Blackburne J. noted in *Balmer Radmore* that his conclusion against contributory fault did not render the principal's conduct irrelevant as there may still be issues of remoteness or causation to contend with. Contributory negligence does not require the plaintiff to be in breach of a duty of care owed to the defendant; rather, it is concerned with issues of causation: was the plaintiff's failure to take reasonable care of her own interests a legally contributing cause in bringing about the loss suffered? Causation is not a matter of pure logic; rather, it involves policy judgments concerning the appropriate allocation of legal responsibility for loss suffered following certain conduct. It therefore depends heavily on the policy reasons underlying the rules in respect of which responsibility is being allocated.

As the majority had not found a breach of fiduciary duty in *Pilmer*, their judgment lacks that sort of analysis. Kirby J. commented that equity has not hitherto held a principal bound to protect himself against his fiduciary and that, traditionally, more is required of a fiduciary than merely taking reasonable care. This allows the principal to act quite unreasonably and simply rely on the fiduciary not to harm his interests. Other analyses are available. In *Canson Enterprises Ltd.* v. *Boughton & Co.* (1991) 85 D.L.R. (4th) 129, 161, McLachlin J. accepted that the high level of fiduciary duty justifies adopting a measure of compensation which ensures that fiduciaries are "kept up to their duty", but also suggested that if the principal acts wholly unreasonably then the losses stemming from that conduct will not be recoverable from the fiduciary. This is not necessarily inconsistent with the high standards expected of fiduciaries, especially when it is recalled that fiduciary law will provide allowances for work done in breach of fiduciary duty (*Boardman* v. *Phipps* [1967] 2 A.C. 46). The relevant policy issues require closer consideration.

MATTHEW D.J. CONAGLEN

CONSTITUTION OF TRUSTS—A NOVEL POINT

THOUGH it is unusual for a point of law to be decided by distinguishing a case apparently regarded as virtually having the authority of holy writ, that occurred in *T. Choithram International SA* v. *Pagarani* [2001] 1 W.L.R. 1 (P.C.).

It is trite law to state that an express trust is constituted in either of two ways, that is to say, by a settlor's transferring title to property to trustees to be held by them on trust for an indicated

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beneficiary or charitable purpose, or for him to declare himself trustee of property for such person or purpose. A mere intent to benefit another without having done the job properly in one way or the other will not suffice to constitute a trust, the worthiness of the intended beneficiary or purpose notwithstanding: *Milroy* v. *Lord* (1862) 4 De G. F. & J. 264 and *Jones* v. *Lock* (1865) L.R. 1 Ch. App. 25. The facts of *Choithram* v. *Pagarani* "are novel and raise a new point ... the case falls between" the two situations above (*per* Lord Browne-Wilkinson at p. 11).

Choithram Pagarani (TCP), an immensely wealthy man, made generous provision for his wife and children, and intended to devote the remainder of his wealth to charity. He executed a trust deed establishing a philanthropic charitable foundation of which he appointed himself one of the trustees. He stated orally that he gave all his wealth to the foundation, and resolutions were adopted by companies controlled by him that the trustees of the foundation were the holders of certain assets. Documents reciting that TCP held other property on the trusts of the foundation were prepared, and instructions issued from him that further assets be vested in the foundation, but TCP had signed none of the documents at the time of his death, nor were his instructions implemented until after it. But on the day before his death, TCP had said to his daughter "I have given up everything and feel very happy now. What I was wanting to do I finally did it."

The plaintiffs claimed and the Court of Appeal of the British Virgin Islands held that no effective gift of the relevant assets had been made to the foundation and that, accordingly, they were held on trust for TCP's estate since, although TCP had intended to make immediate absolute gifts "to the foundation, [he] had not vested the gifted property in all the trustees of the foundation". Thus he had neither effectively vested the property in the trustees as such, nor did his words of gift render him a trustee "because they made no reference to trusts". And "the court will not give a benevolent construction so as to treat ineffective words of outright gift as taking effect as if the donor had declared himself a trustee for the donee". In other words, the Court of Appeal decided the matter on the basis that "equity will not assist a volunteer" or "perfect an imperfect gift".

In allowing the appeal, the Judicial Committee of the Privy Council, whilst accepting the well-known maxims, added that "equity will not strive officiously to defeat a gift". And, on the "novel" facts of the case, since

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> the foundation has no legal existence apart from the trust declared by the foundation trust deed ... the words "I give to the foundation" can only mean "I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed". Although the words are apparently words of outright gift, they are essentially words of gift on trust (*per* Lord Browne-Wilkinson at p. 12).

Thus, since TCP was a trustee of the foundation, he had effectively constituted himself a trustee for the donee; the trust being completely constituted, it "bit" on the property and the donee's status as a volunteer became irrelevant. TCP could not validly have denied that he was a trustee for the purposes of the foundation. Further, "in the absence of special factors [unspecified] where one out of a larger body of trustees has the trust property vested in him he is bound by the trust and must give effect to it by transferring the trust property into the names of all the trustees". Contrary dicta by Sir John Romilly M.R. in *Bridge* v. *Bridge* (1821) 16 Beav. 315, 324 were expressly disapproved.

The decision in *Pagarani* is correct on its facts and is to be welcomed (though it may, possibly, give rise to a degree of uncertainty). And "though equity will not assist a volunteer, it will not strive officiously to defeat a gift" is likely to become a classic dictum alongside the more conventional remarks of Turner L.J. in *Milroy* v. *Lord* and of Lord Cranworth in *Jones* v. *Lock*.

Perhaps the maxim that "equity will not assist a volunteer" is occasionally churned out as a formula a bit too readily and as a cloak for the avoidance of thought. For it often will do so (in addition to such doctrines as *donatio mortis causa* and the extension of *Strong* v. *Bird* (1874) L.R. 18 Eq. 315 in *Re Ralli's W.T.* [1964] Ch. 288). It does so in virtually every instance of a completely constituted trust, where a beneficiary will seldom have given consideration, and also according to the principle in *Re Rose* [1952] Ch. 499. There, failure to transfer title to the assets by the donor, whose intent was clear, was owing to no omission on his part but to omission on the part of a third party.

Perhaps the maxim could be adjusted in the following sense: "equity will not assist a volunteer if, in doing so, it would repair the consequences of a would-be donor's folly". Had the volunteer been assisted in *Milroy* v. *Lord* or in *Jones* v. *Lock*, such folly would have been repaired. In doing so in *Re Rose* it was not. More generally, *Choithram* v. *Pagarani*, with *Re Rose*, shows a willingness on the courts' part to depart from strict legal formalism and, in that sense, is in line with the approaches of Lord Wilberforce in *McPhail* v. *Doulton* [1971] A.C. 424 concerning certainty of objects

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in trust powers and of Lord Cross of Chelsea in *Dingle* v. *Turner* [1972] A.C. 601 concerning public benefit in certain charitable trusts.

JOHN HOPKINS

TOBACCO ADVERTISING: IF YOU MUST, YOU MAY

IN *Germany* v. *European Parliament and Council* (Case C-376/98, judgment of 5 October 2000) the European Court of Justice held that Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products ([1998] O.J. L 213/9), the legality of which had been challenged in various earlier cases (*e.g.*, Cases T-172/98 and T-175/98 to T-177/98 *Salamander AG* et al. v. *European Parliament and Council*; Case C-74/99 *The Queen and Secretary of State for Health* ex parte *Imperial Tobacco Ltd. and Others*), was invalid.

The Directive, like previous approximation measures relating to tobacco products, was adopted by qualified majority voting as an internal market measure, on the basis of Articles 95, 47(2) and 55 EC. Harmonising the rules on advertising and sponsoring of tobacco products was meant to eliminate national regulatory differences deemed to impede the functioning of the internal market; according to Article 3 of the Directive, all forms of advertising and sponsoring of tobacco products were to be banned in the Community. Germany, which was outvoted when the Council adopted the Directive, argued that the Community was not competent to adopt such a measure, at least not on the legal basis that was chosen.

In its judgment, the Court first stressed that the national measures to be harmonised by the Directive were "to a large extent" public health measures, and that, as contended by Germany, the EC Treaty explicitly excludes harmonisation in the field of public health. It nonetheless pointed out that such exclusion did not mean that harmonising measures based on other Treaty provisions could not have an impact on public health, since the latter must form a constituent part of the Community's other policies. At the same time, the Court insisted that the legal basis should not be determined to "circumvent the express exclusion of harmonisation" under Article 152(4) EC. It therefore undertook to verify whether the conditions for recourse to Articles 95, 47(2) and 55 had been fulfilled.

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