When I refer to parents and grandparents, I include legal guardians.

overseas, and experience being a missionary abroad. That is a more than de minimis benefit.

[118] Payments by the parents (including Mr Coward), and grandparents, are therefore not gifts.

(iii) Benefit to other relatives or ward members

[119] I consider that payments by other relatives are gifts because I do not consider there is benefit to these people that goes beyond minor or immaterial. In this category of other relatives, I include siblings, cousins, aunts and uncles, and more distant relations. This may seem somewhat arbitrary, and to an extent it is. But, in my view, siblings and cousins 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, it seems to me, fall into the category of pure generosity, or provide the donor with a "pure moral benefit".

[120] I find the same is true of friends of the missionary, and of other members of the Church.

[121] Mr Ebersohn did argue, with regard to these more removed parties, that even if there is no material benefit to the payor, where a payment is clearly made on the basis that a benefit is to be provided to an identified person, and the donee is placed under an obligation to perform something, that payment is not a gift. Mr Ebersohn gives two examples to illustrate this point.

[122] Firstly, he posits the hypothetical example of a father who takes his children to a restaurant, and pays for their dinner. Mr Ebersohn argues, perhaps somewhat facetiously, that the father is obviously not making a donation to the restaurant, even though he himself does not materially benefit. Secondly, he points to the decision in *Case J76*, which I discussed above. That case concerned a man generously paying for the education of children that were not his own. The Judge in that case found this was not a gift, because the material benefit was the man's contractual right to insist on the school's performance.

[123] I am not persuaded by Mr Ebersohn's submissions on this issue. On his first example, leaving aside the fact that the father would benefit from seeing his child fed, the restaurant would be contractually obligated to deliver the food. A legal right to insist on performance is a material benefit, as found in *Case J76.*

[124] On the present facts, while a prospective missionary's friends, relatives and other members of the Church supporting him or her would likely be dismayed if the missionary did not go on the mission despite raising the funds, the donors would have no legal right to insist the Church send the missionary, or refund them their money. This is made clear in the Church's materials on donations.

[125] I do accept Mr Ebersohn's point that the Church may be under a strong moral obligation to send a beneficiary in such circumstances, and that a particular missionary is almost guaranteed to go if they raise sufficient funds (and are otherwise "worthy"). But this strong moral obligation is not, in my view, sufficient to create a material benefit to the donors.

[126] I therefore do not consider in all of the circumstances that payments by these further categories of donors are gifts.

Conclusion

[127] I have some sympathy with the plaintiffs' arguments in this case. I consider the central issues to be very finely balanced. But, after considering all of the case law and arguments put to me, I find that WMF payments by a missionary, and parents and grandparents of a missionary are not gifts for the purposes of s LD 1. However, I find that payments by other relatives of a missionary and other members of the Church are gifts, and so may attract a tax deduction under that section.

[128] As such, my conclusions on the declarations sought are as follows.

(a) In the matter of the Coward proceeding:

(i) I find Mr Coward's payments to the Trust are not gifts, so the Commissioner's Disputable Decision disallowing Mr Coward's tax credit in respect of those payments is correct.

(b) In the matter of the Trust's proceeding:

(i) WMF payments to the Trust by the following classes of people are not gifts under s LD 1, and the Trust may not issue donation receipts in respect of them:

1. missionaries called to serve the Church;

2. a parent or legal guardian of a missionary; and

3. a grandparent of a missionary.

(ii) But, WMF payments to the Trust by the following classes of people are gifts under s LD 1, and the Trust may issue donation receipts in respect of them:

1. a sibling of a missionary;

2. a more distant relative of a missionary, such as a cousin, uncle or aunt; and

3. a Church member unrelated to the missionary, such as a friend of a missionary or a member from the missionary's local ward.

Costs

[129] My provisional view on costs is that they should lie where they fall. All parties have enjoyed a measure of success, besides Mr Coward. However, my provisional

view is that answering Mr Coward's case would not have required much resources over and above those required to answer the Trust's case.

[130] If the parties wish to, however, they may file memoranda on costs by 5.00 pm on Friday, 15 February 2019.

Hinton J