

**WARNING:** This file is an updated version of the bulk of Chapter 25 of Alastair Hudson, *Equity & Trusts*, 5<sup>th</sup> edition, which will be published in the summer of 2007. This chapter updates the discussion of the law on charities to take account of the passage of the Charities Act 2006. It is incomplete at this stage and does not contain a discussion of the new regulatory regime dealing with charities nor the changes to the cy-pres doctrine. It is subject to change and this file may be updated before you sit your examinations.

## CHAPTER 25

### CHARITIES

The main principles in this area are as follows:

*The case law on charitable trusts has always divided between trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community. However, the enactment of the Charities Act 2006 has had the effect of expanding the categories of “charitable purpose” beyond those categories set out by the case law. The first three categories – the relief of poverty, the advancement of religion and the advancement of education – remain, but the fourth category has been replaced by a statutory list of purposes. That statutory list includes: the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement; the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage; the advancement of animal welfare. Consequently, the bulk of this chapter deals with the long-established case law categories of charitable purpose first before turning to consider the various statutory categories later on.*

*Trusts for the relief of poverty must relieve the poverty of some person. ‘Poverty’ means ‘something more than going short’ but does not require absolute destitution. It is apparently the case that it need not be a broad section of the community which stands to benefit from the trust. Rather, trusts for the relief of poverty are presumed to have a generally altruistic motivation and are therefore enforceable as being charitable.*

*Trusts for the advancement of education require that there is some institution of education benefited, or that the purpose of the trust is to generate research which will be published for the public benefit. Trusts for the pursuit of sport fall within the charitable head provided they are annexed to some institution of education. In many cases, educational charitable trusts have been used as fronts for the provision of benefits to a private class of individuals. Consequently, the courts have developed a requirement that there be a sufficient public benefit, which requires that there is no ‘personal nexus’ between the people who stand to benefit and the settlor of the trust.*

*Trusts for the advancement of religion are required to have a sufficient public benefit, such that the works done and the prayers said by a cloistered order of nuns, though religious, would not be charitable in legal terms. Religion is concerned with ‘man’s relations with God’ and therefore excludes many modern new age religions and cults.*

*Other purposes beneficial to the community require sufficient public benefit. A community must be more than a mere fluctuating body of private individuals (such as employees of a small company). ‘Benefit’ will accrue from the maintenance of public buildings, the provision of facilities for the disabled within a community, but will not be said to accrue from mere recreation or social events (subject to statute). Political purposes promoting a change in legislation will not be charitable.*

## 25.1 INTRODUCTION

### 25.1.1 Context

The law relating to charities is a subject in itself, separate from the ordinary law of trusts and commanding its own distinct treatment in the practitioners' treatises and in textbooks.<sup>1</sup> The law relating to charities does not itself conform neatly with the law on express trusts which we have already considered in Part 2. That the law of charities forms part of trusts law is an accident of history. Charities were originally overseen by the ecclesiastical courts and, as will emerge, retain many of the seeds of their religious heritage in the modern law. This part of the ecclesiastical jurisdiction was subsumed by the Courts of Chancery, in particular by those Lords Chancellor who were themselves bishops, and charities were consequently administered in a manner broadly similar to express trusts. A charity is an institution which acts in the public benefit, especially (in the words of the Oxford English Dictionary) to relieve need or distress, or to provide for the communal services more generally. Charities do not seek to earn profits for any purpose other than their charitable purposes. It will be the principal focus of this chapter to explore precisely what English law considers a charitable purpose to be.

Charities form an essential part of social welfare provision in many Western countries. The charitable sector in the USA stands in place of a welfare state in many contexts, relying on corporations and private individuals to shore up areas of social endeavour by donation or annuity. In the UK, the 'third sector' (as it has become known) provides important support in particular areas of social need by raising funds from the public, or by means of corporate or other donation. Charities are referred to as the 'third sector' because they are neither part of the public sector, because they are not run by the state, but nor are they entirely private bodies. While the charitable third sector, operating somewhere between the public sector and the private sector, does provide important services and support, it has not been admitted historically by any governmental administration that it is meant to act as a replacement for the welfare state, although there are signs that the Labour government and the Conservative Party are both interested in enhancing the role of the charitable sector in providing services which would otherwise have to be provided by government. The principal problem with this approach, it is suggested, is that charities are not democratically accountable in the way that governments are, and therefore it may be difficult to control the decisions of charitable bodies.

Consequently, the charitable sector occupies a difficult middle ground between the private and public sectors. There are issues of public law (or, administrative law) which centre on the equivocal nature of charities as institutions aimed at providing good public works by entities which are not publicly accountable in the way that central or local government are. Therefore, it is unclear how these bodies ought to be controlled. Responsibility for charities lies with The Charity Commission, a public body created by the Charities Act 2006. A perception of widespread mismanagement, and possibly corruption, in the charitable sector had previously led to the enactment of the Charities Acts of 1960 and 1993, with the purpose of creating regulatory bodies which would scrutinise and regulate the affairs of charities more closely than before. Shortcomings were said to include irregular keeping of accounts by charities and a lack of control on the part of the Commission to ensure that money was being applied as required by the charities' own purposes. The Charities Act 2006 has changed the Charities Commission into The Charity Commission in an attempt to renew the regulation of charities yet again.

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<sup>1</sup> Tudor, 1995; Picarda, 1993.

### **25.1.2 The structure of this chapter: the changes effected by the Charities Act 2006**

The Charities Act 2006 has effected some important changes on this topic. The principal purpose of this chapter is to consider the law relating to deciding which purposes will be charitable and which purposes will not be charitable. There is a huge case law on the question which purposes are or are not charitable. The up-shot of that case law was that there were three clear “heads” (or, categories) of charitable purpose: the relief of poverty, the advancement of religion and the advancement of education. There was a fourth, catch-all category: “other purposes beneficial to the community”. If one could not demonstrate that one’s purpose fell within one or other of the first three heads of charity, then one attempted to argue that it fitted under this fourth, general head. Much of the case law related to the extent of this fourth category. One of the main effects of the Charities Act 2006 has been to extend the heads of charity into areas which the case law had previously refused to acknowledge as being charitable. So, what I have done in re-writing this chapter to reflect the Charities Act 2006 is to retain the discussion of the first three heads of charity (because the 2006 Act leaves them largely unaffected); then to consider in outline how the case law on the fourth head divided itself because the courts may yet decide to retain that category regardless of the Act; and then finally to consider each of the new heads of charity created by the 2006 Act in turn, reflecting particularly on how some of these new heads of charity impact on the old case law.

The remainder of the chapter then considers two issues: first, the new regulatory structure for the administration of charities by The Charity Commission and, secondly, the cy-pres doctrine. The chapter ends with an analysis of the important “public benefit test” in charities law.

### **25.1.3 Categories of charitable trust under the case law**

The aim of this introduction is to give some explanation of the importance and context of charities law. However, it is difficult to understand modern charities law without some notion of its history.

#### *The roots of the law of charity*

The law of charities has its roots in the legislation of 1530 dealing with paupers. While this statute has been long-since repealed, its effect was to regularise the provision of alms to the poor. It is clearly demonstrable that, for example, the case law surrounding the Housing Act 1996 dealing with the rights of homeless people to be housed is still grounded in the Poor Law and, I would suggest, this sixteenth century statute. The statute passed in 1530 aimed to licence begging and to ‘outlaw vagabondage by the imposition of severe punishments’. The medieval Poor Laws were used in part to organise casual labour in agricultural communities and provide occasional subsistence living for the poor. The responsibility for controlling such people was placed on their local parishes. The penalties for unlicensed begging and homelessness were criminal punishments. The Vagrancy Acts of 1824 and 1935 remain unrepealed and similarly make it a criminal offence to beg or, effectively, to be part of the indigent poor.

The New Poor Law of the nineteenth century continued to deal with the issue of homelessness as primarily a criminal matter. The workhouses brought to life in Dickens' *Oliver Twist*, and his own experiences of debtors' prisons, were the reality of the treatment of the poor by the law. The spirit of Christian utilitarianism, and the enforced links between the homeless and the parishes from which they came originally, were key features of the treatment of the indigent poor. In a nation which was organised around religious conflict during the 16th century, the division of the country into parishes was the principal means of allocating responsibility for the treatment of the impoverished. Thus, for example, in terms of the law on homelessness, it is still necessary for the applicant to demonstrate a local connection with the local authority which is alleged to be responsible for the accommodation of that person.<sup>2</sup> Such organised, if harsh, benevolence has been replaced by the hostels and pavements of today. There is still a reliance on good works and charity running drop-in centres and soup kitchens, to deal with the most obvious symptoms of a crisis in the social provision of accommodation and subsistence levels of income. The earliest charities law, then, was the statute of 1601 (considered immediately below) is bound up with this treatment of the poor as both a threat to public order (and so subject to criminal punishments) and also as the object of pity to be cared for by the church in their local parishes. It was these local churches which, in time, became responsible for schooling the people of its parish as well as dispensing an eleemosynary ministry. Consequently, the case law developed three principal categories of charitable purpose: the relief of poverty, the advancement of religion and the advancement of education.

#### *The context of this discussion*

The placing of this discussion of the law of charities within a general examination of the welfare uses of trusts is intended to identify precisely the role of charities as means of providing for welfare services otherwise than through government spending. Charitable trusts are considered by the law and by policymakers to be desirable institutions and therefore they attract many benefits not afforded to ordinary trusts or ordinary companies. This has led to a great deal of abuse, which is considered towards the end of this chapter. More generally, this Part 8 *Welfare Uses of Trusts* argues for a coherent set of principles to be developed in relation to the fiduciary obligations of public and welfare trusts generally (including institutions as apparently diverse as pension funds and NHS trusts, as well charities) in recognition of the place of such trusts in the economic life of England and Wales.

#### *The preamble to the Statute of Elizabeth 1601*

In the development of the law controlling the giving of alms to the poor, the welter of common practice dealing with the dispossessed was eventually crystallised in the 1601 Statute of Elizabeth.<sup>3</sup> The aim of the 1601 statute appears to have been to reduce the obligations for the care of paupers which had been placed on parishes. The creation of charities in this way permitted philanthropic assistance to be given to charitable aims in a way that would reduce demand on the coffers of each parish.

The preamble to the 1601 statute set out a number of categories of activity which would be considered to be charitable, as follows:

The relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and schools in universities, the repair of bridges, ports, havens, causeways, churches, sea-banks and highways, the education and preferment of orphans, the relief, stock or maintenance for houses of correction, the marriage of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

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<sup>2</sup> Hudson, 1997.

<sup>3</sup> 43 Eliz I, c 4, 1601, more commonly known as the Charitable Uses Act 1601.

While this statute was repealed by the Mortmain and Charitable Uses Act 1888, its spirit has lived on in the common law and by virtue of s 38(4) of the Charities Act 1960. Despite confusion over the effect of the 1888 Act and the Charities Act 1960 (under neither of which was it entirely clear whether or not the Preamble to the 1601 statute was intended to have been repealed *in toto*), it is clear that the courts have incorporated the practice of allocating charitable status to purposes analogous to the Preamble of 1601 into common law. In *Scottish Burial Reform and Cremation Society v Glasgow City Council*<sup>4</sup> the House of Lords accepted that the case law flowing from the preamble should be accepted as keeping 'the law of charities moving as new social needs arise or old ones become obsolete or satisfied'.<sup>5</sup> In that case a trust for the maintenance of a crematorium was found to have been a charitable purpose.

Therefore, it has been accepted that a purpose will be charitable if it can be shown to fall within the Preamble to the 1601 statute or where it ranks by analogy with one of the purposes set out in that preamble. So in *Incorporated Council of Law Reporting for England and Wales v Attorney-General*<sup>6</sup> the dissemination of law reports was found to be a purpose beneficial to the community. Typically, the court will refer to the case law as to the definition of a 'charitable purpose' rather than grappling expressly with the preamble itself. Therefore, the four categories of charity considered in this chapter are those followed by the courts, as considered immediately below.

#### *The roots of the case law on charities*

The starting point for much of the case law on the definition of a 'charitable purpose' is *Pemsel's Case*.<sup>7</sup> It was in that decision that Lord Macnaghten set out the four categories of charity which are recognised by the case law on charities today:

1. the relief of poverty,
2. the advancement of education,
3. the advancement of religion, and
4. other purposes beneficial to the community.

The first three categories, with some oddities, form comparatively straightforward tests for whether or not a trust's purpose is a valid charitable purpose, whereas the fourth offers greater scope for interpretation. In short, before the Charities Act 2006, the lawyer was concerned to decide in the first place whether or not the trust purpose in question fell within one of the first three charitable purposes: if not, attention then turned to whether or not it could fall within the fourth, general head. In the next section we consider the effect of the Charities Act 2006 on these categories of charitable purpose.

### **25.1.4 The definition of "charitable purposes" after the Charities Act 2006**

#### *The meaning of "charity" as disclosing a "charitable purpose"*

A "charity" is defined in the Charities Act 2006 as being "an institution", which can be a trust or a company under English law, "which is established for charitable purposes only" and "falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities".<sup>8</sup> Thus, to know whether or not a trust purpose will constitute a charity or not we must establish whether or not that purpose can be defined as being a "charitable purpose", as considered in the next section.

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<sup>4</sup> [1968] AC 138; *Re Hummeltenberg* [1923] 1 Ch 237 (training mediums). Cf *Funnell v Stewart* [1996] 1 WLR 288 (faith healing).

<sup>5</sup> *Ibid*, 154, per Lord Wilberforce.

<sup>6</sup> [1972] Ch 73, 88.

<sup>7</sup> *Commissioners for the Purposes of Income Tax v Pemsel* [1891] AC 531.

<sup>8</sup> Charities Act 2006, s.1(1).

### *The definition of “charitable purposes” in the Charities Act 2006*

A charitable purpose is one which fulfils two requirements. First, it must fall within the list of purposes set out in s.2(2) of the 2006 Act, as considered in the remainder of this section; and, secondly, it must satisfy the public benefit test, considered in the next section. The definition of “charitable purposes” in the Charities Act 2006 is found in section 2(2) in the following manner. There are thirteen categories, of which the first three and the last one refer back to the pre-existing case law on the definition of a charitable purpose.

- (a) the prevention or relief of poverty
- (b) the advancement of education
- (c) the advancement of religion

These first three categories are therefore very similar to the initial three case law categories of charitable purpose; whereas the following categories are new:

- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;
- (m) any other purposes within subsection (4) [that is categories of charitable purpose which are already accepted under the case law on charities]

Each of these new categories of charitable purpose is considered in turn later in this chapter in section 25.6, after a discussion of the existing heads of charity set out in the first three categories in the statutory list. The importance of the new categories are that they either give validity to some purposes which the case law refused to recognise as being charitable, or that they bring novel purposes under the umbrella of charitable purposes as part of government policy. Among the purposes which are now included in the list of charitable activities which might otherwise have been excluded from being charitable by the old case law are purposes such as animal welfare, campaigning for human rights or environmental protection. The detail of these changes is considered later in the chapter. Before that we need to introduce some more of the essential features of charities law.

### *The reduced significance of the Preamble to the Statute of 1601*

The Charities Act 2006 seeks to displace the importance of the Preamble to the 1601 Statute in defining the meaning of “charitable purposes”. Thus any reference to the Preamble of the 1601 Act in any documents constituting a charitable trust or company are now to be read as references to the Charities Act 2006, so that it is the new Act which now governs the validity of charities.<sup>9</sup> This objective was somewhat over-emphasised because the case law on the meaning of “charitable purpose”, as considered in the remainder of this chapter, has developed regardless of the Preamble in most circumstances, with only older cases on the fourth head of charity being closely concerned with defining “charitable purpose” by analogy with the contents of that Preamble.

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<sup>9</sup> Charities Act 2006, s.1(2).

### *The continued validity of charitable purposes accepted in the old case law*

What is particularly important is that categories of charity which have been accepted in the old case law continue to be valid under the 2006 Act. Thus, it is provided in s.2(4)(a) of the 2006 Act that any purposes which are “recognised as charitable purposes under existing charity law”, for example under the old case law, will continue to be recognised as charitable purposes regardless of whether or not they appear in the list of charitable purposes in s.2(1) of the 2006 Act. Consequently, it is still important to consider those categories of charitable purpose which have been upheld by the case law because the 2006 Act maintains their validity.

### *The statutory test of “public benefit”*

As considered above, it is a pre-requisite of a trust purpose being held to be a charitable purpose that it is “for the public benefit” under section 2(1)(b) of the 2006 Act. This statutory requirement of public benefit is expressly stated to be a public benefit as currently understood under the case law in the law of charities,<sup>10</sup> as discussed in this chapter. So, it is important to consider what the case law has defined a “public benefit” to be. You are referred to the lengthy discussions of this concept in relation to the case law on educational purposes and on religious purposes in this regard. In the following section is a rough rule of thumb as to what will constitute a “public benefit” and in the section after that it is suggested that the case law, however, did not require that charities for the relief of poverty need be for the public benefit and therefore it will remain a complex matter knowing what constitutes a public benefit in this context.

### *A rough rule of thumb as to “public benefit” in the case law*

The test for a public benefit is ordinarily understood negatively by considering what will *not* constitute a public benefit. So, in the House of Lords in *Oppenheim v Tobacco Securities Trust*<sup>11</sup> Lord Simonds held that there could not be a public benefit if there was a nexus between the people who established the charity and the people who were intended to be benefit such that the people who stood to benefit could not be said to constitute a section of the public. In that case, where a company sought to establish a trust to pay for the school fees of the children of its employees, it was held that there was no *public* benefit because there was a nexus between the children who were to benefit and the company which was establishing the trust. In relation to charities which are created for general purposes, it was suggested by Russell LJ in *ICLR v Attorney-General*<sup>12</sup> that where a trust purpose removes the need for statutory or governmental action by providing a service voluntarily, the organisation providing that service should be deemed to be acting for the public benefit and so to be acting charitably. However, there have been recent cases, particularly relating to the advancement of religion, that if a purpose could possibly be interpreted so as to be for the public benefit, or even if it could not be so interpreted but that the trustees would operate the trust so that there was in fact a public benefit, then that purpose can be considered to be a valid charitable purpose.<sup>13</sup> These principles are considered in greater detail in the various discussion of “public benefit” in relation to the case law heads of charity elsewhere in this chapter.

### *The requirement for a public benefit: distinguishing two lines of authority on the decided cases*

The law of charities teems with case law: there are many hundreds of decisions relating to the validity of individual trusts as charitable purposes. Many of those cases are difficult to reconcile in the abstract because they are so dependent on their own facts. However, it is possible to identify some key themes in relation to judicial attitudes to charitable purposes. There is one very important division which can be made between cases which apply a technical “public benefit” requirement and other cases which are satisfied if there is some genuine charitable intention on the settlor’s part. The purpose of this short section is to draw out one key area of debate. It is suggested, therefore, that there has been a general division in the courts’ attitudes to purportedly charitable trusts over the years into two conflicting approaches:

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<sup>10</sup> Charities Act 2006, s 3(3).

<sup>11</sup> [1951] AC 297.

<sup>12</sup> [1972] Ch 73.

<sup>13</sup> See e.g. *Re Hetherington* [1990] Ch 1.

- (1) a requirement that the applicant only needs to show a genuine charitable intention for there to be a valid charitable purpose trust (see *Dingle v Turner*<sup>14</sup> below), or
- (2) a requirement that the applicant demonstrate that there is no personal nexus between the settlor and the class of people to be benefited, but rather that there is a sufficiently public benefit from the trust's purpose before it can be a valid charitable purpose (see *Re Compton*<sup>15</sup> below).

This theme of conflict between these two approaches will be followed in the large amount of case law considered below. The point is this. There is a significant difference between establishing, first, that there is something intrinsically charitable in the creation of a trust, compared with, second, a merely evidential question of demonstrating that there is a predominantly public rather than a private benefit in the purposes of that particular trust. The former approach considers the intrinsic merits of the trust purpose which is proposed. Thus, even if only a small number of people will take a benefit from the trust, the court may still find that it is a valid charitable trust if the settlor's intention are genuinely charitable. There have been a number of cases in which settlors have sought to win the tax breaks which charitable trusts attract by pretending to create charitable trusts which are in truth intended only to benefit people who are closely linked to the settlor personally. It is because of this sort of fraud that the second approach was developed. The latter approach therefore looks to see how the trustees are actually running the trust and whether or not they are achieving sufficiently public, charitable effects. Thus, defeating this sort of fraud has prompted some courts to require the existence of a public benefit to demonstrate that the settlor is not simply trying to achieve tax breaks.

The Charities Act 2006 has extended the requirement of "public benefit" to all forms of charity in the manner discussed below (in that there are some questions as to exactly how it will apply to trusts for the relief and prevention of poverty). The cases which created the public benefit approach were more concerned with demonstrating that the settlor's intention is to benefit a sufficiently broad category of the public rather than to attract the tax benefits of charitable status to something which is in truth a trust intended to benefit a private class of beneficiaries. This is particularly true in relation to some of the educational charities considered below in which companies sought to acquire tax benefits for paying for the school fees of their employees' children.<sup>16</sup> In those cases, the issue resolves itself to a question of whether or not the company can prove that a sufficiently large proportion of the public will benefit from the trust.

There is one further theme which is worthy of mention at this stage. The courts are eager to find a charitable trust valid wherever possible.<sup>17</sup> I would suggest that this line of cases can be understood as fitting into the approach which seeks to validate genuine charitable purposes. This approach goes beyond any of the tendencies in the case law relating to private trusts to interpret such trusts so as to make them valid. Clearly this underscores the policy addressed at granting advantages to charities which are not available to other forms of institution, such as private trusts or companies. Therefore, in practice the courts have tended to try to validate genuine charitable purposes whenever they are convinced that the settlor's motives are genuinely charitable and not directed at the achievement of some undeserved relief from tax.

## 25.2 THE SPECIAL FEATURES OF CHARITIES

### 25.2.1 The trusts law advantages of charitable status

*Are charities 'trusts' at all?*

In the early law of charities, the admission of trust purposes to charitable status and the general, legal treatment of charities were the responsibility of individual parishes and therefore fell under the ecclesiastical courts' jurisdiction. Over time, the Courts of Chancery acquired responsibility for charities organised as trusts and thus the jurisprudence of charities and the jurisprudence of trusts have come to sit uneasily one beside the other.<sup>18</sup>

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<sup>14</sup> [1972] AC 601.

<sup>15</sup> [1945] Ch 123.

<sup>16</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

<sup>17</sup> *Re Hetherington* [1990] Ch 1; *Guild v IRC* [1992] 2 AC 310.

<sup>18</sup> Matthews, 1996.



There are a number of interesting features of the charitable trust. Primarily, the trustee/beneficiary structure is somewhat more complicated in the case of a charitable (or public) trust than in a private trust. The triangle of settlor-trustee-beneficiary does not apply in the case of public trusts such as charities. There is necessarily a requirement of an intention to create a trust, requiring some person to act as settlor, and there are also trustees appointed to oversee the trust property and to promote the objectives of the trust. However, there is no nexus between trustee and beneficiary precisely because there are no individual beneficiaries. This is because the Attorney-General sues in place of beneficiaries to enforce the purposes of the charity against the trustees. While charities will seek to benefit individuals or groups of people, those people are not beneficiaries in the trusts law sense because they do not acquire proprietary rights in the property held on trust for the charitable purpose. Therefore, the powers of trustees are de facto more wide-ranging because they are not susceptible to the direct control of any beneficiary: only regulation by The Charity Commission and litigation brought by the Attorney-General *in loco cestui qui trust* or, as though a beneficiary.

As will be clear from the discussion in this chapter, there is a requirement that a charitable trust take effect for the public benefit (with the exception of some cases to do with relief of poverty) and therefore there cannot be individual beneficiaries capable of enforcing the trust by definition. Indeed, it is this writer's view that charitable trusts are not properly trusts at all, but rather a form of quasi-public body in which the officers have fiduciary duties which are overseen by a regulatory structure made up of the Attorney-General and The Charity Commission.

### *Charitable companies*

Charities can also be organised as companies. They need not be trusts. Strictly, the law on companies is outside the scope of this book. Whereas companies are ordinarily organised so that they have shareholders who own shares in the company, it is more usual for charitable companies to be organised as "companies limited by guarantee" which do not have shareholders nor a share capital. This form of company limited by guarantee is thus closer to the American notion of a "not-for-profit" company in relation to which the company limited by guarantee does not have to make profits so as to be able to pay dividends to its shareholders. Instead, its purposes are limited to the pursuit of its charitable purposes. In Australia charities law was changed so that charities can only be organised as companies and not as trusts. The purpose behind this change was to limit the possibilities for fraud and mismanagement of charitable trusts. A company will be required to publish accounts annually and its internal structure will be more formalised than the looseness of structure which trusts law ordinarily permits. The downside to the refusal of charitable trusts is that it is comparatively easy for small communities or for people who have little money and little legal expertise to create socially useful charitable trusts; whereas the creation and operation a charitable company involves a large amount of formality and complexity which in turn requires a large amount of professional expertise. This chapter, however, shall continue to consider only charitable trusts, and the general principles relating to charitable purposes which are applicable thereto.

### *Formalities*

There are a number of advantages in applying charitable status to a trust. As seen in the preceding Part 2 *Express Trusts* there are a number of formalities and issues of certainty to be satisfied before a trust will be valid. For the most part, charitable trusts are exempted from these pre-requisites. Some of the most obvious advantages of charitable status are the following.

First, the rules as to perpetuities do not apply to charitable trusts. The rules against inalienability and remoteness of vesting do not apply to charitable trusts, therefore endowment capital and income can be tied up indefinitely.<sup>19</sup> Clearly, a charitable purpose would be expressed by a purpose such as 'to accumulate capital to relieve poverty in the East End of London'. If that were an ordinary private trust, it would be potentially void as a purpose trust and also void on the ground that it would make the property inalienable. However, the aim of charities is to amass large amounts of money, know-how and property to achieve socially-desirable objectives. Therefore, it is important that ordinary principles of trusts law are not allowed to operate so that these charitable intentions are frustrated.

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<sup>19</sup> *Christ's Hospital v Grainger* (1849) 1 Mac & G 460.

Consequently, trust objects are valid despite being for abstract purposes provided that those purposes are charitable purposes. As will emerge in this chapter, the term 'charitable purpose' has a very specific legal meaning beyond any vernacular definition. The explanation for the relaxation of this core rule of the law of trusts is that the trust will be overseen by the Attorney-General and/or The Charity Commission in any event. Similarly, there is no need to satisfy the certainty of objects rule so long as there is a general charitable intention. The *cy-près* doctrine, considered at the end of this chapter, governs the application of assets where the precise objects of any charitable trust are uncertain or impossible to ascertain.

There are also differences in the manner in which the trust is organised in that the trustees do not need to act unanimously, rather they need only act by majority. This relaxation of the rules for the administration of trusts, as considered in Part 3 *Administration of Trusts*, again is aimed at facilitating the use of trusts for charitable purposes. There is a question, in any event, as to why it is that trusts are used as a structure for charitable purposes. Recent developments in Australia have seen the company be designated as the only possible means for carrying out a charitable purpose.<sup>20</sup> The aim of that reform is to restrict the use of charities and to ensure that proper accounts are filed, as required for all companies.

However, the focus on using the company as the only form of charitable body loses some of the informality which is possible where a charity is created on a cottage-industry basis. A trust can be created with comparative informality without the need for the complexity and expense of producing accounts, keeping detailed minutes of meetings, maintaining a share register, and so forth which are required by company law. One of the keynotes of the English law charity is that it can be created with great informality: the applicant need only declare a trust over property and then fill in the forms demonstrating charitable intention, trustee structure and so forth which are required by The Charity Commission before granting registration. This means that comparatively small sums of money and low levels of expertise will not prevent community groups from setting up local charities for the general, public benefit just as effectively as national charities managing millions of pounds and employing professional staff. This informality, it is suggested, is characteristic of the English law charity as a result of its roots in local parish care for the poor. Through the Victorian era much charitable activity was dependent on the (sometimes stern) philanthropy of men like Gradgrind in Dickens's *Hard Times* who gave of their time and their money in the betterment of their fellow men and women. Such altruism relied in large part on the ability of such people to create their own charities and to administer them with some level of informality.

## 25.2.2 The tax advantages of charitable status

### *Advantages to charities*

The primary benefit of charitable status (beyond the altruistic benefits of being empowered to do good works) is freedom from most of the taxes paid by individuals and corporations. Charities are free from the income taxes paid by both individuals and trusts. They are similarly free from corporation tax paid by companies and unincorporated associations. In terms of chargeable gains resulting from the disposal of capital assets, whereas individuals, private trusts and corporations would pay capital gains tax in ordinary circumstances, charitable trusts are free from capital gains tax. Similarly, aside from central governmental taxes, charities are also free from council tax and other local taxes. However, charities are subject to value-added tax (VAT) which is chargeable on any person who supplies goods or services to other persons. In circumstances in which charities are providing such goods or services, there is no reason in principle why they should be free from such a tax.

The freedom from tax means, in terms, that other taxpayers are subsidising the charitable sector (through higher rates of tax than would otherwise be necessary) by freeing charities from liability to tax. The most tax-efficient structure for a charitable trust is frequently to organise itself as a charitable company, rather than as a trust, which will be liable for all the trustees' fiduciary duties and which would then covenant to pay all of its profits to the charity, thus attracting tax relief.

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<sup>20</sup> Bryan, 1999.

### *Advantages to third persons*

It is not only charities who benefit from the removal of liability to tax from charities. Individuals who make deeds of covenant in favour of charities (under which they pay regular sums to charity) typically have the covenanted amount treated as part of the charity's income for tax purposes. Similarly, companies can recover some of the tax they pay by giving gifts to charity (see, for example, the discussion below of companies' educational charities). This ability which charities have to recover the tax paid by donors led to a spate of tax avoidance schemes in the 1960s and 1970s when the highest income tax rates in the UK remained above 60% for some time. Taxpayers falling into super-tax brackets would covenant money to charities. The charity would then be able to recover the tax paid by the taxpayer from the Inland Revenue. In many circumstances, the charity would then pay the tax deducted back to the taxpayer (typically offshore) as part of a complex tax avoidance arrangement.

Suppose the following situation in illustration of this scheme.

*The charity would receive a donation (say, £40,000 after tax had been deducted) and recovered the tax paid by the taxpayer (£60,000 at a 60% tax rate) and then paid the recovered tax to the taxpayer (£60,000). Consequently, the taxpayer earned more money through this route than through paying tax in the ordinary way. When some tax rates rose to 98% under super-tax, the taxpayer could (on £100,000 income) pay £2,000 to charity and have the charity recover £98,000 from the Inland Revenue.*

In the 1990s, developments in legislation and case law made these types of simple schemes impossible by ignoring any 'artificial steps' in such transactions.<sup>21</sup> More recent case law on tax avoidance has removed the presumption against artificiality in favour of an approach which subjects each taxing statute to ordinary principles of statutory interpretation.<sup>22</sup>

## 25.3 FACTORS WHICH MAY NEGATIVE A FINDING OF CHARITABLE STATUS: THE NEED FOR A CHARITABLE INTENTION BUT NO POLITICAL PURPOSES

### 25.3.1 Sufficient intention to create a charitable trust

#### *In general terms*

The settlor must have had an exclusively charitable intention in creating her trust for it to be a valid charitable purpose. The courts have tended to disallow ostensibly charitable purposes if there has been some failure to disclose a purpose which is exclusively charitable. This chapter will consider the detail of each of the heads of charity. The structure of that analysis will be to examine each of those heads and then to consider those factors which will deprive an institution of charitable status, even if it is *prima facie* charitable. So, if a settlor has two purposes behind his trust, one charitable and the other not, then the trust may not be held to be a valid charity. By the same token, however, some courts will seek to validate a genuinely charitable purpose wherever they find one.<sup>23</sup> Evidently, as with all forms of trust, there is a requirement that there be sufficient intention to create a charitable trust on the part of the settlor before that trust will be deemed to be charitable. Thus, in *Re Koeppler*,<sup>24</sup> Slade LJ looked to the general charitable intention of a testator who had sought to leave money for the furtherance of a charitable project on which he worked. It was held that, even where a gift is expressed in vague terms, it would be interpreted as having been charitable. It is clear from the decided cases that the court will tend to find trusts with charitable intention valid wherever possible.<sup>25</sup> This theme is considered further in relation to the *cy-près* doctrine at the end of this chapter. At this stage it is sufficient to point out that the courts will give effect to a genuine charitable intention wherever they find one.

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<sup>21</sup> *Ramsay v IRC* [1982] AC 300; *Furniss v Dawson* [1984] 2 WLR 226.

<sup>22</sup> *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684; [2005] 1 All ER 97.

<sup>23</sup> *Re Hetherington* [1990] Ch 1.

<sup>24</sup> [1984] 2 WLR 973.

<sup>25</sup> *Incorporated Council for Law Reporting v Attorney-General* [1972] Ch 73; *Guild v IRC* [1992] 2 AC 310.

### *Need for exclusivity of charitable intention*

It is important that the settlor's purpose be exclusively charitable. That means the settlor will not be able to confuse a charitable with a non-charitable purpose and hope to have the trust recognised as being charitable. The case law has taken a very strict approach to this question in many cases.<sup>26</sup> If the settlor were to declare that property be held on 'charitable *or* other purposes', then the trust would not be a valid charitable trust because that could potentially be applied by its trustees for a charitable purpose or alternatively for a non-charitable purpose.<sup>27</sup> The uncertainty introduced by the word "*or*" is crucial. The rationale for disallowing such trusts from being charitable trusts is that it is possible for the trustees to apply the property either for charitable purposes or potentially for some other purpose which is not charitable. However, there have been cases in which the use of the disjunctive '*or*' in these circumstances has been coupled with a purpose which the court has been able to accept as being almost charitable: such as 'charity, or any other public objects in the parish of Farringdon'<sup>28</sup> and '[charity] or some similar purpose in connection with it'<sup>29</sup> because in those circumstances the court was prepared to interpret that provision as meaning that the trustees were still required to use the trust property for purposes which were charitable, even if they may have some other features as well as their charitable nature.

Cases in which the settlor has provided that property be settled for a 'charitable *and* other purpose' have tended to receive a more generally benign construction where the court has been able to interpret the word '*and*' as connoting an intention either that the trustees must administer the trust in a charitable manner even if some other, incidental purpose is also to be achieved, or that the other purpose must be also be charitable – or at least not detract from the underlying charitable purpose.<sup>30</sup> However, where that provision is interpreted to mean that the trust need have charitable purposes only as part of its core goals, then it will be invalid as a charitable trust: for example, 'benevolent, charitable and religious purposes' where charity was found to be only one of three purposes in which 'benevolent' does not mean 'charitable'<sup>31</sup> and similar situations where purposes were grouped so as to make them appear to be in the alternative.<sup>32</sup>

It is suggested that, in the wake of more benignant constructions like that in *Guild v IRC*<sup>33</sup> and *Re Hetherington*<sup>34</sup> in recent years, that the courts are less likely to invalidate trusts on the basis of lack of exclusivity of purpose than was the case in the many of the preceding decisions. However, that does not mean that the courts will accept as charitable those trusts which are not exclusively charitable. Rather, they will be prepared to accept both that the underlying intention can be *construed* as being charitable and that the trustees will in fact *apply* the trust property so as to make it operate as a charitable trust: that is, by applying the property only for strictly 'charitable' purposes and not also for more generally 'benevolent' but non-charitable purposes.

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<sup>26</sup> *Blair v Duncan* [1902] AC 37 (charitable or public purposes); *Chichester Diocesan Board of Finance v Simpson* [1944] AC 341 (charitable or benevolent purposes); *Re Coxen* [1948] Ch 747 (quantification of separable charitable and non-charitable elements). Cf *Re Best* [1904] 2 Ch 354 ('charitable and benevolent'); *Attorney-General v National Provincial and Union Bank of England* [1924] AC 262 ('such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects ...'); Charitable Trusts (Validation) Act 1954.

<sup>27</sup> *Re Macduff* [1896] 2 Ch 451; *Blair v Duncan* [1902] AC 37; *Houston v Burns* [1918] AC 337.

<sup>28</sup> *Re Bennett* [1960] Ch 18.

<sup>29</sup> *Guild v IRC* [1992] 2 AC 310.

<sup>30</sup> *Blair v Duncan* [1902] AC 37, *supra*; *Re Sutton* (1885) 28 Ch D 464; *Re Best* [1904] 2 Ch 354.

<sup>31</sup> *Williams v Kershaw* (1835) 5 Cl & F 111; also *Morice v Bishop of Durham* (1805) 10 Ves 522.

<sup>32</sup> *Re Eades* [1920] 2 Ch 353; *Attorney-General v National Provincial and Union Bank of England* [1924] AC 262; *Attorney-General for the Bahamas v Royal Trust Co* [1986] 1 WLR 1001.

<sup>33</sup> [1992] 2 AC 310.

<sup>34</sup> [1990] Ch 1.

### 25.3.2 Political purposes

#### *The theoretical outline*

The notion of charity has been taken by English law to exclude any attempt to promote political purposes, even where the end-goal of such a political policy is aimed at the benefit of a community. Where a goal is avowedly political, the courts will not uphold it as a valid charitable purpose.<sup>35</sup> The stated reason for this principle is that it would be beyond the competence of the court to decide whether or not that purpose would be for the benefit of the community.

Furthermore, Lord Simonds in *National Anti-Vivisection Society*<sup>36</sup> cited with approval the argument that the court must assume the law to be correct and therefore could not uphold as charitable any purpose which promotes a change in the law. This jurisprudential approach does appear to be a little thin. Given that judges contentedly take it upon themselves to interpret, limit and extend statutes (as well as occasionally recommending the creation of new statutes to shore up the common law), it is peculiar to see judges so coy in the face of an argument being advanced that legislation might be changed.

Clearly, there will be factual circumstances in which a charitable purpose is advanced for political ends. For example, a charitable purpose to care for the elderly may also serve as a vehicle for pressuring central government into changing its policy on the treatment of elderly people. It is common for charities to campaign for the advancement of their cause as a collateral object to the charitable purpose. As a general rule of thumb, the courts will consider activities as being political if they involve campaigning for a change in the law. However, there will necessarily be a large range of activities which fall short of such campaigning but which go beyond the pursuit of the charitable objective.

#### *The strict rule*

The leading case of *National Anti-Vivisection Society v IRC*<sup>37</sup> before the House of Lords considered the question whether or not the society's political campaigning for the banning of vivisection would prevent its purposes from being defined as being charitable. The type of political campaigning undertaken was to procure a change in the law so that vivisection would be banned outright. Lord Simonds considered the society's aims to be too political to qualify as a charity on the basis that an aim to change legislation is necessarily political. Consequently, the society was found not to be charitable and therefore not exempt from income tax. It is suggested that this approach creates a strict rule for charitable status. In applying the approach of Lord Simonds, it must be the case that to advance a change in the law as a core aim of the trust will be to take outwith the definition of charity necessarily.

There is a theoretical problem as to whether or not the court could decide that the benefit of one side of a political argument (for example banning vivisection) outweighs another. Suppose for example a trust with a purpose to advance the medical utility of experiments on animals in the search for a cure for cancer. By admitting the medical trust to charitable status the law is impliedly accepting that side of the political argument. Clearly, the argument in defence of the current position is that the law is outside politics. However, it is clear that the effect of the law is to favour some political points of view over others.

As with all trusts law issues, the question is to use the correct structure for the statement of aims. The RSPCA is registered as a charity, even though it works to stop vivisection in some contexts. The reason why it is upheld as being charitable despite its attempts to stop vivisection are that the anti-vivisection attitudes it holds are only a part of its activities. Similarly, in *Bowman v Secular Society*,<sup>38</sup> Lord Normand held that a society whose *predominant* aim was not to change the law, could be charitable even though its campaign for a change to legislation was merely a subsidiary activity. It is a question of degree whether a society seeks to change the law as its main focus, or whether it espouses ends which incidentally require a change in the law. It is unclear where the law of charities draws that particular line.

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35 *National Anti-Vivisection Society v IRC* [1940] AC 31.

36 *Ibid.*

37 *Ibid.*

38 [1917] AC 406.

### *Arguments for flexibility*

If the approach in *National Anti-Vivisection Society v IRC*<sup>39</sup> were to be followed to its logical conclusion, it would mean that housing charities like Shelter would be able to research into improving housing conditions while helping the homeless, but that it would not be able to publish its results for fear that they would be recommending a change in the law.

In *McGovern v Attorney-General*,<sup>40</sup> the human rights campaigning organisation Amnesty International was held not to be charitable, despite its good works, because it campaigned for changes in the laws of many nations. The court held that it was not for the court to decide whether or not the changes in the law which it sought would be in the public interest or not. However, the Charity Commissioners have suggested that an organisation may supply information to the government regarding changes in the law without forfeiting its charitable status. Without this flexibility being built into the law, many charities would not be able to disseminate the important information which only they are able to amass.

On the cases it is clear that a trust for the discussion of political ideas is not itself void under the rule in the *National Anti-Vivisection* case.<sup>41</sup> For example, it is not an invalid activity under the law of charities for a university students' union to discuss political matters<sup>42</sup> but it is not a charitable purpose to campaign on a political issue or to apply funds to an organisation formed to change the law or public policy. So in *Webb v O'Doherty*<sup>43</sup> a students' union wanted to pay funds to a national committee of students which sought to apply pressure to stop the conflict in the Persian Gulf in 1991 but the union was not able to uphold this purpose as a charitable purpose because it was found to be politically motivated.

### **25.3.3 A note before we proceed**

For the student of trusts law, charities can offer a comparatively welcome relief from the complexities of forming express private trusts, as considered in Part 2, and from implied trusts Parts 4, 5 and 6, or the many equitable remedies in Part 9. The central question with reference to charities for our purposes is to decide in what circumstances a trust will be held to be charitable. In any charities problem, the subject matter should be divided clearly between the various different categories of charitable trust: trusts for relief of poverty, trust for educational purposes, trusts for religious purposes and trusts for other purposes beneficial to the community as listed in s.2(2) of the Charities Act 2006. Sections on charities in trusts law textbooks are capable of being extremely long, given the enormous variety of the case law. However, it is proposed in this chapter to concentrate on the leading cases in each of the four categories and then tease out some of the inconsistencies among some of the other decisions. This may then prove to be a banker at exam time.

## 25.4 RELIEF OF POVERTY

*Trusts for the relief of poverty must relieve the poverty of some person. 'Poverty' means something more than simply 'going short' but does not require absolute destitution. It is apparently unnecessary that a broad section of the community stand to benefit from the trust. Rather, trusts for the relief of poverty are presumed to have a generally altruistic motivation and are, therefore, enforceable as being charitable. There is no need for a 'public benefit' – a factor which has led to the anomalous trusts for the benefit of relatives which appear, prima facie, to be private trusts.*

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39 [1940] AC 31.

40 [1982] 2 WLR 222.

41 [1940] AC 31.

42 *Attorney-General v Ross* [1986] 1 WLR 252; *Re Koeppler's WT* [1986] Ch 423.

43 (1991) *The Times*, 11 February.

### 25.4.1 Introduction

The first category of charitable purpose under the case law is that of the relief of poverty. This is the clearest category of charitable purposes in many ways. Having considered the birth of the law on charities in terms of a development of the legislation dealing with the poor above, poverty is the most straightforward illustration of a charitable intention. The Charities Act 2006 has amended this category slightly by providing that it should be “the prevention or relief of poverty”. The effect of this slight change is considered below. For present purposes, however, we shall consider the leading case on trusts for the relief of poverty which was decided before the Act came into force, on the basis that it is provided in s.2(4)(a) of the Charities Act 2006 that any purposes which are “recognised as charitable purposes under existing charity law”, for example under the old case law, will continue to be recognised as charitable purposes.

The leading decision is that of the House of Lords in *Dingle v Turner*,<sup>44</sup> which forms the centrepiece of this section. Characteristic of the approach of the courts in this area of the ‘purposive’ decision of Lord Cross. Of further interest is the historical context of cases on the creation of trusts expressed to be for the relief of impoverished relatives, whether they should properly have been considered to be charitable given the nexus between settlor and beneficiary, and the suitability of such trusts in the modern context.

The trust in *Dingle v Turner* concerned a bequest of £10,000 to be applied ‘to pay pensions to poor employees of E Dingle & Company’. Those arguing that the bequest be held invalid sought to rely on *Oppenheim v Tobacco Securities Trust*,<sup>45</sup> and also *Re Compton*,<sup>46</sup> which had held that a trust could not be charitable if ‘the benefits under it are confined to the descendants of a named individual or company’.<sup>47</sup> It was contended, further, that the poor relations cases were simply an anomaly in the development of this core principle and that the *Dingle* trust could not be validated by analogy to those cases.<sup>48</sup>

Lord Cross did not allow this appeal. He explained that the rule in *Re Compton* was not one of universal application in the law of charities, particularly in relation to trusts for the relief of poverty. His speech had two main points: first, that the *Compton* principle was intellectually unsound in itself and, second, that trusts for the relief of poverty required a different test from other forms of charitable trust which did not require a public benefit.

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44 [1972] AC 601.

45 [1951] AC 297.

46 [1945] Ch 123.

47 *Oppenheim* is a case relating to educational purpose trusts, considered below at para 27.3.3.

48 Considered below at para 27.3.

As to the first strand of his lordship's decision, the approach taken by Lord Cross was to say that the meaning of the term 'public' in the public benefit test was itself a difficult one. The expression which was frequently used in previous cases to contrast with the term 'public' was the term a 'mere fluctuating body of private individuals' by which the courts meant that if the people who would benefit from a trust purpose would be merely a fluctuating body of private individuals then they could not constitute a sufficiently large section of the public to constitute a charity. However, Lord Cross in *Dingle v Turner* pointed out that logically the public was itself just such a fluctuating body of private individuals: that is, the total population may be 60 million private individuals in the UK but it was still a fluctuating body of private individuals. Therefore, this was an insufficient rendering of the difference between the terms "private" and "public" class. Lord Cross explained that the residents of a particular London borough could be both a section of the public and a fluctuating body of private individuals. There would be no doubt that "all of the residents of the Royal London Borough of Kensington and Chelsea" would constitute a valid section of the public for the purposes of the law of charity. Nevertheless, logically, the total number of inhabitants of Kensington and Chelsea would be a fluctuating body of private individuals: that is, some will be born and some will die, some will move into the area and some will move out of it (such that their identities will fluctuate), and each of those inhabitants is a private citizen, even though collectively they constitute a section of the public. Similarly, to talk of 'the blind' would be to define a section of the public, even though its members have a common characteristic which binds them together. That means, the law of charities will accept that a trust for the benefit of the "blind in the UK" will be a valid charitable purpose, although logically again this class constitutes a group of private individuals with a link between them and so, logically again, it ought to fail on a literal application of the *Compton* test. Therefore, Lord Cross sought to demonstrate that the *Compton* test was not logically appealing and so Lord Cross chose not to follow it in relation to trusts for the relief of poverty.

His lordship then turned to the question of the validity of a trust for the benefit of employees of a company, and the argument that such a class would be a private class (and so arguably invalid under charities law) on the basis that the people who were to benefit from the trust were bound together by a common factor. It was held that, even when considering gifts to employees of a large company, it might be that a particular corporation would employ many thousands of people and therefore constitute a numerically larger class than were resident in a particular borough. It would be illogical to consider the former to be a void private class, whereas the latter would be a valid section of the public, when the former is a numerically larger class than the latter. For example, the Post Office employs hundreds of thousands of sorting staff and delivery staff in the UK and so a trust "for the benefit of employees of the Post Office" would fail a literal application of the *Compton* test (because all of the people who would benefit worked for the same organisation) even though the class which could benefit would constitute a statistically significant proportion of the population. By contrast a trust for the benefit of the inhabitants of a small town would pass the literal application of the *Compton* test but oddly the people who stood to benefit from the trust would be numerically smaller than in the Post Office example. Lord Cross suggests that the Post Office trust could be valid, provided that the settlor's intention was a genuinely charitable one. It is the settlor's intention which is said to be vital in *Dingle v Turner*. In the words of Lord Cross:

*Much must depend on the purpose of the trust.* It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

It is suggested that the opening words of these *dicta* (with this author's own italics) sum up the approach of the House of Lords in *Dingle* most accurately in this area. This encapsulates Lord Cross's second line of argument. The court is prepared to adopt a purposive approach to charitable purposes genuinely concerned with the relief of poverty. To put it crudely, if you are genuinely acting with a charitable purpose in the relief of poverty, then your trust will be valid.



The point of distinction from the *Compton* and *Oppenheim* line of cases was said to be the fact that those cases involved trusts whose purpose was to acquire 'an undeserved fiscal immunity'. In short, the court would be prepared to support a genuinely charitable motive, although in the absence of such a motive the court would refuse to find the trust charitable. It is suggested that charitable motives are more obviously demonstrated in relation to the relief of poverty (provided those receiving the benefits can be shown to be genuinely impoverished), unlike cases in which companies are seeking to acquire tax benefits for their directors and other employees by setting up educational trusts which benefit only the children of their own employees. Lord Cross described this as the 'practical justification ... if not the historical explanation' for the distinction between trusts for the relief of poverty and other trusts.

It is possible to return to the earlier distinction between decisions based on finding an underlying charitable intention on the one hand, and seeking a sufficient public benefit on the other hand. *Dingle v Turner* is clearly demonstrative of the line of cases which are concerned with the identification of an underlying charitable motive for the trust. Lord Cross considered this to be more important than seeking to address a purely evidential question as to whether or not a sufficient section of the public will be benefited by the operation of the trust.

Having considered the leading case, it is worth exploring the requirements for a charitable trust for the relief of poverty. There are two core questions concerned with the relief of poverty: first, what is 'poverty', and second, what is 'relief'? These two questions will be considered in turn.

### 25.4.2 What is 'poverty'?

In considering the meaning of the term 'poverty' there is a perennial discussion between political scientists as to the meaning of the term. In forming public policy there is a temptation to set an absolute measurement of poverty, bound to income levels, health and housing requirements perhaps. Once an individual reaches that absolute measurement, that individual ceases to be poor. There are two principle problems with this approach. First, the setting of such levels would necessarily cause disagreement as to what constitutes a level of poverty. Second, there is the issue of general social enrichment which might render such standards obsolete over time, such that an income level for poverty set in the 1960's would now be meaningless as a result of inflation and the greater distribution of consumer goods amongst the whole population. (On this issue see generally the work of Townsend.<sup>49</sup>)

The contrary argument is that there should not be absolute standards of poverty set because the question of impoverishment is something which should always be relative to standards of living at any period of time in any social context. However, the counter-argument is that it becomes impossible to eradicate poverty if the measurements are allowed to shift in this way.

On the cases, there are precious few clear statements on the meaning of 'poverty'. In *Mary Clark Homes Trustees v Anderson*,<sup>50</sup> Channell J held that poverty was a relative term which would consider someone to be poor if he is in 'genuinely straitened circumstances and unable to maintain a very modest standard of living for himself and the persons (if any) dependent upon him'.<sup>51</sup> Even this approach does not require destitution. Nor is there any sense of the length of time for which those who are to benefit from the trust are required to be in straitened circumstances: presumably that must last for more than one or two days. What is interesting about this approach is that it focuses on the poverty of individuals benefiting from the munificence of the charity and not on the framing of the charity's objects to apply solely to people in general terms as though that category must be sufficiently impoverished. This chimes in with the acceptance in *Dingle v Turner*<sup>52</sup> that the trust need not be demonstrated to be for the public benefit. Given the all-encompassing nature of the case law definitions, the meaning of poverty can be most clearly demonstrated by examples, as set out in the following sections.

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<sup>49</sup> Townsend, 1979 and the work of the Child Poverty Action Group generally.

<sup>50</sup> [1904] 2 KB 745.

<sup>51</sup> Quotation taken from Tudor, 1995, 29; see also *Re Clarke* [1923] 2 Ch 407; *Re De Carteret* [1933] Ch 103; *Shaw v Halifax Corp* [1915] 2 KB 170; see also Cross (1956) 72 LQR 182.

<sup>52</sup> [1972] AC 601.

### *Examples of poverty*

The difficulty for the courts is then to establish a test for deciding in any case whether or not a particular trust is sufficiently directed at the relief of poverty. To be honest, there is no very clear definition of “poverty” in the law of charities. The cases have taken the view that poverty does not necessitate proof of outright destitution, rather it can encompass simply ‘going short’.<sup>53</sup> There are a number of examples of situations in which the courts have held cases of financial hardship, rather than grinding poverty, to be within the technical definition of ‘poverty’. For example, a trust for ‘ladies of limited means’ has been held to be charitable<sup>54</sup> together with the (gloriously expressed) trust for the benefit of ‘decayed actors’.<sup>55</sup> It is difficult to know exactly what a ‘decayed actor’ is, but I think it is a wonderful idea. In the seventeenth century this term “decayed” had as one of its meanings “to have declined in prosperity”:<sup>56</sup> so, again, it did not require that the person benefiting had become entirely destitute but rather simply that they were in greatly straitened circumstances. Significantly, that we cannot know exactly what a decayed person is, despite its inclusion in the 1601 Statute of Elizabeth (and assuming it is not meant literally as someone decomposing), does not stop the purpose from being a valid charitable purpose. It is an illustration of the type of vague trusts provision which courts are prepared to admit as valid in the context of charitable trusts for the relief of poverty whereas they would never satisfy the tests for conceptual certainty for express private trusts considered in chapter 3 *The Creation of Express Trusts*. Another example is a trust for the benefit of members of a club who have ‘fallen on evil days’, which would have been too vague an expression for ordinary trusts purposes.<sup>57</sup>

### *Poverty and the preamble*

There was an argument raised as to notion of poverty in the preamble to the 1601 statute in the case of *Joseph Rowntree v Attorney-General*.<sup>58</sup> It was argued that the expression ‘aged, impotent and poor’ in the preamble to the 1601 Statute should be read so as to require the class forming the charitable purpose to be all three of those things, such that someone who was not (for example) aged would not fall within the test. It was held that the three terms should be considered disjunctively so that a beneficiary need only fit one of these descriptions.<sup>59</sup> Therefore, if the beneficiary is aged and impotent but not poor, then the trust will be held to be valid.<sup>60</sup> It has been held that a person aged 50 was ‘aged’ (although that was in a decision in 1889 when life expectancies were shorter).<sup>61</sup> After the enactment of the Charities Act 2006, the role of the 1601 Preamble with nevertheless be limited.

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<sup>53</sup> *Re Coulthurst's Will Trusts* [1951] Ch 661, at 666 (more than ‘going short’); *Re Cottam* [1955] 3 All ER 704 (flats at ‘economic rents’); *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288 (special housing for the elderly; ‘alleviation’ of poverty constitutes ‘relief’).

<sup>54</sup> *Re Gardom* [1914] 1 Ch 662.

<sup>55</sup> *Spiller v Maude* (1881) 32 Ch D 158.

<sup>56</sup> See, for example, the definition of the word “decay” in the Shorter Oxford English Dictionary, which contains this sense among numerous others.

<sup>57</sup> *Re Young* [1951] Ch 344.

<sup>58</sup> [1983] 1 All ER 288.

<sup>59</sup> *Re Resch's Will Trusts* [1967] 1 All ER 915.

<sup>60</sup> *Re Glyn's WT* [1950] 66 TLR 510; *Re Bradbury*; *Re Robinson* [1951] Ch 198; *Re Cottam* [1955] 3 All ER 704; and *Re Lewis* [1955] Ch 104.

<sup>61</sup> *Re Wall* (1889) 42 Ch D 510.

### *Poverty and social class*

There have been cases in which the largesse of the courts has been pushed to its limits. A number of charitable purposes have been expressed to be for the relief of the poverty of the 'working classes'. It was held in *Re Sanders' WT*<sup>62</sup> that the 'working class' do not constitute a section of the poor. It is necessary to define in some way those in poverty, as opposed to those who could be merely expressed to be working class. However, in *Re Niyazi's WT*<sup>63</sup> it was held that a gift for the construction of a working men's hostel in an area of extreme poverty in Cyprus created a valid charitable trust for the relief of poverty on the basis that the class of persons described could be considered, in all the circumstances, to be suitably impoverished.

The latter case of *Niyazi* illustrates the acceptance of the courts that there is a need, with reference to charitable trusts, to look to the manner in which the money is to be used in fact to determine whether or not there is sufficient charitable intention. This has tended to be the approach of the courts in situations in which it would be possible for both rich and poor people to benefit from a particular trust on the face of the trust. Therefore, in *Re Gwyon*<sup>64</sup> a trust for the provision of clothing for boys was held to be invalid on the basis that there was no necessary requirement that the boys in question be in poverty. Rather, the court accepted that the money would be applied *de facto* by the trustees for the benefit of poor boys only. This purposive approach has led to the validity of a number of charitable trusts for the relief of poverty which would otherwise have appeared to have been uncertain in their charitable intent.

### **25.4.3 What is meant by 'relief' and by 'prevention'?**

#### *The relief of poverty*

The term relief is not intended to lead to resolution of the poverty experienced by those who receive the benefits of the trust. Rather, it is sufficient that there be some alleviation of the poverty as a result of the activities of the trust.<sup>65</sup> Therefore, a trust for the relief of poverty of millionaire food merchants by means of food parcels, would not be a valid charitable trust for the *relief* of poverty because there is no poverty which would actually be relieved by such a trust because the recipients are already millionaires. However, it would appear that a genuine charitable intention to relieve poverty by opening a soup kitchen which also occasionally provided food to people who were not impoverished would not be invalid, provided that the poverty of others who were impoverished was being relieved. So, it is said, it cannot be a trust for the *relief* of poverty if the soup kitchen provides millionaires with food because millionaires would not be in need of such soup to relieve any poverty. A soup kitchen for the benefit of the genuinely impoverished will be a valid charity for the relief of poverty.<sup>66</sup>

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62 [1954] Ch 265.

63 [1978] 1 WLR 910.

64 [1930] 1 Ch 255.

65 *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288.

66 *Biscoe v Jackson* (1887) 35 Ch D 460.

### *The prevention of poverty*

The Charities Act 2006, s 2(2)(a) adds the notion of the “prevention” of poverty to this category. The principal effect of this change would be to remove the requirement that the people who are to be helped must already be in poverty. Thus it would be a valid charitable purpose if someone anticipated that a person was going to fall into poverty and so took some action by constituting a trust to prevent that state of affairs arising. This could clearly be open to abuse. Suppose two examples. First, if a trust was created to provide a hostel for young people in London who found themselves with no home then that would be preventing those people from falling into poverty by dint of giving them somewhere to live, especially so if the trust also helped them to find work or gave them enough money to afford food and clothing. Second, suppose that a trust was created for the benefits of the permanent inhabitants of Marlow in Buckinghamshire, one of the richest towns in the country, in case any of its permanent inhabitants should possibly fall into poverty. Suppose further that the settlor’s real objective was to achieve the tax benefits of charitable status so that all of the money which he gave to the charity received tax relief but was never paid out to any impoverished people but instead was used to pay for dinners for himself and his millionaire friends at the golf club. In this example, whereas the trust appears to be worded so as to prevent poverty, in fact it is not being so used. The difficulty with the notion of prevention is that it supposes action before poverty has necessarily arisen. However, it is suggested that Lord Cross’s test in *Dingle v Turner* remains the best one in this context because it will deny charitable status only to those trusts which do not disclose a genuine charitable intention: something which exists in the first of my examples but not the second.

#### **25.4.4 Limits on the class of people taking a benefit**

It is a peculiarity with reference to the rules for charitable trusts for the relief of poverty that the settlor can validly define a limited group of people who are entitled to benefit from the trust, and can even show a nexus with the intended beneficiaries.

#### *Is there a need for a public benefit?*

It was held in *Dingle v Turner*<sup>67</sup> that a trust for the relief of poverty does not have to be shown to be for the general public benefit, as long as it does go beyond the relief of the poverty of a single, individual beneficiary. Therefore, the applicant would be required to show that the trust was more than a private trust for the benefit of a fixed class of beneficiaries which merely sought to attract the fiscal advantages of charitable status. However, it is acceptable for the people who will actually benefit from the trust to be related, or otherwise linked, to the settlor (as considered immediately below). Thus in *Dingle v Turner* a trust for the relief of poverty of poor employees was upheld as a valid, charitable purpose, despite the link between the settlor and the intended class of beneficiaries as employer and employees.

Consequently, it has been held that a trust for the purpose of establishing a home for elderly Presbyterians was held to be a sufficiently broad public benefit, even though the category of people who could have benefited was limited.<sup>68</sup> In that case there was sheltered accommodation provided by a company (Joseph Rowntree Memorial Housing Association Ltd) which both charged occupants for their accommodation and which made that accommodation available only to a limited number of people. It was held by Peter Gibson J that neither of these factors disqualified the purpose from qualifying as a charitable purpose. Just as in *Re Neal*,<sup>69</sup> Goff J had upheld a trust which charged occupants of an old persons’ home as being charitable; similarly Buckley J in *Re Payling’s WT*.<sup>70</sup> In such cases, where there is an intention to provide for ‘succouring and supplying the needs of old persons because they were old persons’ was sufficient to found a charitable intention to relieve poverty – provided also that these old persons were in need of the help that they were given.

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<sup>67</sup> [1972] AC 601.

<sup>68</sup> *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288.

<sup>69</sup> (1966) 110 SJ 549.

<sup>70</sup> [1969] 1 WLR 1595; cf *Re Martin* [1977] 121 SJ 828.

The Charities Act 2006 requires that any charitable purpose both be on the list of charitable purposes – as the prevention and relief of poverty is under s 2(2)(a) – and also be “for the public benefit”. There is no exception for poverty trusts, even though the effect of *Dingle v Turner* was that there would not need to be a public benefit in this context. If one reads s 3(3) of the 2006 Act it provides that ‘... reference to the public benefit is a reference to the public benefit as that term is understood for purposes of the law relating to charities ...’. This provision should, it is suggested, be understood to mean that the requirement for a public benefit under the statute is to be interpreted in accordance with the current understanding of the term public benefit as applied in the case law on charities before 2006. Thus, it should be interpreted so as to mean that no public benefit is required in relation to a trust for the relief of poverty. To do otherwise would be to overrule a long line of cases, including *Dingle v Turner*, which have granted charitable status to trusts for comparatively small numbers of people provided that there was a genuine charitable intention to relieve poverty involved. The alternative reading would be to take this provision to mean that a public benefit test must apply to poverty trusts as well, and that that public benefit test should be the same as the public benefit test applied on the authorities in charities law generally. As considered below in relation to the “poor relations cases”, such as *Re Scarisbrick*,<sup>71</sup> there are some cases in which the link between the settlor and her own relatives does make the finding of a charitable purpose somewhat eccentric. Those cases can only be explained as demonstrating a genuine charitable intention to relieve the poverty of people for whom one is not morally bound to provide. Otherwise, I must confess to a personal preference for the *Dingle v Turner* formulation of the test for charitable status over the formulaic “public benefit” test, but nevertheless it does ensure that genuine charitable intentions are not frustrated simply because the settlor is considered to be relieving too little poverty to constitute a benefit to the public at large.

#### *Charging for services*

It is not an objection to its charitable status that a charity charges generally for the services which it provides<sup>72</sup> nor that it receives rent for accommodation provided.<sup>73</sup> Similarly, charities can trade in general terms without necessarily threatening their charitable status under trusts law principles.<sup>74</sup>

This permission granted to charities to trade and to charge those who benefit from its services is in spite of the general statement by Rowlatt J that charity is to be provided by way of ‘bounty and not bargain’.<sup>75</sup> However, that ideal was limited to its own facts in that case by Peter Gibson J in *Joseph Rowntree* where it concerned the obligation on a mutual society (that is, a society providing benefits for its own members on the basis of contract) which sought to acquire charitable status in circumstances in which it charged those same members for its services. It has even been held that the making of loans to poor people may be charitable purposes.<sup>76</sup>

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<sup>71</sup> [1951] Ch 622.

<sup>72</sup> *Re Cottam* [1955] 1 WLR 1299; *Re Resch’s WT* [1967] 1 All ER 915; *Abbey Malvern Wells v Ministry of Local Government and Planning* [1951] Ch 728.

<sup>73</sup> *Re Estlin* (1903) 72 LJ Ch 687; *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288.

<sup>74</sup> *Incorporated Council for Law Reporting v Attorney-General* [1972] Ch 73.

<sup>75</sup> *IRC v Society for the Relief of Widows and Orphans of Medical Men* (1926) 11 TC 1.

<sup>76</sup> *Re Monk* [1927] 2 Ch 197. The reader is referred to the essay on [www.alastairhudson.com/trustslaw](http://www.alastairhudson.com/trustslaw) on *Co-operatives, Friendly Societies and Trusts* for a discussion of mutual societies.

### *Links to the settlor – trusts for the benefit of poor relatives*

Following on from the issue of the breadth of public benefit necessary to create a valid trust for the relief of poverty, is the question of the closeness of the links between settlor and the people who are to be benefited. For charitable purposes other than the relief of poverty, it is important that the class of purposes to be benefited must not be defined by reference to their proximity to the settlor. In terms of trusts for charitable purposes, it stands to reason that a settlor could not create a settlement ‘for the benefit of my two poor children’ and then claim that it is a charitable trust for the relief of poverty. Such a trust would clearly be an express private trust in relation to which the children were intended to be beneficiaries. It would stretch the credulity of the court to suppose that a parent could permit her children to live in poverty and then to be entitled to charitable tax breaks in supporting them. However, it has been held that to define a charitable purpose for the relief of poverty of the settlor’s poor relations would not affect its validity as a charitable bequest.<sup>77</sup> So in *Re Scarisbrick*<sup>78</sup> a testatrix provided that property be held on trust ‘for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances’. It was held by the Court of Appeal that this was a valid charitable trust for the relief of the poverty of such persons.<sup>79</sup> It is from this line of decisions that trusts for the benefit of poor relations have been upheld as being valid charitable trusts. This line of cases would be overruled if the public benefit test in s.2(1)(b) of the 2006 were interpreted as applying to trusts for the relief of poverty because there is clearly a nexus between the settlor and the people who are intended to benefit from the trust. But for the poverty of the relations involved, such trusts would clearly be private express trusts.

## 25.5 TRUSTS FOR THE ADVANCEMENT OF EDUCATION

*Trusts for the advancement of education require that there is some institution of education benefited or that the purpose of the trust is to generate research which will be published for the public benefit. Trusts for the pursuit of sport fall within the educational head of charity, provided that they are annexed to some institution of education. In many cases, educational charitable trusts have been used as sham devices for the provision of tax and other benefits to a private class of individuals. Consequently, the courts have developed a requirement that there be a sufficient public benefit which requires that there be no ‘personal nexus’ between the people who stand to benefit and the settlor of the trust.*

### 25.5.1 Introduction

The discussion in this section considering the nature of charitable educational trusts falls into two halves. The first half will consider the decision in *IRC v McMullen*<sup>80</sup> (a decision of the House of Lords which offers the most accessible entry point to the concept of education) and other cases which define what is meant by the term ‘education’ in this context. The second half will consider the tax avoidance cases in which corporations sought to benefit their employees by using sham charities. These cases demonstrate the extent to which it is necessary to demonstrate some public benefit to be classified as a truly charitable trust.

### 25.5.2 What is ‘education’

#### *Education in general terms*

The first issue is therefore to decide what exactly is meant by the term ‘education’ in the context of the law of charities. Clearly trusts purposes involving schools and universities fell within the cases analogous to the preamble of the 1601 statute; however, the case law has developed a more sophisticated understanding of what constitutes an educational purpose, as considered below. The contexts in which there is greater confusion surround trusts set up for the study of more esoteric subjects, or even simply to advance an ideological position, which are not annexed to any accepted educational institution.

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<sup>77</sup> *Re Scarisbrick* [1951] Ch 622.

<sup>78</sup> *Ibid.*

<sup>79</sup> Following *Attorney-General v Price* (1810) 17 Ves 371; *Gibson v South American Stores* [1950] Ch 177; *Re Cohen* [1973] 1 WLR 415; see also *Re Segelman* [1995] 3 All ER 676.

<sup>80</sup> [1981] AC 1.

What is clear is that 'education' in the charitable sense is not limited to teaching activities in schools and universities. Rather, education can involve activities not in the classroom such as sport<sup>81</sup> or the establishment of a choir<sup>82</sup> or the payment of staff in educational establishments.<sup>83</sup> It will also involve the establishment of companies to provide education, subject to the proviso that they must not seek to make profit.<sup>84</sup>

Research, as considered below, will also be a valid educational purpose in many circumstances<sup>85</sup> as will the educational advancement of the works of a renowned classical composer.<sup>86</sup> Gifts to established museums will also be charitable as being educational purposes.<sup>87</sup> In *Re Holburne*<sup>88</sup> an art museum was founded and held to be of public utility for the purposes of education. By contradistinction keeping a collection of eclectic *objects d'art* (some described in evidence as being 'atrociously bad') intact for the benefit of the National Trust will not be charitable if it is impossible for the court to establish any merit in the objects nor any public utility in the gift.<sup>89</sup>

Provided that there is a genuine charitable intention evident in the words, the courts will be prepared to validate such a trust wherever possible.<sup>90</sup> The main caveats are that there must be sufficient public utility and sufficient public benefit (which terms might be synonymous, depending on the context) in the purpose.

The reason why the allocation of charitable status to these purposes is important is that it frees them from liability to pay tax on their ordinary activities. A number of the key areas of controversy are considered in the sections which follow.

### *Research, teaching and ideology*

One leading case in this context is that of *Re Hopkins*<sup>91</sup> under which a bequest had been made to the Francis Bacon Society. The aim of the society was to prove that Bacon was in fact the author of the works generally attributed to William Shakespeare. The court held that this purpose was educational because it was 'of the highest value to history and to literature'. The contention had been made in favour of the purpose being found to be charitable that the Society would tend to publish its work. Consequently, the court held that the fact that the research would be made public would lean towards finding of charitable status, thus illustrating the requirement that there be some *public* benefit resulting from the gift.

A case reaching a different conclusion was that of *Re Shaw*.<sup>92</sup> The trust at issue in that case concerned a bequest made by the great socialist playwright and man of letters George Bernard Shaw. Shaw had left money to be applied towards research to create a new alphabet. Ultimately, it was hoped that this research would have led to the creation of a new common language, in line with Shaw's humanist philosophy, so that his works could be comprehensible to all nations no matter what their mother tongue and so that peace might be founded through this common language. It was held by Harman J (never the most liberal of judges) that this purpose was not a charitable purpose because it involved propaganda.

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81 *IRC v McMullen* [1981] AC 1; *London Hospital Medical College v IRC* [1976] 1 WLR 613 (sport in universities).

82 *Royal Choral Society v IRC* [1943] 2 All ER 101.

83 *Case of Christ's College, Cambridge* (1757) 1 Wm Bl 90.

84 *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728; *Re Girl's Public Day School Trust* [1951] Ch 400.

85 *McGovern v Attorney-General* [1982] Ch 321.

86 *Re Delius* [1957] Ch 299.

87 *British Museum Trustees v White* (1826) 2 Sm & St 594.

88 (1885) 53 LT 212; (1885) 1 TLR 517.

89 *Re Pinion* [1965] Ch 85; following *Re Hummeltenberg* [1923] 1 Ch 237. Cf *Funnell v Stewart* [1996] 1 WLR 288.

90 *Re Koeppler's WT* [1986] Ch 423.

91 [1965] Ch 699.

92 [1958] 1 All ER 245, confirming [1957] 1 WLR 729. See also *Re Shaw's WT* [1952] Ch 163.

The two cases of *Shaw* and *Hopkins* deserve a little comparison. In *Hopkins* it was held that there could be a valid, charitable purpose based on an ideological commitment to the idea that the son of a Midlands glove-maker could not have written *Hamlet*, *King Lear*, or the rest of the staples of the English literary canon. Instead, the Francis Bacon Society seem to take the view that it must have been the university-educated Bacon who produced such works of genius. On the other hand, a determination that war and conflict could be reduced if different nations spoke a common language (made possible by the development of a new alphabet) was held not to be a charitable purpose. The latter purpose clearly has, at its root, a commitment to the public benefit. (What could be more beneficial to the public than the prevention of war?) Therefore, it is not that element which explains the difference between the decisions. Rather, it is a murkier thread in the common law that there are certain activities which judges are prepared to accept are beneficial to the public in the manner which the judiciary chooses to interpret that term.

The decision in *Hopkins*, delivered by Wilberforce J, considered *Shaw* and sought to expand the definition of 'education' used by Harman J to extend beyond a necessity that there be teaching. Rather, it would be sufficient that research be carried out either for the benefit of the researcher or with the intention that it be published. Provided that there was some element of publication, and thereby public benefit, that would qualify as a charitable purpose.

Slade J set out the principles on which a court would typically find that research work would be held charitable in *McGovern v Attorney-General*.<sup>93</sup>

(1) A trust for research will ordinarily qualify as a charitable trust if, but only if, (a) the subject matter of the proposed research is a useful subject of study; and (b) it is contemplated that knowledge acquired as a result of the research will be disseminated to others; and (c) the trust is for the benefit of the public, or a sufficiently important section of the public. (2) In the absence of a contrary context, however, the court will be readily inclined to construe a trust for research as importing subsequent dissemination of the results thereof. (3) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either (a) that a teacher / pupil relationship should be in contemplation, or (b) that the persons to benefit from the knowledge to be acquired should be persons who are already in the course of receiving 'education' in the conventional sense.

Therefore, the term 'education' will encompass research carried out outside schools or universities, provided that there is an intention to publish that research or to make its benefits available to the public. Beyond academic research, the courts have also been prepared to find that the practice of high quality craftsmanship will also be of educational value to the public in charitable terms.<sup>94</sup>

### *Sport and education*

In the leading case of *IRC v McMullen*,<sup>95</sup> the House of Lords considered the charitable status of a trust created to promote the playing of Association Football and the playing and coaching of other sports, provided that it is done within schools or other educational establishments. The contention was made that the playing of sport ought properly to be considered a part of education, in the same way that sitting in a classroom is generally supposed to be educational. The leading speech was delivered by Lord Hailsham, who held that this purpose was indeed educational because sport was essential to the development of young persons.

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<sup>93</sup> [1982] Ch 321: see also that judge in *Re Besterman's Will Trusts* (1980) *The Times*, 21 January.

<sup>94</sup> *Commissioners of Inland Revenue v White* (1980) 55 TC 651.

<sup>95</sup> [1981] AC 1.



However, sporting purposes will not, in themselves, be charitable. A trust to provide a cup for a yachting competition was not held to be charitable<sup>96</sup> and the same was held in relation to a cricket competition.<sup>97</sup> It does appear that the link to formal education is a necessary one, in the terms that Lord Hailsham described in *McMullen*, as was decided in *Re Mariette*<sup>98</sup> a case in which a trust for the conduct of sport in a school was found to have been charitable. Trusts in relation to the conduct of sports and cultural activities at university have also been held to be charitable purposes.<sup>99</sup> (In the writer's opinion, all this supposes that drinking while wearing a rugby shirt counts as either a sport or culture.)

Where to draw the line at the extent of charitable purposes in this area is a difficult issue. In *Re Dupree's Deed Trusts*<sup>100</sup> Vaisey J was uneasy about the limits on this charitable educational purpose. When validating a trust to provide funds for an annual chess tournament for young men under the age of 21, his lordship sensed that

'one is on rather a slippery slope. If chess, why not draughts? If draughts, why not bezique, and so on, through to bridge and whist, and by another route, to stamp collecting and the acquisition of birds' eggs? Those pursuits will have to be dealt with if and when they come up for consideration'.

Therefore, there will come practical limits on the types of pursuits which will be genuinely charitable – although the cases will not give us hard-and-fast principles on which to make such decision in advance.

### *Business and charity*

Many charities carry on trading activities to support their underlying charitable purposes. As considered above, it is not an objection to its charitable status that a charity charges generally for the services which it provides<sup>101</sup> nor that it receives rent for accommodation provided.<sup>102</sup> By the same token, charities can trade without the carrying on of the trade itself calling their charitable status into question under trusts law principles.<sup>103</sup>

Therefore, the fact that a purpose involves trading with the public will not preclude the organisation involved from being a charity. In this way in *Incorporated Council for Law Reporting v Attorney-General*,<sup>104</sup> the ICLR had been permitted registration as a charity. It was held that, because the law reports are essential for the study of law, they must be considered to be educational and also valid as a purpose beneficial to the community under the fourth head of charity. Therefore, the publication of law reports and all other attendant activities fall within the head of education in relation to their research function and their contribution to education ordinarily so-called in universities.<sup>105</sup>

### *An important note for students of law*

As a service to law teachers around the world I will also tarry briefly over the following words of Buckley LJ in *ICLR v Attorney-General* as to the importance of reading cases:

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96 *Re Nottage* [1885] 2 Ch 649.

97 *Re Patten* [1929] 2 Ch 276.

98 [1915] 2 Ch 284.

99 *London Hospital Medical College v IRC* [1976] 2 All ER 113; *Attorney-General v Ross* [1985] 3 All ER 334.

100 [1945] Ch 16, 20.

101 *Re Cottam* [1955] 1 WLR 1299; *Re Resch's WT* [1967] 1 All ER 915; *Abbey Malvern Wells v Ministry of Local Government and Planning* [1951] Ch 728.

102 *Re Estlin* (1903) 72 LJ Ch 687; *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288.

103 *Incorporated Council for Law Reporting v Attorney-General* [1972] Ch 73.

104 [1972] Ch 73.

105 See also on similar points *Beaumont v Oliviera* (1864) 4 Ch App 309; *Re Lopes* [1931] 2 Ch 130; *Royal College of Surgeons v National Provincial Bank* [1952] AC 631; *British School of Egyptian Archaeology* [1954] 1 All ER 887; provided that the objects are exclusively charitable: *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663.

... in a legal system such as ours, in which judges' decisions are governed by precedents, reported decisions are the means by which legal principles (other than those laid down by statutes) are developed, established and made known, and by which the application of those legal principles to particular kinds of facts are illustrated and explained. Reported decisions may be said to be the tissue of the body of our non-statutory law ... In a system of law such as we have in this country this scholarship can only be acquired and maintained by a continual study of case law.

It is perhaps ironic that in a textbook such as this I belabour the importance of reading cases. What this book aims to do is to give you, dear reader, a flavour of the many impulses behind those decisions and their practical effects on the world in which we live. But there is no substitute for going out and reading that material for yourself and for living that life for yourself. In the words of Dickens in *David Copperfield*, this book seeks only to be guide, philosopher and friend – it cannot be a replacement for your own application and effort.

### 25.5.3 The 'public benefit' requirement

In this chapter we have already considered trusts for the relief of poverty. In that context it was found unnecessary to demonstrate a public benefit to qualify as a charity. The rationale given in the old case law was that giving property for the relief of poverty will typically constitute a charitable purpose in and of itself. That discussion was contrasted with tax avoidance cases in which corporations have sought to gain tax advantages for themselves and their employees by creating trusts which had the form of charitable purposes but which were in substance private trusts for the benefit of employees and their families. In consequence, it has become important in the context of educational trusts to look beyond the apparent purpose of the trust to require some evidence that the trust is intended to be run as a *de facto* charity. Therefore, the requirement of sufficient public benefit has emerged. All charities must be for the public benefit.<sup>106</sup> The requirement for a public benefit was always a part of charities law relating to the advancement of education. It is provided in s.2(4)(a) of the Charities Act 2006 that any purposes which are "recognised as charitable purposes under existing charity law", for example under the old case law, will continue to be recognised as charitable purposes. Consequently it is supposed that the old case law will continue in effect for the application of the public benefit test to purposes for the advancement of education.

#### *The problem*

Suppose the following facts. MegaCorp plc, employers of 200,000 people in the UK, decide to set up a trust which has only one purpose – 'to provide educational opportunities for young people in the UK', giving the trustees unfettered discretion to receive applications for grants and to apply the money as they see fit. On its face, that purpose looks straightforwardly charitable. However, suppose that all of the money is distributed only to defray the school fees of children of the board of directors. In that situation, the trust would be one run simply as a private trust. Therefore, it would fall to be taxed as an ordinary trust would. Alternatively, if the money was paid out over a ten year period to children who had no family connection with the company, the trust would be a charitable trust.

The difficulty would come if money was given out for the benefit of children of the 200,000 ordinary employees (otherwise than on the basis of their poverty). One argument might be that such children formed a sufficiently large section of the public to enable the trust to be considered to be a charitable one.<sup>107</sup> Alternatively, it could be said that the trust remains a private trust *de facto* because money is only applied to those with a nexus to the settlor.<sup>108</sup> The trustees may, for form's sake, pay 10% of the available money to children entirely outside any nexus to the company. In such a situation, the argument would still appear to be that the trust is predominantly a private trust.<sup>109</sup> The question would then be: what if the trustees paid 50% to those outwith any nexus with the company, and 50% to those who were the children of employees?

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<sup>106</sup> Charities Act 2006, s 2 (1)(b).

<sup>107</sup> Cf *Dingle v Turner* [1972] AC 601.

<sup>108</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

<sup>109</sup> *IRC v EGA* [1967] Ch 123 below; *Re Keottgen* [1954] Ch 252 below.

### *The 'personal nexus' test*

The leading case is that of *Oppenheim v Tobacco Securities Trust*<sup>110</sup> in which the House of Lords considered a trust which held money from which the income was to be applied for the education of the children of employees of British-American Tobacco Co Ltd. That company was a very large multi-national employing a large number of people. The trust would have been void as a private trust on the basis that it lacked a perpetuities provision. It was argued, however, that the purpose was charitable and therefore that no perpetuities provision was necessary. Lord Simonds followed *Re Compton*<sup>111</sup> in holding that there was a requirement of public benefit to qualify as an educational charity.

The phrase that was used by the court to encapsulate the test was whether or not those who stood to benefit from the trust constituted a sufficient 'section of the community'. Lord Simonds held that:

A group of persons may be numerous, but, if the nexus between them is their personal relationship to a single *propositus* or to several *propositi*, they are neither the community nor a section of the community for charitable purposes.

Therefore, it was held that the trust at issue could not be a charitable trust because of the nexus between those who stood to benefit from the trust and the *propositus* (the company) which was settlor of that trust.

### *The in-between cases*

The heading for this section is not intended to suggest that there are cases which seek to apply different tests. Rather, there are cases which indicate that the court, and the Inland Revenue, will take flexible approaches to charitable trusts in some cases. For example, the court in *IRC v Educational Grants Association*<sup>112</sup> supported the core principle that where a trust is for the benefit of private persons it cannot be a charitable trust. In that case, however, there was a trust created with the apparently charitable purpose of holding property on trust 'for the education of the children of the UK'. In fact the trust was actually operated predominantly by the trustees to provide funds for the education of children of employees of the company Metal Box. This application for the employees of the company and their children accounted for 80% of the trust fund. The remaining 20% was applied for ostensibly charitable purposes. It was held that there could be no permissible exemption from tax on the grounds of charitable status on these facts because the trust was being run as a *de facto* private trust.

The older case of *Re Koettgen*,<sup>113</sup> a decision of Upjohn J, upheld a trust as charitable where the assets were applied 75% as a private trust and only 25% for the public benefit. This decision was rationalised in *IRC v EGA* as being properly considered as a trust for a public class, with a direction to the trustees to give preference to a private class who fell within the definition of that public class. Thus in *Koettgen* the trustees were required to give money to the public, but also directed to prefer that part of the public which also had a nexus with the settlor. In reality, charitable tax relief was allowed only to the extent that the trustees could demonstrate that the property had in fact been applied for the public benefit.

### *Concluding themes*

Returning to the themes identified at the beginning of this chapter, it is clear that the approach taken by the authorities in the educational trusts cases is one of requiring the person contending that the trust is charitable to prove that the trust will operate for the benefit of the public. Therefore, the onus is, in reality, to disprove the existence of a personal nexus (such as ties of blood, or an employment contract) between the settlor and those who stand to benefit. This approach contrasts with that of the House of Lords in *Dingle v Turner*<sup>114</sup> where the court focused on seeking out a truly charitable intention, rather than proving or disproving any relationship between the parties. It is suggested that the context of tax avoidance is the distorting factor here. Generally, in genuinely seeking to relieve poverty, there is not such a problem of motive.

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110 [1951] AC 297.

111 [1945] Ch 123.

112 [1967] Ch 123.

113 [1954] Ch 252.

114 [1972] AC 601.

The principle to be taken away from *Oppenheim v Tobacco Securities*<sup>115</sup> is that a trust will not be accorded charitable status where the purpose fails the ‘personal nexus’ test. The purpose of the trust must be to benefit a ‘section of the community’. Therefore, where there is a personal nexus between those who stand to benefit from the trust (for example where they are employed by the same company) and the settlor, those ‘beneficiaries’ cannot constitute a requisite ‘section of the community’. In comparison with *Dingle v Turner*, where the court did not follow the personal nexus test, rather one should look to the substance of the trust and evaluate its effects (although this comment is possibly *obiter*). In *Oppenheim*, however, a majority of the House of Lords say that fiscal matters should not be taken into account as a determining factor in deciding whether or not a purpose is charitable.

The question then is as to the applicability of the *Oppenheim* decision across the law of charities. Lord Cross held in *Dingle* that no distinction ought to be drawn between different types of trusts for the relief of poverty. Deciding on whether or not a group forms a section of the public is a matter of degree in which ‘much must depend upon the purpose of the trust’. Whereas the issues in *Oppenheim* were decided very much on the basis that the trust would attract an undeserved fiscal advantage if it were found to be charitable.

## 25.6 TRUSTS FOR RELIGIOUS PURPOSES

*Trusts for the advancement of religion are required to have a sufficient public benefit, such that the works done and the prayers said by a cloistered order of nuns (for example), though religious, would not be charitable in legal terms. Religion is concerned with ‘man’s relations with God’ and, therefore, excludes many modern New Age religions and cults. The definition of ‘religion’ for the purposes of allocating charitable status requires a public benefit and will not necessarily include all purposes which might be considered by a layperson to be ‘religious’.*

### 25.6.1 Introduction

This section considers the third of Lord Macnaghten’s heads of charity: religion. The concept of religion has a very particular form in the cases – if not in the Charities Act 2006. In the case law, religion is considered to be concerned with the worship of a deity. Indeed, in these times of growing new age cults, crystals and baubles, the attitude taken to charitable religious purposes in the cases has been limited to the presence of a public benefit from a deistic form of religion,<sup>116</sup> and has not embraced any of the so-called New Age belief systems. However, the effect of the Charities Act 2006 has been to expand the concept of religion beyond the case law focus on systems of belief which believe in a god and into any “religion which does not involve belief in a god”.<sup>117</sup> This significant change is considered below in section 25.6.2. It is also a requirement, as underlined by the 2006 Act, that there must be a public benefit from the religious purpose. Indeed, the requirement of public benefit has even caused bequests in favour of orders of contemplative nuns to be held not charitable on the basis that contemplative religious communities cannot benefit the public because they are cloistered away from the public.<sup>118</sup> Therefore, a lifetime’s religious devotion will not necessarily be enough to convince an English court that a purported charitable trust created to further your observance ought properly to be considered a valid religious, charitable purpose, unless that purpose also confers a palpable public benefit. The reason for the presence of this head of charity results from the historical administration of alms to the poor and of education in local parishes by the church – in consequence, the English conception of charity has long been bound up with religious devotion.

### 25.6.2 What is a ‘religion’ in charities law?

*The structure of this discussion*

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<sup>115</sup> [1951] AC 297.

<sup>116</sup> *Re South Place Ethical Society* [1980] 3 All ER 918, below.

<sup>117</sup> Charities Act 2006, s.2(3)(a)(ii).

<sup>118</sup> *Gilmour v Coates* [1949] AC 426; *Leahy v Attorney-General for NSW* [1959] AC 457.

It is important to understand that the case law on the meaning of “religion” was limited to belief in god, whereas the Charities Act 2006 explicitly seeks to extend that definition into religions which do not involve a belief in a god. It is unclear at the time of writing where the new legislation will take this area of the law. Therefore, this section will, first, consider the old case law in detail before, secondly, considering how the new legislation may impact on that case law. First, then, a consideration of the case law definition of “religion”.

*The old case law definition of “religion”*

In *Re South Place Ethical Society*,<sup>119</sup> Dillon J gave a taste of the meaning of the concept of a ‘religious purpose’ in the law of charity: ‘... religion, as I see it, is concerned with man’s relations with God ...’ Therefore, on the facts of *South Place*, the study and dissemination of ethical principles was held not to constitute religion. In the words of Dillon J, ‘ethics are concerned with man’s relations with man’. He continued: ‘It seems to me that two of the essential attributes of religion are faith and worship: faith in a god and worship of that god.’ The focus is therefore on a system of belief in a god or the promotion of spiritual teaching connected to such religious activity.<sup>120</sup> Other forms of spiritual observance are not included in this case law category. Therefore, beliefs in crystals or the majesty of Sunderland Football Club would not constitute religion (no matter how fervent the devotion to the cause).

Similarly, the Scientologists have not been held to be a religious purpose.<sup>121</sup> The approach of the courts to Scientology has been vitriolic. In *Hubbard v Vosper*<sup>122</sup> Lord Denning described Scientology as ‘dangerous material’. Whereas Goff J described it as ‘pernicious nonsense’ in *Church of Scientology v Kaufman*.<sup>123</sup> The beliefs of the Unification Church (popularly known as the ‘Moonies’) have been accepted as disclosing a valid charitable religious purpose in spite of their popular presentation in tabloid newspapers as a dangerous cult. The distinction is that the former does not involve an element of worship of a god or gods whereas the latter does. Freemasonry is not a religion for similar reasons.<sup>124</sup>

*The effect of the Charities Act 2006 on the meaning of “religion” in charities law*

The effect of s 2(3)(a) of the Charities Act 2006 will be significant in this context. Under s 2(3)(a)(i), the charities law practice of accepting major world religions, such as Hinduism, which include belief in more than one god has been given effect. That paragraph provides that a religion for the purposes of charities law will include ‘a religion which does not involve belief in a god’. Thus it is clear that religions such as Hinduism will constitute religions (although that particular example constituted a religion in any event).<sup>125</sup>

The more complex idea is contained in s 2(3)(a)(ii) of the Charities Act 2006. That paragraph further provides that the term “religion” includes ‘a religion which does not involve belief in a god’.<sup>126</sup> This latter extension to the concept of religion will be more problematic. Previously, charities law had separated religions off from other forms of belief by reference to the existence of a belief in a god or gods. Now that there is no need for the presence of a god, how will a religion be distinguished from, for example, a merely ethical system of belief, or a belief in the existence of hobbits, or a belief in Spider Man as the ultimate power for good in the universe? The Shorter Oxford English Dictionary defines “religion”, from the Middle English period onwards, as involving a

“belief in or sensing of some superhuman controlling power or powers, entitled to obedience, reverence, and worship, or in a system defining a code of living, esp. as a means to achieve spiritual or material improvement”.

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<sup>119</sup> [1980] 3 All ER 918.

<sup>120</sup> *Keren Kayemeth Le Jisroel Ltd v IRC* [1931] 2 KB 465.

<sup>121</sup> In essence, the Scientologists believe in the writings of L Ron Hubbard, a Science Fiction novelist, to the effect that human beings were placed on Earth by aliens millions of years ago and that, through a process of auditing themselves, they make themselves ready for the return of said aliens.

<sup>122</sup> [1972] 2 QB 84, 96.

<sup>123</sup> [1973] RPC 635, 658.

<sup>124</sup> *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 3 All ER 281.

<sup>125</sup> Charities Act 2006, s 2(3)(a)(i).

<sup>126</sup> Charities Act 2006, s 2(3)(a)(ii).

There are, it is suggested, two very different senses of “religion” here. First, the requirement for some superhuman being and, secondly, a code of living. I shall deal with each in turn. The requirement that there be a “superhuman” being clearly accords with the need for a god. The Canadian authorities have identified a “belief in the supernatural” as being one of the main indicia of a charitable purpose for the advancement of religion.<sup>127</sup> This was the approach in the old case law. Literally, of course, the reference to a superhuman being could include a belief in the powers of Spider Man or Iron Man but that would not necessarily include the reference to Spider Man having an entitlement to reverence or worship. It is not a requirement that one be able to prove the existence of one’s god, but one would genuinely have to believe that one’s superhuman being did have the powers which one revered. The second sense of religion in this definition is interesting and potentially much broader. Of course being a samurai warrior or a soldier on special operations or a dedicated swimmer who trains every morning at 5am is involved in a “code of living ... as a means to achieve ... material improvement” but none of them involves any sort of belief in a higher power or controlling energy in the universe. However, membership of an organisation which the tabloid newspapers might refer to as a “cult” would involve a code of living seeking spiritual improvement if, for example, the adherents live in a commune, devote themselves to good works and contemplation, and seek spiritual enlightenment without believing there is a god in the universe. It is suggested that such a code of living would be easier to demonstrate in relation to groups of individuals, either living communally in the context of their shared beliefs or coming together in some form of religious activity, than it would be for individuals who adhered to entirely individual beliefs: this would be so because charities law requires a public benefit which would be easier to achieve for groups of people reaching larger sections of the community, and a lone individual would find it more difficult to demonstrate a credible belief system. However, taken literally, the presence of a “belief system” of some sort ought to constitute a religion if it defines the manner in which the adherent or adherents live.

On this basis, groups like the Scientologists may now become valid charitable purposes because they live communally and pursue a system of belief. That system of belief relates (to the extent that I understand it) to a belief that the aliens who put us here will return at some point in the future and to a belief in personal development through a number of “courses” of “auditing” which resemble one-on-one counselling sessions. There is no god or no gods in which adherents believe – the aliens apparently not constituting gods or immortal beings. Nevertheless, it would be difficult for charities law to accept Scientology as being a charitable purpose given the opprobrium which has been heaped on it in previous, decided cases, as mentioned earlier in the preceding section. Scientology has been described judicially as “pernicious nonsense”: it would be interesting to see how the judges would explain such “pernicious nonsense” as being a religion which is entitled to the state’s support in the form of relief from taxation and so forth. The reason why the Charity Commissioners, before 2006, refused to accept the Scientologists as being a charitable purpose was that their activities were conducted in private and therefore did not constitute a public benefit. More “new age” religions which have a belief in spiritualism as opposed to a god might therefore constitute religious charitable purposes, if they involve a belief system and a code of living. However, the ethical, humanist society in *Re South Place Ethical Society* is unlikely still to be a religion because humanism generally constitutes a form of atheism, and is therefore almost the opposite of a religious purpose which may be considered to lack the presence of a code of belief or a code of living because it does not involve any single system of belief rather than “unbelief”.

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<sup>127</sup> *Church of the New Faith v Commissioner of Pay-roll Tax* [1982-1983] 154 CLR 120, 174, *per* Wilson and Deane JJ.

### 25.6.3 The requirement of public benefit

#### *Drawing distinctions*

All charities must be for the public benefit.<sup>128</sup> The requirement for a public benefit was always a part of charities law relating to the advancement of religion. It is provided in s.2(4)(a) of the Charities Act 2006 that any purposes which are “recognised as charitable purposes under existing charity law”, for example under the old case law, will continue to be recognised as charitable purposes. Consequently it is supposed that the old case law will continue in effect for the application of the public benefit test to such purposes. In *Thornton v Howe*<sup>129</sup> the question at issue was the validity as a charitable purpose of a trust created to secure the publication of the writings of one Joanna Southcott, who had claimed to have been impregnated by the Holy Ghost and to have been pregnant with the new Messiah. It was held that the publication of such works would be for the public benefit. By definition, the root of the word ‘publication’ is ‘public’ – thus the former implied a benefit to the latter necessarily.

In contrast to publication of such spiritual works, the trust at issue in *Gilmour v Coates*<sup>130</sup> was a trust created for the benefit of an order of contemplative Carmelite nuns. The trust was held not to have been charitable on the basis that the order contemplated in private, thus failing to communicate any benefit to the public. The court dismissed an argument that the nuns’ contemplation would have helped society in a spiritual sense, on the basis that it would not have been enough to constitute charitable help to society. This point has been accepted in a number of cases.<sup>131</sup> In *Dunne v Byrne*<sup>132</sup> the point is made that such activities of nuns in a convent would be accepted as being ‘religious’ in a general sense but not ‘charitable’ in the legal sense.

#### *Which types of activities constitute a ‘public benefit’?*

The courts are concerned with the advantages of charitable status being given to certain activities. Therefore, English law ought to state clearly that it is not awarding badges of honour to certain activity, nor judging their merits. Rather, it is concerned to accord the precise benefits attached to charitable status (tax relief, no trusts law formalities) to particular forms of approved activity like the relief of poverty and doing good works in the community. As has already been seen, a trust for the benefit of a contemplative order of nuns will not be valid because there is no public benefit resulting from that cloistered observance.<sup>133</sup> Religious observance or activity is generally not a public matter but to deny it charitable status is not to criticise it.

The courts have begun to adopt increasingly relaxed approaches to the interpretation of such charitable purposes. In *Neville Estates v Madden*<sup>134</sup> the issue arose whether a trust to benefit members of the Catford Synagogue could be a charitable purpose. The central issue was whether the members of that synagogue could be considered to be a sufficient section of the population for ‘public benefit’. It was held that, because the religious observance practised in the synagogue was (in theory) open to the public, the requirement of public benefit would be satisfied.<sup>135</sup>

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<sup>128</sup> Charities Act 2006, s 2 (1)(b).

<sup>129</sup> (1862) 31 Beav 14.

<sup>130</sup> [1949] AC 426.

<sup>131</sup> *Cocks v Manners* (1871) LR 12 Eq 574; *Re White* [1893] 2 Ch 41; and also *Leahy v Attorney-General for NSW* [1959] AC 457.

<sup>132</sup> [1912] AC 407.

<sup>133</sup> *Gilmour v Coates* [1949] AC 426.

<sup>134</sup> [1962] Ch 832.

<sup>135</sup> See also *Attorney-General v Bunce* (1868) LR 6 Eq 563; *Bunting v Sargent* (1879) 13 Ch D 330.

In *Re Hetherington*<sup>136</sup> there was a trust to provide income for the saying of masses in private. On the facts it was found that it was not susceptible of proof in these circumstances that there would be a tangible benefit to the public. Nevertheless, Browne-Wilkinson V-C was prepared to construe the gift as being a gift to say masses in public (and therefore as a charitable purpose) on the basis that to interpret the transfer as such a trust would be to render it valid and that it was open to the court to interpret a transfer as being an intention to create a charitable trust so as to make that trust valid. Therefore, Browne-Wilkinson V-C is under-scoring a straightforwardly purposive approach to the treatment of charitable trusts by the courts. On those facts it was therefore possible that the masses be heard in public and a further benefit in that the funds provided by the trust would relieve church funds in paying for the stipends of more priests.

This purposive approach indicates the attitude of the courts to validate charitable trusts wherever possible, in contradistinction to the stricter interpretation accorded generally to express private trusts. However, it worth noting that Browne-Wilkinson V-C in *Hetherington* was careful to rely on authorities like *Gilmour v Coats*,<sup>137</sup> *Yeap Cheah Neo v Ong*<sup>138</sup> and *Hoare v Hoare*<sup>139</sup> in relation to the need for a public benefit, and *Re Banfield*<sup>140</sup> in relation to the exclusion of non-charitable purposes. This decision also illustrates a generational approach by judges like Lords Wilberforce, Goff and Browne-Wilkinson (when in the High Court) to uphold the validity of trusts wherever possible, in contrast to the approaches of judges like Viscount Simonds and Harman J to invalidate trusts in circumstances in which there was some apparent incongruity in their creation.

#### *Some conclusions on religion*

This sub-heading does seem a little overly portentous as written – it does not intend to draw theological conclusions on the meaning of religion. Rather, its aim is limited to an examination of the types of activity which English law will accept as being charitable, religious purposes. A charitable religious purpose requires some public action or benefit. The question then is what type of action. It does appear that the courts have in mind religious observance which involves classically English activities such as jumble sales and gymkhanas which will have a public benefit. As will be discussed below in *Other purposes beneficial to the community*, political action to improve the housing conditions of the impoverished by religious groups will not be *charitable* actions under the head of religious purpose. Their only possible salvation<sup>141</sup> in the law of charities for this type of purpose is as a trust for the relief of poverty.

Similarly, religious observance itself is insufficient – it must be available to the public. However, the notion of religion is that it has adherents (or members) and therefore excludes others. Necessarily, religions, and religious observance will exclude sections of the public as well as offering others spiritual succour. The point is that seeking a public benefit in relation to religious purposes appears to be, at some level, counter-intuitive.

Indeed the general approach to religion is a rather parochial Anglican approach to religion and spirituality. It might be asked, in these pluralistic times, why New Age spiritual awareness or druidism should not be allowed registration as religious charitable trusts. In a patch of purple prose in *Re South Place Ethical Society*,<sup>142</sup> Dillon J explained his requirements for qualification as a charitable religious purpose in the following terms:

If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of qualities, such as truth, beauty and love, or believe in the platonic concept of the ideal, their beliefs may seem to them to be the equivalent of a religion, but viewed objectively they are not a religion.

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136 [1990] Ch 1.

137 [1949] AC 426.

138 (1875) LR 6 PC 381.

139 (1886) 56 LT 147.

140 [1968] 2 All ER 276.

141 No pun intended.

142 [1980] 3 All ER 918.



In other words, if you do not believe in what I believe in (or in what established religions believe in) in the way that I believe in them, then you do not have a religion at all. That is far from the approach in *Dingle v Turner*<sup>143</sup> whereby the court would look to whether or not there is an underlying charitable or altruistic purpose to the trust. Instead an ideological approach to religion emerges in relation to the availability of the fiscal and other advantages of charitable status.

## 25.7 OTHER PURPOSES BENEFICIAL TO THE COMMUNITY

*Other purposes beneficial to the community require that there be a sufficient 'public benefit'. A 'community' in this sense must be something more than a mere fluctuating body of private individuals (such as employees of a small company). The term 'benefit' will be found to exist in relation to purposes providing for the maintenance of public buildings, the provision of facilities for the disabled within a community, but will not apply under the caselaw in relation to mere recreation or social events (subject to certain statutory exceptions). These principles will be subject to certain general exclusions from the category of charitable purposes.*

### 25.7.1 Introduction

This final category is clearly broader in scope than the other three heads of charity under the old case law, acting as a reservoir for a number of the miscellaneous trusts which have struggled to qualify as charitable despite their seemingly benevolent aim. The category is culled from those parts of the 1601 preamble which do not fit into those already considered and the cases which have argued by analogy, or more generally, that they disclose purposes beneficial to the community. It appears that many of the new charitable purposes which were approved by the Charity Commissioners before the passage of the 2006 Act have fallen under this head rather than under any of the three more specific purposes. In many of the decided cases, applicants have sought to argue that they fell within one of the three specific heads of charity and have then argued that, in the alternative, they fell within the fourth head. Therefore, the fourth head can often be seen as a catch-all or residuary category for purposes which could not otherwise be characterised as being charitable.

This category no longer exists intact as a result of the passage of the 2006 Act. Rather, a number of the categories of purpose which used to fall under this head are now listed in section 2(2) of the 2006 Act. However, any purposes which were formerly valid under the pre-2006 case law,<sup>144</sup> whether or not they are now listed in that Act, will continue to be valid.<sup>145</sup> Therefore, it is still important to know how the fourth head under *Pemsel's Case* operates because any case which would have been valid under it will still be valid in the future, whether or not it appears in the list in section 2(2) of the 2006 Act. Furthermore, a number of the issues considered in this section relating to the nature of a benefit or to the scope of the community which is to be benefited will continue to be important even after the enactment of the 2006 Act. For the purposes of this discussion, this category of other purposes beneficial to the community will still be referred to as "the fourth head".

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<sup>143</sup> [1972] AC 601.

<sup>144</sup> Charities Act 2006, s 2(8).

<sup>145</sup> Charities Act 2006, s 2(4)(a), by dint of s 2(2)(m).

### 25.7.2 The nature of the fourth head: other purposes beneficial to the community

To fall under this head the trust has to show that its purpose is either analogous with the examples cited in the preamble to the statute of 1601 or with the principles deriving from its decided cases: as held by Lord Macnaghten in *Pemsel's Case*.<sup>146</sup> As considered above, while the 1601 preamble was repealed by the Charities Act 1960, the effect of the preamble on the common law was retained by the decision in *Scottish Burial v Glasgow Corporation*.<sup>147</sup> Importantly, in that same decision Lord Reid held that a trust ought not to be deprived of its charitable status simply because it charges fees or conducts a trade with the public;<sup>148</sup> provided that the profits derived from such fees or trade are applied for the purposes of the charity and not paid out to individuals. In this way, schools which charge fees have been accepted as being charitable provided that they are either non-profit making or that any profits are applied for the benefit of the school. It is, of course questionable whether the fiscal advantages of charity ought to be accorded to charitable entities which trade. Any other person who makes a profit will be *prima facie* liable to some form of taxation.

### 25.7.3 The requirement of a public benefit

The fourth head includes a requirement that the purpose be 'beneficial to the community'. It is therefore important to unpack this notion of 'community'. In terms of education and religion, the requirement of public benefit has been adapted to cope with the particular types of trust which have generated litigation. With reference to educational purposes, the focus has been on the extent to which the fund has been applied for people outwith any personal nexus to the settlor, and in relation to religion the public benefit has come to include a notion of access to religious service. The conception of 'beneficial to the community' is slightly different. It can be best summarised as requiring that some identifiable section of the community can derive a real benefit from the purpose. The roots of the case law are established in the *dicta* of Sir Samuel Romilly in *Morice v Bishop of Durham*<sup>149</sup> making reference to a requirement of 'general public utility' to satisfy this fourth head.

#### *The notion of 'benefit'*

The existence of some benefit is important. The people who are intended to take a benefit from the trust must actually be shown to benefit in some tangible fashion. Thus, for example, a trust of a small amount of money for the benefit of aged and blind millionaires would not qualify on the basis that such people would not derive any further benefit from such a trust, given their existing wealth.<sup>150</sup> However, a charitable purpose for the care of the blind which will provide real benefits to the blind people within a given area would be charitable because those people who were intended to benefit would actually be taking a tangible benefit.<sup>151</sup>

As a general rule of thumb it was suggested in *ICLR v Attorney-General*<sup>152</sup> by Russell LJ that where a trust purpose removes the need for statutory or governmental action by providing a service voluntarily, the organisation providing that service should be deemed to be charitable. However, that permissive approach is not adopted in all cases. In *Re South Place Ethical Society*<sup>153</sup> Dillon J suggested that to say that a purpose is of benefit to the community and therefore charitable, is to put the cart before the horse - the two ideas are not mutually inclusive. Just because a purpose may be of benefit to the community does not necessarily mean that it is charitable. The only rational approach for the student of this subject is to consider each case in turn to decide whether or not there appears to be sufficient benefit provided by the particular trust purpose.

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146 [1891] AC 531.

147 [1968] AC 138.

148 See the discussion of *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288; *ICLR v Attorney-General* [1972] Ch 73, considered above.

149 (1805) 10 Ves 522.

150 As considered in *Rowntree Memorial Trust Housing Association v Attorney-General* [1983] Ch 159, 171.

151 *Re Lewis* [1955] Ch 104.

152 [1972] Ch 73.

153 [1980] 3 All ER 918.

### *The notion of 'community'*

There is a necessary requirement that there be sufficient benefit to the community. The term 'community' is a particularly vexed one for political scientists and sociologists as well as for lawyers. A community could be said to be defined by reference to a geographical area. The obvious question would be what size of geographic area would be necessary to constitute a community. To define that area as being 'people in my back garden' or 'the monsters under my bed' would clearly be too small a geographic area. But would the settlor be required to identify an area as populous as 'London' or as geographically large as 'Yorkshire'? In *Verge v Somerville*<sup>154</sup> Lord Wrenbury held that:

The inhabitants of a parish or town or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals cannot.

Therefore, the community must be more than a fluctuating body of private individuals – precisely the concept which was criticised in *Dingle v Turner*<sup>155</sup> as being a reasonable definition of a group as large as the inhabitants of a London borough, as discussed above.

The further question with reference to charity would be whether a defined class of people (such as 'the elderly', or 'six year old footballers') within that geographic area would be sufficiently 'communal'. In some cases, the class may be a broad enough section of the community – such as 'the elderly'. Whereas others may appear to be too narrow and overly selective – such as 'six year old footballers'. There are arguments raised by the political scientists that the millions of people who watch *Brookside* on Channel 4 constitute a community, or that people who share a physical ailment or a religious or political belief, should all be considered as examples of virtual (rather than tangible) communities.

The question is then as to the approach which English law does in fact take. Evidently, a purpose which provides a benefit to a private class sharing a personal nexus with the settlor will not be a valid charitable purpose.<sup>156</sup> The notion of limiting the class extends further than the personal nexus test used in *Oppenheim*<sup>157</sup> for educational purpose trusts. Thus in the leading case of *IRC v Baddeley*<sup>158</sup> the settlor purported to create a charitable trust to provide facilities for 'religious services and instruction and for the social and physical training and recreation' of Methodists in the West Ham and Leyton area of east London. It was held by Viscount Simonds that the charitable purpose would fail because the class of those who could benefit was too narrowly drawn. His lordship held that 'if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed' it cannot fall under the fourth head of charity. Therefore, to restrict the class of people who can benefit from the purpose too narrowly will fail the requirement of a benefit to the community. In the words of Viscount Simonds, those who are expressed as being entitled to benefit from the purpose must be an 'appreciably important class of the community'.

### *Benefiting individuals within a community*

The courts have accepted a variety of defined classes as being suitably charitable. Trusts for the relief of the aged have been held to be charitable. Thus, in *Re Dunlop*<sup>159</sup> a trust to provide a home for elderly Presbyterians was upheld, as was sheltered accommodation providing for fee-paying patients in *Rowntree Memorial Trust Housing Association v Attorney-General*.<sup>160</sup> As considered above, despite the charging of fees, trusts will be upheld as being for valid charitable purposes when they are for the care of the elderly, or the sick, or the disabled. It appears that these cases are adopting the *Dingle v Turner* approach of seeking out an underlying charitable purpose, rather than relying simply on the applicant to prove that a sufficient constituency of the public will be benefited by the trust.

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154 [1924] AC 496.

155 [1972] AC 601.

156 *Re Hobourn Aero Components Ltd's Air Raids Disaster Fund* [1946] Ch 194 – in which the mooted benefit was restricted to the employees of a particular company.

157 [1951] AC 297.

158 [1955] AC 572.

159 [1984] NI 408.

160 [1983] Ch 159; *Re Resch's WT* [1969] 1 AC 514.

### *Benefiting the civic amenities of a community*

Aside from demonstrating that charitable assistance will be given to people, it is sufficient that the trust fulfils a purpose not directed at specific individuals but providing for some civic amenity. Trusts for the maintenance of a town's bridges, towers and walls have been upheld as valid charitable purposes<sup>161</sup> as has a trust for the support of a crematorium.<sup>162</sup> In these cases there are no specific individuals who stand to benefit directly, rather the community in general receives some indirect benefit in the quality of their civic life.

The notion of community, and of municipal services, is greatly extended by some of the case law. Included within the idea of 'benefit to the community' is the resettlement of criminal offenders and the rehabilitation of drug users.<sup>163</sup> Similarly, trusts for the support of fire-fighting services<sup>164</sup> and lifeboats<sup>165</sup> have been upheld as charitable purposes. It is suggested that this development, and understanding of the civic context of the 'community' is a very welcome development for the law. The fiscal and other advantages of charitable status ought to be bestowed on social useful activities. The way forward for the charitable sector is in the support of the welfare state and local government in the development of such amenities and in the support of local initiatives within which communities develop their own shared space.

As a slight development to one side of those issues of civic amenity, trusts for the moral improvement or instruction of the community have been upheld as being charitable purposes. Thus, a trust *inter alia* to 'stimulate humane and generous sentiments in man towards lower animals' has been upheld as a charitable purpose attached to the establishment of an animal refuge.<sup>166</sup> Even trusts for 'the defence of the realm' have been upheld as being charitable.<sup>167</sup>

The question of the provision of recreation grounds and sporting or leisure amenities is covered by the Recreational Charities Act 1958, in the wake of the *Baddeley* decision considered above. Decisions in which such amenities have been upheld as charitable have now been dismissed as being anomalous and outwith the operation of the statute.<sup>168</sup> In *Williams v IRC*<sup>169</sup> a trust was established for 'the benefit of Welsh people resident in London'. In delivering the leading speech, Lord Simonds held that 'a trust must be of a public character' and not restricted to individuals. The trust failed as a charitable purpose trust on the basis that the trust's purpose was solely social and recreational, and not strictly charitable. This particular decision, it is suggested, must now be considered to have been overruled by s.2(2)(...).

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161 *Attorney-General v Shrewsbury Corp* (1843) 6 Beav 220.

162 *Scottish Burial Reform and Cremation Society v Glasgow Corp* [1968] AC 138.

163 *Attorney-General for Bahamas v Royal Trust Co* [1986] 1 WLR 1001.

164 *Re Wokingham Fire Brigade Trusts* [1951] Ch 373.

165 *Johnston v Swann* (1818) 3 Madd 457.

166 *Re Wedgwood* [1915] 1 Ch 113.

167 *Re Stratheden* [1895] 3 Ch 265; *Re Corbyn* [1941] Ch 400.

168 *Williams Trustees v IRC* [1947] AC 447.

169 *Ibid.*

## 25.7.4 The remaining purposes beneficial to the community under the Charities Act 2006

The principal effect of the Charities Act 2006 in relation to the definition of “charitable purpose” has been to break out a number of the key, contested categories of “other purposes beneficial to the community” in an attempt to make clear that they should now be considered to be heads of charity in their own right. What is unclear at the time of writing is whether or not the courts will attempt to perpetuate their case law categorisations of charitable and non-charitable purposes regardless of the statute on the basis that the statute is drafted in only the most general language. Significantly head (m) in s.2(2) of the Charities Act 2006 preserves all charitable purposes which were previously valid under the case law, as set out in s.2(4)(a) of that Act. Also contained in that provision is a reference to the validity of recreational charities, given that under the old case law the courts effectively chose to ignore the Recreational Charities Act 1958 which had been passed to overturn a decision of the House of Lords which had sought to perpetuate long-standing principles of the case law disallowing charitable status to recreational activities. It is to be hoped that the courts will react to the spirit of the statute which is clearly to expand the categories of charitable purposes to include activities which the case law had previously refused to recognise as being charitable. Those purposes, and the old case law which previously dealt with them, are considered in turn in the following section of this chapter.

## 25.8 THE NEW CATEGORIES OF CHARITABLE PURPOSE UNDER THE CHARITIES ACT 2006

### 25.8.1 An introduction to the Act

It is difficult to write much on the terms of this new Act immediately in the wake of it receiving the Royal Assent because there is no case law to explain the extent of the new heads of charity and because the manner in which those categories are expressed is very general indeed. Therefore, what follows is a discussion of each of the new statutory heads of charity in turn with a reference to previous problems in the case law where appropriate and otherwise with a suggestion as to their possible future applications. There is a division between these new statutory heads of charitable purpose: first, those heads which have been the subject of litigation and which the statute now seeks to resolve; and, secondly, those heads which are new governmental initiatives without any history in the old case law.

### 25.8.2 The advancement of health or the saving of lives

The reference to the advancement of health includes the “prevention or relief of sickness, disease or human suffering”.<sup>170</sup> Research into medical procedures would ordinarily have fallen under educational purposes under the research category in any event, in the manner considered earlier in this chapter in relation to the advancement of education. Therefore, it is to be supposed that this category is aimed at other purposes. The “*advancement* of health” could encompass activities which promote healthy eating – such as celebrity chef Jamie Oliver’s campaigning for the improvement of dinners in schools – or public information campaigns promoting sexual health. Campaigning for the advancement or improvement of public health would in itself be a charitable activity, although if that campaigning took to advocating a change in the law then it would fall foul of the principle in *National Anti-Vivisection v IRC*<sup>171</sup> that no charitable purpose may campaign for changes in the law. It may also include the advancement of alternative health therapies. The “*saving of lives*” could encompass anything from medical care to lifeboat services which save lives at sea.<sup>172</sup>

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<sup>170</sup> Charities Act 2006, s 2(3)(b).

<sup>171</sup> [1940] AC 31.

<sup>172</sup> *Thomas v Howell* (1874) LR 18 Eq 198; *Re David* (1889) 43 Ch D 27.

### 25.8.3 The advancement of citizenship or community development

Category (e) in s 2(2) deals with “the advancement of citizenship or community development”. At first blush, this category is very in line with the rhetoric of the current government and is fairly meaningless as drafted. The Act contains a gloss to the effect that it includes “rural or urban regeneration” and “the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities”.<sup>173</sup> What is not clear is what is meant by “citizenship”. It could be linked to whatever is taught in schools as part of the national curriculum under “citizenship”. There are references elsewhere in s.2(2) to religious or racial harmony and equality,<sup>174</sup> although the reference to “community development” could include the organisation of youth groups, and other activities which are directed at harmony. What is difficult to see is how these intangible – but important – improvements in social life will tally with the judges historical aversion to services or activities which do not lead to any tangible benefit to identifiable groups of people. For example, recreational charities were always avoided in the case law because mere social activities which had no direct effect on the quality of people’s lives. Therefore, the judges would need to expand their understanding of a charitable activity in this sense to incorporate a range of intangible activities, which must extend beyond those categories of purpose which have already been accepted under the old case law and which will continue to be effective in the future.<sup>175</sup>

### 25.8.4 The advancement of the arts, culture, heritage or science

This category refers to “the advancement of the arts, culture, heritage or science”. Each of these four elements should be considered separately. None of these terms is defined in the Act and therefore we must develop our own understandings of these provisions and guess as to the future. First, “the arts”. It is suggested that the reference to “the arts” in the plural is not a reference simply to “art”. Thus, it is a reference activities which ordinarily constitute a part of “art” in the singular and so refers to painting, to sculpture and so forth, but it could also be said to refer to theatre performances, opera, classical music and so forth which all generally fall under the rubric of “the arts” generally. The advancement of art, in the singular, could include not only the display of artworks<sup>176</sup> and the maintenance of museums,<sup>177</sup> but its advancement might also refer to the funding of future artworks provided the Charity Commission can accept that it is genuinely of sufficient artistic merit.<sup>178</sup> The general reference to “heritage” suggests the maintenance of historic land, gardens and buildings, and also monuments and so forth beyond artworks. Heritage need not be purely physical: there are, for example, a large number of folk music societies whose work is concerned with the preservation and conservation of cultural heritage items like songs, poems and so often. This last item might be said to merge into “culture”. The term “culture” is one which is hotly contested among social theorists and could encompass almost any aspect of human interaction.<sup>179</sup> In the context of these four categories, culture would certainly include literature, theatre, classical music and opera, in the sense that is of what is commonly referred to as “high culture”. However, ceremonies or festivals which are particular to specific geographic communities or ethnic communities – such as religious festivals, or the Durham Miners’ Gala, or festivals of popular music – could certainly fall within a broader definition of “culture”. The advancement of science need not be limited to scientific research because that is already included under “education” – therefore it can be assumed that this purpose is supposed to stretch further than research. The advancement of science could include the establishment or support of institutes which bring scientists together or which popularise science among the population generally.

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<sup>173</sup> Charities Act 2006, s 2(3)(c).

<sup>174</sup> Charities Act 2006, s 2(2)(h).

<sup>175</sup> Charities Act 2006, s 2(4)(a).

<sup>176</sup> *Abbott v Fraser* (1874) LR 6 PC.

<sup>177</sup> *Trustees of the British Museum v White* (1826) 2 Sim & St 594; *Re Holburne* (1885) 53 LT 212.

<sup>178</sup> See Charity Commission, *RR10: Museums and Art Galleries*, paras 7-12 and Annex A.

<sup>179</sup> Taken literally, of course, “culture” could refer to mould or fungus.

### 25.8.5 The advancement of amateur sport

This category refers to “the advancement of amateur sport”. Under the old case law the mere advancement of sport did not in itself constitute a charitable purpose: thus paying for a cup for a yachting competition and to promote yachting was not held to be a charitable purpose,<sup>180</sup> nor was the promotion of cricket.<sup>181</sup> Recreational charities have been held valid under the old case law as charitable purposes only if they improve the conditions of life of the people using them and either if they are available to all members of the population without discrimination or if they are made available by reason of their users’ “youth, age, infirmity, disability, poverty or social and economic circumstances”: all terms which were contained in the Recreational Charities Act 1958, which is considered in detail below in section 25.8.12. Most of the key cases on recreational charities related to combined sports and social clubs. Thus the inclusion of this category in the list of charitable purposes will require the judges to accept the charitable nature of amateur sports clubs or the raising of money for example for the training of amateur athletes for the 2012 London Olympic Games. What the judges will need to accept is that it is not necessary for the participation in sport to alleviate some lack in the sportsperson’s life. (It should be recalled that the chance to earn money from sport will not count in this instance because the category refers strictly to *amateur* sport.) The Charity Commission has, however, changed its view and decided that it will accord charitable status to “the promotion of community participation in healthy recreation by providing facilities for playing particular sports”.<sup>182</sup> Consequently, in practice there are unlikely to be any further cases on this topic because the Charity Commission will not challenge genuine trusts set up to achieve these goals. The terms of the new Act have only confirmed this approach, it is suggested. The remaining questions relating to recreational charities, discussed below, may similarly be disposed of by this regulatory development.

### 25.8.6 The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity

This category deals with “the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity”. Purposes of this kind would previously have run the risk of being held to be void purposes on the basis that they sought a change in the law or that they were more generally political purposes.<sup>183</sup> As considered above, political purposes will not be enforced by the courts. The pretext for refusing to enforce such purposes is that it might be considered to be tantamount to the courts expressing support for one political ideology over another and that it would be impossible for a court to weigh purely political arguments given that judges (purportedly) merely put the law into effect but do not make it.<sup>184</sup> The old case law had not recognised the pursuit of better relations between groups or nations – such as the British and the Boers after the Boer War – as being charitable.<sup>185</sup> The Charity Commission, however, doubtless emboldened now by the new Act, has expressed its view that promoting good race relations ought to be considered to be a charitable purpose in the future and as being innately for the public benefit.

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<sup>180</sup> *Re Nottage* [1885] 2 Ch 649.

<sup>181</sup> *Re Patten* [1929] 2 Ch 276.

<sup>182</sup> Charity Commission, *RR 11: Charitable Status and Sport* (2003).

<sup>183</sup> See *National Anti-vivisection Society v IRC* [1940] AC 31.

<sup>184</sup> However, in a common law system where the bulk of the law has been made by a judge at some point this argument has always struck this writer as being facile in the extreme.

<sup>185</sup> See *Re Strakosch* [1949] Ch 529.

### **25.8.7 The advancement of environmental protection or improvement**

This category is concerned with “the advancement of environmental protection or improvement”. The environment can be taken to refer to particular items of flora and fauna at one end of the spectrum right the way through to combating climate change or global warming at the other end. Thus the protection of sites of special scientific interest or the maintenance of areas of outstanding natural beauty – particularly areas which have been classified as such under planning law – would constitute environmental protection at what we might consider the “micro” end of the spectrum. Research into climate change or activities relating to global environmental threats might be considered to be the “macro” end of this spectrum. Both, it is suggested, should constitute charitable purposes. It is suggested that such activities can be demonstrated to be for the public benefit if it is accepted, as the Act seems to suggest by the very inclusion of this category in s.1(2), that protection or improvement of the environment is necessarily in the public good.

### **25.8.8 The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage**

The contents of this category are “the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage”, of which references to “the relief of aged impotent and poor people” were contained in the Preamble to the statute of 1601. At first blush, it is difficult to see how this category extends far beyond the category for the relief and prevention of poverty: the focus would need to be on the “other disadvantage” which persons might suffer to extend it beyond mere poverty. It is easiest to see how suffering connected to ill-health or old age or disability could be assisted by charitable donation or services. These ideas were encapsulated in the Preamble to the Statute of 1601, as set out earlier in this chapter. What one needs to demonstrate is a “need” which would be met by that charitable service. Need in relation to youth could involve after-school care if there is no parent or other adult able to care for a child before her parents finish work or recover from a medical condition. Activities involving the National Society for the Prevention of Cruelty to Children have been upheld as being charitable purposes,<sup>186</sup> as has the provision of a children’s home.<sup>187</sup> Otherwise, this category seems to enact a part of the old fourth head under the case law and the Preamble.

### **25.8.9 The advancement of animal welfare**

#### *The advancement of animal welfare under statute*

This category relates to “the advancement of animal welfare”. This would encompass the good works of the Royal Society for the Prevention of Cruelty to Animals or the Royal Society for the Protection of Birds, it is suggested, as organisations committed to the care of animals. Equally, the provision of hospices for animals or even the provision of veterinary services may be charitable purposes. What is significant is that under the old case law the thread which appeared to run through those cases (for the most part) was that there was a public benefit in animal welfare if, and only if, there could be showed to be some moral improvement to the human community by dint of treating animals better.<sup>188</sup> It remains to be seen whether or not the courts will consider the express inclusion of this category in the legislation as signalling a need to accept that promoting or procuring better animal welfare was in itself for the public benefit without any anthropomorphic or humanist concerns about showing some moral improvement in the human community. It is suggested that a civilised human society only truly achieves a higher level of civilisation when it is capable of treating all creatures humanely, just as it looks after human beings incapable of caring for themselves. Thus, it is suggested, that the advancement of animal welfare should be considered in itself to be a good in itself. It may be that, however, a trust to provide for the welfare of the settlor’s only dog would not constitute a public benefit because the only benefit would be felt within the settlor’s own home. Therefore, the trust would need to achieve some advancement of animal welfare which had a broader effect, but without needing to show that human beings in particular were benefiting. The old – and frequently unsatisfactory case law – is considered in the next section.

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<sup>186</sup> See *D v NSPCC* [1978] AC 171.

<sup>187</sup> *Re Sohal’s WT* [1958] 1 WLR 1243.

<sup>188</sup> *Re Wedgwood* [1915] 1 Ch 113.



### *The pre-2006 case law on benefiting animals*

It is frequently said that the British are a nation of animal lovers and that they become more concerned about harm being caused to animals than to people (that is probably because animals cannot tell you what they are thinking and that is clearly a cause to like anyone). There are frequently attempts to create trusts for the maintenance of animals. Typically this would not constitute a valid private trust if it were for the benefit of specific animals.<sup>189</sup> The argument might be that a trust for the benefit of a broadly defined class of animals would constitute a charitable purpose. On the basis that such a purpose directed at the prevention of cruelty to animals would contribute to public morality, the Court of Appeal held that the trust would be a valid charitable trust.<sup>190</sup> In *Re Moss*<sup>191</sup> a trust for a specified person to use 'for her work for the welfare of cats and kittens needing care and attention' was held to be a valid charitable purpose by Romer J.<sup>192</sup> Similarly, a trust *inter alia* to 'stimulate humane and generous sentiments in man towards lower animals' has been upheld as a charitable purpose attached to the establishment of an animal refuge.<sup>193</sup>

However, the Court of Appeal in *Re Grove-Grady*<sup>194</sup> held that a will providing for a residuary estate to be used to provide 'refuges for the preservation of all animals or birds' was not a charitable purpose because there was no discernible benefit to the community. In that case, Russell LJ held that there was no general rule that trusts for the preservation and care of animals would necessarily be of benefit to the community: rather, each case should be considered on its own merits.

The protection of animals could also be expressed in terms of protection of the environment (and thereby of benefit to the community)<sup>195</sup> or as an educational purpose in some circumstances. Interestingly in *re Lopes*<sup>196</sup> Farwell J held that 'a ride on an elephant may be educational'. The trouble with that statement is that it would seem to make circuses potentially charitable, particularly if linked specifically to a research or straightforwardly educational activity.

### **25.8.10 The promotion of the efficiency of the armed forces of the Crown**

This category was a late addition to the legislation and covers "the promotion of the efficiency of the armed forces of the Crown". It had previously been the case that trusts to promote national defence through the armed forces would be considered to be for the public benefit.<sup>197</sup> The armed forces refer clearly to the army, the Royal Air Force and the Royal Navy, and all attendant services. The statute focuses on the "efficiency" specifically of these forces. This could have two senses. The first sense might include an economic measure of efficiency. The second sense could be taken to mean the "effectiveness" of the armed forces, perhaps including activities such as the physical fitness of soldiers, the ability of armed services personnel to use modern technology. If this second sense were taken to its extremes then it could even include the acquisition of military equipment which would make the armed services more effective or efficient.

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189 *Re Lipinski* [1976] Ch 235, *infra*; *Re Endacott* [1960] Ch 232.

190 *Re Wedgwood* [1915] 1 Ch 113.

191 [1949] 1 All ER 495.

192 An approach applied generally in *University of London v Yarrow* (1857) 21 JP 596; *Tatham v Drummond* (1864) 4 De GJ & Sm 484; *Re Douglas* (1887) 35 Ch D 472; and *Re Murawski's WT* [1971] 2 All ER 328.

193 *Re Wedgwood* [1915] 1 Ch 113.

194 [1929] 1 Ch 557.

195 *Re Verrall* [1916] 1 Ch 100.

196 [1931] 2 Ch 130.

197 The "setting out of soldiers" was included in the 1601 Preamble.

### **25.8.11 The promotion of the efficiency of the police, fire rescue and ambulance services**

This category covers “the promotion of the efficiency of the police, fire rescue and ambulance services”. It had previously been the case that trusts to promote the services provided by these three emergency services.<sup>198</sup> The statute focuses on the “efficiency” specifically of these forces. As with the previous provision, this could have two senses. The first sense might include an economic measure of efficiency or the ability of those services directly to carry out their functions. The second sense could be taken to mean the “effectiveness” of these services, perhaps including activities such as the physical fitness of police officers, the ability of ambulance personnel to use modern technology, and so forth. Importantly the old case law had held that a trust for the recreation of police officers was not a charitable purpose.<sup>199</sup> It is suggested, however, that a distinction should be drawn between circumstances in which police officers are merely being provided with social club facilities such as a pool table which cannot improve the discharge of their official duties, and circumstances in which the fitness or other equipment which is being provided would enable those officers to discharge their official duties more effectively. Thus, put at its crudest, a fitter policeman is more likely, I should say, to be able to cope with arresting fit young criminals if she has fitness equipment made available to her. In that sense all of the emergency services would become more “efficient”. It is in this direction which the legislation ought, it is suggested, to develop in its application.

### **25.8.12 Recreational charities**

#### *Introduction*

Recreational charities have long been contentious in the law of charities. Under the old case law charitable status was not given to social clubs or sports clubs which did not alleviate any material lack in the lives of a section of the public. That much was outlined in relation to the new purpose of the advancement of amateur sport above, and is considered in detail in the next section. Recreational charitable purposes under s 1 of the Recreational Charities Act 1958 remain effective further to s 2(4)(a) of the Charities Act 2006. Section 5 of the Charities Act 2006 makes provision for the effectiveness of some recreational purposes as charities. This part of this chapter considers the case law and then the material terms of the 1958 Act.

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<sup>198</sup> *Re Wokingham Fire Brigade Trusts* [1951] Ch 373.

<sup>199</sup> *IRC v Glasgow City Police* [1953] AC 380.

### *The old case law*

In the wake of the *IRC v Baddeley*<sup>200</sup> decision, which held that recreation for a restricted class of people in a specific geographic area would not be charitable, the Recreational Charities Act 1958 was introduced to bring such purposes within the head of charity. It had long been a part of the common law that a generally expressed trust for recreation would not be a charitable trust.<sup>201</sup> Similarly in *IRC v Glasgow City Police*<sup>202</sup> it had been held that the provision of facilities for the recreation of police officers would not be a charitable purpose and that in *Williams v IRC*<sup>203</sup> a trust established for 'the benefit of Welsh people resident in London' and the development of 'Welshness' would not be considered to be charitable.<sup>204</sup> So it has been held that 'general welfare trusts' seeking to provide in general terms for the welfare of the community were not charitable trusts because their purposes would be too indistinct.<sup>205</sup> This is particularly so where the community whose welfare the purposes sought to secure was either too narrow a class or related to too limited a geographic area.<sup>206</sup>

The Recreational Charities Act 1958 established a 'public benefit test' to legitimise recreational charities as charitable trusts.<sup>207</sup> However, the facilities must be provided with the intention of improving the conditions of life for the person benefiting.<sup>208</sup> There are two further, alternative requirements that either<sup>209</sup> those persons must have a need of those facilities on grounds of their social and economic circumstances or that the facilities will be available to both men and women in the public at large.<sup>210</sup> Section 1 of the 1958 Act provides:

'(1)... it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:

Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

- (2) The requirement in the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless –
- (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
  - (b) either – (i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or (ii) the facilities are to be available to the public or female members of the public at large.'

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200 [1955] AC 572.

201 *Guild v IRC* [1992] 2 All ER 10, [1992] 2 AC 310, [1992] 2 WLR 397; *Re South Place Ethical Society* [1980] 1 WLR 1565.

202 [1953] AC 380.

203 [1947] AC 447.

204 See generally: *IRC v City of Glasgow Police Athletic Association* [1953] AC 380 (police efficiency); *Re Wokingham Fire Brigade Trusts* [1951] Ch 373 (fire brigade); *Re Resch's Will Trusts* [1969] 1 AC 514 (hospitals); *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288 (special housing for the elderly).

205 *Attorney-General Cayman Islands v Wahr-Hansen* [2000] 3 All ER 642, HL.

206 *Ibid.*

207 Recreational Charities Act 1958, s 1(1).

208 *Ibid*, s 1(2)(a).

209 *Ibid*, s 1(b)(i).

210 *Ibid*, s 1(b)(ii).

Thus it is a charitable purpose under the Act to provide recreational facilities provided that those facilities both improve the “conditions of life” of those who will use them and that the facilities are generally available to the public or they are needed by certain people who will use them because of their youth or disability and so forth. On a lenient interpretation it could be said that improving the conditions of someone’s life might include simply providing recreational facilities which otherwise they did not have; or else one could take a restrictive view that one must be suffering from some lack or poverty and that the mere provision of recreational facilities will not necessarily be making good such lack or poverty and so should not be protected by the Act. In explaining the ambit of the 1958 Act, the majority of the House of Lords in *IRC v McMullen*<sup>211</sup> held that it was only if the persons standing to benefit from the trust were in some way deprived at the outset that their conditions of life could be said to have been improved. Therefore, their lordships took the more restrictive view of the Act. On the facts of that case the promotion of the playing of organised football among young people by the Football Association, by providing facilities for the playing of football by people at school or university, could not be said to ‘improve the conditions of life’ of the persons who would benefit because it would not remedy any identifiable deprivation in those people.<sup>212</sup> The minority were of the view that the test ought to be relaxed so that a very broad interpretation could be given to social and economic circumstances requisite for the application of the 1958 Act: effectively the lenient view set out above. The minority would have allowed this promotional activity to be validated by the 1958 Act.

A more liberal interpretation was taken by a differently constituted House of Lords in *Guild v IRC*<sup>213</sup> in relation to a bequest “to the town council of North Berwick for the use in connection with the sports centre in North Berwick or some similar purpose in connection with sport”. It was accepted that this sports centre would be available to the general public as required by s 1(2)(b) of the Act. The principal question was whether or not this sports centre could be said to be connected with “social welfare” as required by s 1(1) of the Act. Lord Keith made it plain that he was prepared to adopt a “benignant construction” of the bequest in this case. It was a bequest which demonstrated that the testator’s intention was to benefit a sports centre the facilities of which were available to the public at large. Consequently, it was held that this constituted a valid charitable purpose under s 1(1) and (2) of the 1958 Act.

To reinforce the status of charities as welfare trusts, there is a specific provision in s 2 of the 1958 Act which provides for the validity as charitable trusts of trusts provided for the social welfare activities set out in the Miners’ Welfare Act 1952, which relates to miners’ welfare funds. Those trusts must have been declared before 17 December 1957. Otherwise, such a fund would not necessarily have been a charitable purpose given the nexus between the members and the possibility that the fund was a mutual fund organised on the basis of contract rather than as a charity.

#### *The effect of s 5 of the Charities Act 2006*

Section 5(2) of the Charities Act 2006 introduces two “basic conditions” to the Recreational Charities Act 1958, namely that the recreational facilities must be provided on the same terms as under s 1(2) of the 1958 Act as previously in effect, except that the material in paragraphs (a) and (b) are now pre-conditions for the validity of the charitable purpose. What has not been dealt with in the 2006 Act is the restrictive interpretation which has been put on the 1958 Act by the House of Lords in *IRC v McMullen*, as considered in the previous section.

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<sup>211</sup> [1981] AC 1.

<sup>212</sup> By extrapolation from the London Welsh case, then, the establishment of a ‘London Scottish’ centre, for the recreation of Scottish people living in London could not be said to ‘improve the conditions of life’ of the persons who would benefit because it would not remedy any identifiable deprivation in those people in spite of the passage of the Act.

<sup>213</sup> [1992] 2 AC 310, [1992] 2 All ER 10.

## 25.9 CY-PRÈS DOCTRINE

*The cy-près doctrine gives the courts a power to re-constitute the settlor's charitable intentions so as to benefit charity if the original purposes cannot be achieved, for whatever reason. The Charities Act 1960 (as amended in 1993) provides for broader powers to apply property cy-près than was available under the caselaw. The caselaw itself drew a distinction between impossibility of achieving those objectives before the trust came into effect, and impossibility arising at a later date.*

[This section does not yet include the changes made to this doctrine under the Charities Act 2006 and therefore this part of the discussion has been omitted, with the exception of a short section on a possible future development of the doctrine.]

### *The future for the cy-pres doctrine*

In her book on this topic, Dr Mulheron suggests that the cy-pres doctrine could have a more general application in relation to the validation of non-charitable purpose trusts than being restricted to the law of charities as it is at present.<sup>214</sup> It is suggested that many void private trusts could usefully be maintained if the courts were able to order the application of the trust property for equivalent purposes so as to make them valid. Of course, as was considered in sections 4.2.3 and 4.2.4 in relation to cases such as *Re Barlow*,<sup>215</sup> *Re Denley*<sup>216</sup> and *Re Lipinski*,<sup>217</sup> it often happens that judges seek to give effect to the settlor's true intentions by means of benignant constructions of the trust instrument. For example, in *Re Barlow's WT Browne-Wilkinson J* was prepared to permit the trustees to carry out a bequest (which might otherwise have been void for uncertainty of objects) partly on the basis of proposed scheme of distribution which his lordship considered would give effect to the spirit of the testator's intentions.<sup>218</sup> It could be said that this operates as a sort of distant cousin to the cy-pres doctrine in private law terms in that the precise words used by the settlor are interpreted by the court so as to achieve an equivalent result which is valid under private trusts law. While the cy-pres doctrine has always been limited to the law of charities in England and Wales there is no reason why an expansion of the doctrine, if thought desirable in the manner in which Dr Mulheron makes clear in chapter 10 of her book,<sup>219</sup> should be considered impossible in perpetuity.

## 25.10 THE REGULATION OF CHARITIES

[This section is omitted from this web-page at this stage.]

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<sup>214</sup> See, for example, R Mulheron, *The Modern Cy-pres Doctrine*, UCL Press, 2006, chapter 6 and chapter 10.

<sup>215</sup> [1979] 1 WLR 278.

<sup>216</sup> [1969] 1 Ch 373.

<sup>217</sup> [1976] Ch 235.

<sup>218</sup> Otherwise, his lordship was also prepared to give effect to this bequest by interpreting it to be a gift as opposed to a trust.

<sup>219</sup> R Mulheron, *The Modern Cy-pres Doctrine*, UCL Press, 2006, 304 *et seq.*

## 25.11 A BRIEF SURVEY OF THE PUBLIC BENEFIT TEST IN THE LAW OF CHARITIES

This short section considers the extent of the notion of public benefit in the law of charities. It is suggested that, prior to the enactment of the Charities Act 2006, it was a rule honoured more in the breach than in the observance, unless the settlors were seeking to use their charity solely or primarily for the avoidance of tax. As was suggested in the final part of section 25.1 above, there are two lines of authority in relation to “public benefit”. On the one hand we have the *Re Compton* line of cases which require that there must be no personal nexus between the people who will benefit from the charitable trust and the settlor of that trust. Thus, the benefit must be available to a sufficiently large section of the public outwith any direct connection to the settlor. This, it is suggested, does not tell us much about the nature of the trust – it only tells us that the settlor must be acting selflessly in the provision of some communal benefit. This brings us neatly to the alternative line of authority, that propounded by Lord Cross in *Dingle v Turner*. His lordship identified a number of shortcomings with the *Compton* approach. First, that approach is predicated on cases which were attempting to avoid tax by means of applying the benefit of the trust to a narrow group of people. This means that the approach of those courts was necessarily skewed towards seeking an open-ended public benefit. Secondly, the *Compton* approach requires that a large section of the public be able to take a benefit even if the funds which are to be raised by charity are likely to be small and so no general benefit of this sort can be attained. Suppose a charity for sufferers from a particularly rare disease. The people who will take a benefit may be small, even if the benefit stemming from the charity may be theoretically available to the entire population. Thirdly, Lord Cross identified a logical problem with the *Compton* test to the effect that there may be a nexus between the settlor and those who will take a benefit, but nevertheless the number of people who will take a benefit would be a sufficiently large section of the population. For example, the largest employer of non-skilled labour in the country is the Post Office: a trust for the benefit of the employees of the Post Office would be of benefit to a significant proportion of the population but a literal application of the *Compton* test would find that that trust was void. Similarly, the expression used in *Oppenheim*, that the class of people taking a benefit be “more than a mere fluctuating body of private individuals”, would itself be a description of the entire general public: the general public is a fluctuating body of private individuals. So the *Compton* test tells us nothing. The core point instead, as suggested by Lord Cross, is that there must be some genuine charitable intention on the part of the settlor. Thus trusts for the relief of poverty may be valid, even if there are only a few people who will take a benefit from the trust, provided that there is a genuine intention to relieve poverty. As the distinction between these two approaches was expressed above: Lord Cross’s approach requires that there is something intrinsically charitable in the creation of a trust, compared with the *Compton* approach which is concerned with a merely evidential question of demonstrating that there is a predominantly public rather than a private benefit in the purposes of that particular trust. The former approach considers the intrinsic merits of the trust purpose which is proposed; whereas the latter looks instead to see how the trustees are actually running the trust and whether or not the practical approach achieves suitably public, charitable effects.

There are two other doctrines which have an effect on the free operation of the *Compton* test as applied to all charities other than charities for the relief of poverty. First, the intention disclosed in *Re Hetherington* and in *Guild v IRC* to validate genuine charitable intentions wherever possible, even if that means effectively altering the purpose of the trust or requiring the trustees to undertake to manage the trust in accordance with the court’s directions so as to make it compliant with charities law. Thus a trust need not be drafted so as to disclose a public benefit because the court may well order that the trust be performed in a compliant manner. Thus trusts such as that in *Re Koettgen* may be validated for tax purposes to the extent that they were operated in compliance with charities law. Secondly, the cy-pres doctrine enables the court to give effect to otherwise invalid or impossible purposes and thus, again, validates a trust which is performed in accordance with charities law. On the one hand it could be said that these two doctrines enhance the public benefit requirement by interpreting trust powers so as to fit in with charities law; on the other hand they tend to show that a settlor need not have drafted a charitable purpose which was compliant with the public benefit because the court will find a way to render it valid wherever possible. What these two doctrines illustrate is that, for all the apparent rigidity of the *Compton* test, the law of charities operates on a far more flexible basis. The basis for this flexibility is the general understanding that charities are a good thing, and that in consequence a genuinely charitable intention should be implemented wherever possible.