The Charity Law & Practice Review

REMOVAL FROM THE REGISTER[1]

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Two recent decisions of the Charity Commissioners prompt the question what are the implications for charities which are removed from the Register. It is true that one of these decisions was a refusal to register two organisations (the Burnley Rifle Club and the City of London Rifle and Pistol Club), but the result has been that most of the clubs that had been registered have now been removed according to the Commissioners draft consultation document on the review of the Register.

The other decision concerned five institutions set up, it would seem, to facilitate the payment of school fees. These institutions are apparently still on the Register, having offered to restructure themselves, but their possible removal has been mentioned as an option. A spokesman for the Commissioners is reported to have said:

> "We think that these organisations no longer qualify for this [charitable] status, so we will simply remove them. Our ruling comes at the end of a long investigation."

But how simple is removal and how subjective can the Commissioners' decision be? Why removal rather than some other remedy? The purpose of this article is to examine some of the issues involved, not to get involved in the arguments for or against any particular decision.

There are four grounds on which an institution may be removed from the Register:

1. Rectification of the Register.

2. The institution no longer appears to the Commissioners to be a charity.

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1 This is one of the topics intended to be covered in *Charity Law, A-Z: Key Questions Answered*, 2nd edition, to be published by Jordans.

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3. The institution ceases to exist.

4. The institution does not operate.

Rectification

This is referred to in passing in s.4(1) Charities Act 1993, but no grounds for rectification are set out in the Act. It would seem that the only significant ground would be that the institution has been registered erroneously, either because the Commissioners formed a mistaken view of the law or because they were supplied with false or misleading information with the application for registration.

Any institution removed on this ground will be entitled to retain the fiscal and rating benefits already received as it was conclusively presumed to be a charity for all purposes whilst it was on the register (s.4(1) Charities Act 1993).

It will also retain its property because the effect of the Commissioners' decision must be that it never was a charity and there are therefore no grounds for the Commissioners to secure the application of the property for charitable purposes.

We are not aware of any case since registration began in 1962 where rectification has been given as a ground for removal, and it is interesting to note that rectification was not mentioned as an option in the case of the school fees charities. In the case of the gun clubs the question did not arise because they were not yet on the Register. We have already pointed out that these were applications.

"No Longer Appears to be a Charity"

This is the first ground mentioned in s.3(4) of the 1993 Act, the sub-section dealing with removal. It goes on to say that where the removal is due to a change in the purposes or trusts it shall be with effect from the date of that change. This suggests that financial advantages will be lost from the date of the change, but how does this marry up with s.4(1) - conclusive presumption of charitability whilst on the Register? Whilst the charity trustees have a duty under s.3(7)(b) to notify the Commissioners of any change, it is quite conceivable that there could be some delay before the Commissioners are actually told.

Is the answer perhaps that, whereas an institution removed by rectification retains its benefits up to the date of removal, an institution which changes its trusts loses its benefits immediately. This suggests that removal on the latter ground is not rectification but rather ordinary maintenance of the Register.

Change of purposes is the only example given in the sub-section of removal on this ground. This might happen where a settlor has reserved a power of revocation of the charitable trusts (which, clearly, would have to be exercisable within the perpetuity period), where a so-called "time charity" reaches the end of the charitable period, or where a charitable corporation changes its objects so as to become non-charitable. If the body is a company any change to the Objects Clause will require the prior written consent of the Commissioners, and the change will not affect the application of assets previously acquired otherwise than for full consideration or of income or property derived from those assets, so that these will be saved for charity. Proper provision will therefore have to be made for these assets. This might take the form of a new trust to be established to carry on the original purposes, or passing the assets over to another charity by way of charitable application. It is thought that there will not be grounds for a Scheme of the Commissioners in these circumstances because the machinery for dealing with the situation is normally available in the Memorandum and Articles of Association of the company, or can readily be adopted. In the other two cases mentioned above the assets will be lost to charity, but in the first case that was always a possibility and in the second always the intention.

The use of the word "appears" suggests that the Commissioners are sole judges on the facts before them, so long as they are acting in good faith. A mere subjective test is not, however, sufficient and there must be some grounds for the decision (*Ross Clunis v Papadolpoullos* [1958] 2 All ER 23). But does this mean that the Commissioners can simply change their collective mind? The answer is probably "yes", but the reason they give for the change can be important as it may have serious repercussions for the charities affected by it.

It was hoped that the decision in the case of the gun clubs would throw some light on the subject, but this has not proved helpful because the reasons for that decision are not clear (see "Decisions" Volume 1, August 1993). These clubs had originally been registered on the authority of *Re Stephens, Giles v Stephens* (1892) 8 TLR 792 that their purpose was to promote the efficiency of the armed forces or the security of the nation and the defence of the realm. However, the Commissioners state:

> "We considered that *Re Stephens* had no application beyond the individual circumstances of that particular decision."

In other words, that case was not authority for holding that the standard object

adopted by gun clubs[3] is charitable. It must be inferred from this that the Commissioners thought the clubs never had been charitable and had been wrongly registered by their predecessors. If this is right then clubs already on the Register could breathe a sigh of relief, because if as a result of this decision they are removed this will be a matter of rectification, and since, on this view, their assets were never held for charitable purposes, the clubs can take them with them.

However, the Commissioners go on to muddy the waters by saying that the decision in *Re Stephens* is now obsolete, and they pray in aid dicta of Lord Simons in *National Anti-Vivisection Society v IRC* [1948] AC 32 and *Gilmour v Coates* [1949] AC 126 suggesting that purposes which were once charitable can cease to be so as a result of changes in social conditions. They had not seen any evidence to support the contention that instruction in single shot marksmanship had any relevance to the technologically advanced warfare of today. In other words, *Re Stephens* was good law once (and presumably the clubs were correctly registered) but has ceased to be applicable in modern conditions.

This raises the awkward question "at what point did it cease to be relevant?" This is important because it could determine whether there are still any assets held for the original charitable purposes. If one goes back far enough (e.g. the advent of highly mechanised warfare with the tank, machine gun, etc, then it may well be that all the charitable assets have long since been expended; but if a club has substantial investments or land (both unlikely but possible) then it could be argued that these are held for purposes which were, but have since ceased to be, charitable. This is a ground for a cy-près scheme under s.13(1)(e)(iii) of the 1993 Act. The result would be that a de-registered club could not take its assets with it.

The Commissioners go on to advance yet a third reason for their decision, namely that because these clubs have a restrictive membership provision (new members are on probation for six months and have to be approved by the committee) they are established primarily for the benefit of the members and not the public and are not therefore charitable. Quite apart from the doubtful reasoning, this again raises the question "were they ever charitable?"

The Commissioners accept that the declared object discloses a good charitable purpose, and, that being so, the restrictive membership becomes irrelevant, since

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3 "The object of the Club is to encourage skill in shooting by providing instruction and practice in the use of firearms to Her Majesty's subjects so that they will be better fitted to serve their country in the Armed Forces, Territorial Army or any other organisation in which their services may be required in the defence of the Realm in times of peril."[3]

the members are not the beneficiaries. The Commissioners must therefore be arguing that the true purposes is the encouragement of skill in shooting and not the defence of the realm, or that clubs which had a restricted membership from the beginning were never charitable. It is vital that clubs on the Register should know where they stand, and when the Commissioners publish their reasons for a decision which affects registered charities it is important that these should be stated clearly.

In the Commissioners' Annual Report for 1996 there is no suggestion that the school fee charities had ceased to be charitable; what seemed to be in issue was their modus operandi. So why should the Commissioners' spokesman say: "We think that these organisations no longer qualify for this status, so we will simply remove them"? This kind of pronouncement can only create uncertainty in the minds of lay trustees who do not fully understand the Commissioners' powers.

The legal position is absolutely clear. If an institution is established for exclusively charitable purposes but has been operating in a way which has resulted in funds being applied for purposes which are not charitable, then this must amount to mismanagement or misconduct in the administration of the charity. The proper course in those circumstances is for the Commissioners to institute an inquiry under s.8 of the 1993 Act and, if satisfied that there has been misconduct or mismanagement, either appoint additional trustees or a receiver and manager, replace the charity trustees, or establish a Scheme. The appropriate remedy will depend on whether the Commissioners proceed under s.18(1)(b) or 18(2)(b) of the Act, but that is a subject for a different article. The point is that other remedies are available and the question of removal does not arise.

The Charity Ceases to Exist

Examples of institutions which cease to exist are companies or unincorporated associations which wind up under an appropriate power.

It is conceivable that a dissolved company can be removed from the Register but that there will still be trusts in existence of which the company was trustee. The Commissioners can exercise their power under s.18(5)(b) of the 1993 Act to appoint new trustees where there are no charity trustees, and the trusts, if liable for registration, will be retained on the Register.

A trust can similarly be terminated if there is a power to do so in the trust instrument. Where there is no such power it has been argued that, even though all the property of the charity may have been expended, it does not technically cease to exist. It follows that any property which later comes to light can be

claimed by the trustees. So a gift by Will will not lapse or fall to be dealt with by way of Scheme. Such an institution will be removed under the next head.

Does not Operate

It has been suggested that this could mean "does not operate *as a charity*", so that any charity which did not carry out any charitable activities or whose activities lay outside its declared objects could be removed. However, the better view is that "does not operate" means "carries out no activities" and is dormant. Certainly, any charity trustees acting outside the declared objects would be in breach of trust and liable to appropriate sanctions. Similarly, charity trustees who simply fail to act can be removed after an inquiry, and this must be the proper course in such a case (s.18(4)(d) Charities Act 1993).

Some charities are kept nominally in being simply for the purpose of receiving legacies, which they then pass on to another charity which has already received their assets under some kind of merger or amalgamation. It is a moot point whether the former charities are still operating, since the charity trustees are exercising no discretion and the charity is a mere conduit for the property. It is understood that the Commissioners have so far taken a lenient view and allowed these charities to remain on the Register. However, it is thought that the charity would suffer no great prejudice by being removed from the Register provided that it genuinely remains in existence.

Defunct companies which are still on the Companies Register can and should be removed from the Register of Charities. Once the company is struck off by the Registrar under s.652 Companies Act 1985 it is dissolved and would therefore be removed under the previous head. Under s.63(4) of the 1993 Act the Commissioners can object to the striking off and apply for an Order[4] for the Company to be restored.

The Commissioners might do this, for instance, if there were still substantial assets but no directors to run the company. In that case the Commissioners could in effect resurrect the company by appointing new directors by virtue of their power to appoint charity trustees. Further, where a charitable company is dissolved in any other way the Commissioners can apply for an Order, declaring the dissolution void. In that case it would appear that by virtue of s.651(1) Companies Act 1985 the Commissioners stand in the place of the liquidator. The Commissioners can make these applications of their own motion but require the agreement of the

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4 Section 653(2) Companies Act 1985.

Attorney General. Where a company is struck off under s.652 and there are assets but no application for restoration is made, the assets will become bona vacantia.

Any person who is or may be affected by the registration of an institution may apply to the Commissioners under s.4(2) of the 1993 Act for it to be removed, but only on the ground that it is not a charity. Such an application is most likely to be made by the Inland Revenue or the rating authority.

An appeal against a decision not to remove an institution may be brought in the High Court, and pending the determination of the appeal the entry in the Register will be marked to show that it is in suspense. Where the Commissioners remove an institution and the decision is appealed against, the entry is deleted not suspended.

Apart from the two decisions mentioned above, the question of removal has been highlighted further by the Commissioners' recent announcement of their proposed review of the Register. There is apprehension in the charitable sector that some institutions long accepted as charities will find themselves deprived of their charitable status. The Commission's spokesman quoted above is reported to have said on the same occasion: "The charities can appeal against the decision in the High Court if they want to." But for the vast majority of charities this is simply not an option. The legal costs of an appeal are daunting and few charities can afford them. If the Commissioners are going to disturb long-standing registrations then their legal reasons for doing so must be clearly stated and, ideally, there ought to be properly funded machinery for testing their decisions.