IS YOUR CHARITY A TRUST? A CASE STUDY

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Introduction

1. Must a charity always be a trust? Must the people who have control of charities necessarily be trustees? This is the question that will be addressed in this article, using the particular case of Church of England Parochial Church Councils ("PCC"s) as a case study.

2. The reason for the choice of the PCC as a type of charity for investigation is that steps taken recently by the Charity Commissioners ("CCs") have required the registration of many PCCs as charities.

3. It will be argued that it does not follow from the fact that a PCC is a charity that either the corporate body or its members must be charitable trustees.

4. This is very much at odds with the interpretation adopted by the CCs. Indeed, many PCCs appear now to be of the opinion that they need to invest in trustee training courses and behave in accordance with all the requirements of trust law when making investment and spending decisions.

5. It is submitted that this interpretation rests upon a faulty analysis of the law. Furthermore, whilst the arguments set forth here are specifically developed in the context of PCCs, with their own peculiar constitutions and governing legislation, it will be readily appreciated that the overall point being made is actually of very general application.

6. Put simply, the fact that an institution is a charity does not mean that the institution or the people who control it are necessarily trustees. The impact of this is potentially very significant for all those involved in the running of charities when it comes to assessing their legal duties.

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Background

7. For many years now, Parochial Church Councils have regarded themselves as charities and have been regarded as such by the Charity Commissioners.

8. This has meant, in particular, that PCCs have been accustomed to render their accounts in accordance with the rules for charitable bodies and have likewise claimed the various tax advantages that accompany charitable status.

9. It is not the chief thrust of this paper to argue that PCCs are not charities. What is under discussion here is whether it automatically follows from the fact that PCCs are charities that (a) the PCC itself is a charitable trustee in its corporate personality and/or (b) the individual member of the PCC are charitable trustees.

10. If the answer to this question is in the affirmative, then a number of serious consequences will flow for the ways in which PCCs make their decisions and document them. If the answer is in the negative, then it will come as a surprise to the Charity Commission, which appears to have taken the conclusion as read.

11. It is important to have in view from the outset of this discussion an important terminological distinction. As the argument proceeds, it will be suggested that part of the problem that has arisen is precisely the result of a slippage in language and, consequently, thought. There is an important distinction to be made between "charitable trustees", who are trustees in the full technical sense, and "charity trustees" who might or might not be trustees but are entrusted with the management of charities. We shall return to this issue in due course.

What is a charity?

12. Before the recent legislative reforms,[2] the question of what activities were charitable and which were not fell to be determined in accordance with the Statute of Charitable Uses 1601, passed towards the end of the reign of Queen Elizabeth I.

13. After some considerable development in the nineteenth century, Lord Macnaghten declared in *Pemsel's Case* that there were four heads of charity:[3]

2 By which are meant the Charities Acts of 1960, 1985, 1992, 1993, 2006.

3 [1891] AC 531.

(i) Promotion of religion;

(ii) Relief of poverty;

(iii) Advancement of education;

(iv) Other purposes beneficial to the community and within the spirit and intendment of the preamble to the Act of 1601.

14. The matter has now, however, been encapsulated in sections 1, 2 & 3 of the Charities Act 2006. By virtue of section 2(2) of that Act, a far larger group of activities has been explicitly stated to be charitable than before, although it is arguable that some at least of these had been established already by decisions of the courts.

Registration

15. In accordance with the growing legislative predilection for the establishment of registers, the Charities Act 1960 provided that certain charities were required to be registered. It was not provided that non-registration meant that they were not charities; but it was enacted that registration should be conclusive proof of charitable status.[4]

16. These provisions concerning registration have, so far as is relevant here, been transposed into the currently applicable legislation in the shape of sections 3, 4 & 5 of the Charities Act 1993.

17. In particular, section 4(1) of the Charities Act 1993 provides that an institution is to be conclusively taken to be a charity if its name appears on the register maintained by the CCs. (This is, to be sure, a contingent kind of conclusiveness, because it can be reversed upon an application to the court by an interested person.[5])

18. As was the case with the Charities Act 1960, the current regime also provides that two categories of charity do not need to be registered with the CCs. These are exempt charities and excepted charities.[6]

Impact on Parochial Church Councils

19. PCCs are not exempt from registration as they do not appear in Schedule 2 to CA 1993.

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4 CA 1960, ss. 4, 5.

5 CA 1993 s.4(2).

6 CA 1993 s.3A(2).

20. They are, however, excepted from the requirement of registration, provided that (a) they are permanently or temporarily excepted for the requirement to register by order of the CCs and (b) that their gross annual income does not exceed £100,000.[7]

21. The relevant section of CA 1993 as amended was brought into force by statutory instrument on 31st January 2009.[8]

22. As a result, PCCs must register themselves if their gross annual income exceeds £100,000. This has meant that a considerable number of PCCs have come within the ambit of registration.

23. As part of this exercise, individual members of the PCCs been asked to provide their names and signatures to the CCs. Upon completion of registration, all such persons who have been notified to the CCs as PCC members receive a booklet explaining their duties as trustees.

Plus ça change?

24. If a PCC has been registered as a charity, this does not mean that it suddenly became a charity at the point of registration. Unless the PCC had to alter its objects in order to achieve registration, then the result of registration is merely the official recognition of a state of affairs that must have existed from the outset. In other words, the PCC was a charity all along.[9]

25. However, it does not follow that the PCC itself or its individual members have become trustees. If they were charitable trustees before registration, then they will continue as such thereafter; if they were not, then they will not become such merely as a by-product of registration.

26. The duties of trustees are wide and onerous. A number of PCC members might be surprised to learn that these are what they signed up for.

The establishment of trusts

27. Although the CCs appear to regard it as settled and uncontroversial that PCC members are charitable trustees, it is submitted that the matter is in truth far from straightforward or self-evident.

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7 CA 1993 s.3A(2)(b).

8 SI 2008/3267, art. 2.

9 *Re Murawski's WT* [1971] 1 WLR 707.

28. As was remarked at the outset, the term "charity trustees" is in widespread use, and properly so: most charities are run by trustees. But does it follow that all charities must be under the control of trustees? Or can it be shown that one can have a charity without trustees?

29. It is worth going back to first principles. If a charity is a trust, then how may trusts come about?

30. A trust can arise either (a) expressly, by means of a trust instrument, or (b) impliedly, in circumstances giving rise to a resulting or constructive trust.

31. Whilst one can imagine that there might be an implied trust of charitable funds, for example where a stranger has intermeddled or where there has been a mistaken transfer, it is hard to imagine how a charity might come into being in the first instance in the form of an implied trust. In any event, such a mode of formation will be of no relevance to the PCC.

32. The obvious and almost universal means of setting up a charitable trust fund is for a settlor to transfer assets to trustees upon charitable trusts. In such cases, the objects of the trust will be able to be ascertained from the deed, together with the duties of the trustees.

33. It will be immediately obvious that this is not how PCCs were or are constituted. PCCs were brought into being by a Measure of the National Assembly passed in 1956.[10] They took the place of the earlier vestries. Like a limited company, a PCC is an independent legal person that may own property, enter into contracts, be a trustee and have the other rights and duties of a legal person.

34. It is an old adage that a legal person has neither body to burn nor soul to save. Such acts as the PCC performs in the world are done by the agency of those natural persons who are authorized to act for it. Nevertheless, the legal personality of the PCC is separate from that of the natural persons who constitute it from time to time.

35. Two questions thus arise: (i) Is the PCC itself a charitable trustee?, and (ii) are the individual members of the PCC charitable trustees.

Is the PCC a trustee?

36. Taking the first point first, it is striking that the Measure that created PCCs specifically provided that any realty acquired by the PCC, whether

10 Parochial Church Councils (Powers) Measure 1956 s. 3.

absolutely or on trust, and any personalty acquired on permanent trusts, was to be transferred to the diocesan authority ("DA"), subject always to the PCC retaining powers of management.[11]

37. Although it is not expressed in these terms, the position of the DA is like that of a "custodian trustee" under the Public Trustee Act 1906. Prof. Doe has written that the DA holds the legal title on trust as custodian for the PCC, which in turn acts as "managing trustee" with respect to disposals and so forth.[12] Presumably the thought is that the PCC holds the beneficial title on sub-trust for the beneficiaries.

38. This analsysis requires further investigation depending on the kind of property held.

39. Plainly there are four categories of property that a PCC may own: (a) realty held on trust, (b) personalty held on trust, (c) realty not held on trust, (d) personalty not held on trust.

Realty held on trust

40. So far as realty held on trust is concerned, there is nothing surprising in the conclusion that a PCC could become an express trustee of land. The PCC is a legal person and is not debarred by any Act, Measure or common law rule from being a trustee.

41. It need not be the case however that such property is held on *charitable* trusts. All would depend on the construction of the trust instrument. One cannot say that the trust of realty automatically becomes charitable simply because the PCC is a charity.

42. Furthermore, whilst a PCC is undoubtedly a charitable trustee to the extent that it holds realty on charitable trusts, there is a palpable distinction between the fund of realty held on trust and the rest of the overall fund that belongs to the PCC. With regard to the latter, there need be no automatic trusteeship.

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11 Parochial Church Councils (Powers) Measure 1956 s. 6(2), (3).

12 This is the analysis of Prof. Norman Doe, *The Legal Framework of the Church of England* (Oxford, 1996), 419-20. See also Incumbents and Churchwardens (Trusts) Measure 1964 (No. 2), ss.1 & 3 referring to the DA as "custodian trustee" and giving that term the same meaning as in the Public Trustee Act 1906. This measure is not further discussed here since it has the same effect as the Parochial Church Councils (Powers) Measure 1956, but applies only to property held by incumbents and churchwardens. It is thus of no direct relevance to the PCC.

Personalty held on trust

43. The same is true of personalty held on trust. There is nothing to stop a PCC from becoming a trustee of personalty if it chooses to accept trusteeship of an express settlement. But it by no means follows that the rest of the PCC's funds are held on trust, much less on charitable trusts.

Property not held on trust

44. In truth, we are not chiefly concerned with the situation where the PCC explicitly consents to trusteeship since that can self-evidently arise; the question is whether a PCC can be a trustee without realizing it either by its very nature or by operation of law.

45. If Prof Doe is correct, the answer must in part be that any PCC that has complied with the Measure becomes a "managing trustee" of any realty that it has acquired other than a "short lease".[13] Quite simply, on this analysis, the PCC cannot acquire land without a trusteeship arising unless it neglects to transfer legal title to the DA. The trust property is the beneficial title, it would seem.

46. If one asks for what purposes trust property within category (c) is held, the answer cannot be that it is held on any explicit trusts because there are none. The Measure simply provides that the legal title to the land must be vested in the DA.

47. If the custodian trustee analysis is correct, then it is not clear on what trusts the PCC holds the beneficial title. One apparent answer might be to say that it holds it for the general purposes of the parish. It is an easy step form here to conclude that the purposes of the parish must be ecclesiastical and therefore charitable.

48. However, there have been decided cases where the purposes of a parish have been submitted to judicial scrutiny and found not to be charitable within the strict meaning of that word.

49. For example, in *Farley v Westminster Bank*, [14] the House of Lords considered testamentary gifts to "the Vicar and Churchwardens of St. Columba's Church, Hoxton (for parish work), and the Vicar and Churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington (for parish work)". Lord Atkin said this:

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13 Parochial Church Councils (Powers) Measure 1956 s. 6(2); defined at s. 6(6).

14 *Farley v Westminster Bank* [1939] AC 430

> *" … 'parish work' seems to me to be of such vague import as to go far beyond the ordinary meaning of charity, in this case in the sense of being a religious purpose. The expression covers the whole of the ordinary activities of the parish, some of which no doubt fall within the definition of religious purposes, and all of which no doubt are religious from the point of view of the person who is responsible for the spiritual care of the parish in the sense that they are conducive, perhaps, to the moral and spiritual good of his congregation. But that, I think, quite plainly is not enough; and the words are so wide that I am afraid that on no construction can they be brought within the limited meaning of 'charitable' as used in the law."*[15]

50. Again, in *Re Stratton*,[16] the Court of Appeal had to consider a testamentary gift to the vicar of the parish of Mortlake in Surrey "to be by him distributed at his discretion among such parochial institutions or purposes as he shall select". Lord Hanworth MR said,

> *"It is not without significance that the words of the gifts are 'among such parochial institutions or purposes as he shall select,' and the attention of the Court has been directed to the various parochial activities which are shown in the parish magazine, and which are doubtless very excellent in themselves. But the words of the codicils impose no restriction upon the activities to which the trust moneys might be applied nor is the vicar's discretion in any way limited. The only condition is that what is done shall have something to do with the parish; that might be something to do with the church or it might not. In law it is not every parochial purpose which is a charity. Many objects are commonly called charitable, but if they are merely benevolent, or humanitarian, then, however excellent they may be, they are not necessarily charitable in the legal sense."*[17]

51. It is true that, in *Re Bain*,[18] a gift made "unto the Vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the Church as he shall think fit" was held to be a good charitable gift. The difference between this case on the one hand and *Farley's Case* and *Re Stratton* on the other is perhaps that the phrase "objects connected with the Church" may be construed more narrowly to point to the promotion of

15 *Farley v Westminster Bank* [1939] AC 430 at 435.

16 *Re Stratton, Knapman v AG* [1931] 1 Ch 197.

17 *Re Stratton, Knapman v AG* [1931] 1 Ch 197 at 200-1.

18 *Re Bain, Public Trustee v Ross* [1930] 1 Ch 224.

religion than the words "parish work". The distinction is perhaps too nice for modern purposes and might not command universal assent.

52. But what must follow from the examination of these cases is that it is by no means self-evident that the PCC must be a charity with regard to property held by it as managing trustee. Plainly a PCC might suppose that everything that it does conduces to the promotion of religion in the broadest sense. But the courts have taken a different view of what a parish is and does; thus it cannot be assumed that funds held by a PCC on trust as managing trustee, are *ipso facto* charitable.

53. There is, however, an alternative analysis of the effect of the 1956 Measure on property within category (c), i.e. realty not acquired on trust. With regard to property in categories (a) and (b), it is obvious that the PCC must be a managing (sub-)trustee because the property was never owned absolutely by the PCC and, whilst it might have transferred the legal title to the DA, it retains the obligations of a trustee as regards the beneficiaries. It plainly cannot use property within categories (a) and (b) absolutely for its own purposes.

54. But there is no reason why these considerations ought to apply to property within categories (c) and (d). The property was never acquired on any kind of trust. The PCC ought, in effect, to have the ultimate beneficial interest. One might thus conclude that the PCC is quite simply a beneficiary with powers of management (in the case of category (c)) or a full beneficial owner (in the case of category (d)); there is nothing in the 1956 Measure to contradict such an analysis. If that is so, then the question of trusteeship simply does not arise.

55. It is certainly striking that the Measure has nothing whatever to say about a PCC that has £1m in the bank not held on trust and no realty. Is the PCC a charitable trustee of those funds?

56. It is hard to see that it is. The conclusion one draws about sections 6(2) and 6(3) of the Measure is that they are aimed at making the DA a custodian trustee of certain property and the PCC a managing trustee of the same property. If the Measure had meant to constitute the PCC as a trustee, or a charitable trustee, of other funds, then it could have done so explicitly.

57. The Measure is silent on what is likely to be the vast majority of the property of any registered PCC, namely money in the bank. There is nothing that explicitly or implicitly constitutes the PCC a trustee of those funds. Furthermore, the conclusions in *Farley's Case* and *Re Stratton* would tend to militate against the assumption that everything done by a PCC must automatically be charitable.

58. There is, of course, an apparent solution to this quandary and it is one of beguiling simplicity. There is no doubt that a PCC that is registered by the CCs is a charity, absent an action for rectification of the register. That being so, if the PCC is a charity in its corporate persona, then must it not follow that is it also a trustee?

59. This is undoubtedly the view that has been adopted by the CCs, otherwise they would not have supplied all members of registered PCCs with leaflets concerning trustees' duties. But to take that view is merely to beg the question. For is it not well established that there can be charities without charitable trustees? Maybe not.

A charitable corporation not a trustee?

60. In *Liverpool and District Hospital for Diseases of the Heart v Attorney-General*,[19] a company limited by guarantee had been incorporated under the Companies Act 1908. The purpose of the company was to provide and maintain a hospital for the treatment of heart diseases and to promote research in the same field.

61. It was common ground that the company was charitable in its objects. The question before the court concerned the distribution of the company's assets upon an application for winding up made by the Attorney General under s. 30(1) of the Charities Act 1960.

62. There was a provision in the memorandum of association that, upon dissolution, the assets should not be distributed among the members of the company but transferred to an institution or institutions having similar objects to the original company – in other words applied *cy-près*.

63. If the company was a charitable trust, then it did not hold its assets beneficially and they could be distributed *cy-près*. If however the company was not a trust, then – so the argument ran - it did hold its assets beneficially and they could be distributed to members in accordance with s. 265 of the Companies Act 1948.

64. It was held by the Court that the company was not a trust in the strict sense. Nevertheless, the Court held that it had the jurisdiction to intervene in the affairs of the company on the grounds (a) that the members of the company had effectively contracted out of any right to a distribution by the terms of the articles of association, and (b) that the court's power to make a *cy-près*

19 [1981] Ch 193 at 209.

scheme extended to any charity whether or not it was constituted as a trust in the strict sense.

65. It is the finding that the company was a charity but not a trust that is of relevance here.

66. In coming to this conclusion, the Court reviewed a number of earlier cases that seemed to suggest an opposite conclusion. However, when examined in detail, they were all found not to be quite on all fours with the instant case.

67. In *Re Manchester Royal Infirmary*,[20] for example, a corporation incorporated by a special Act of Parliament held its funds for charitable purposes. It was held that the corporation was a trustee within the meaning of the Trust Investment Act 1889. However, in *Liverpool and District Hospital*,[21] Slade J held that this was of no direct assistance in deciding whether a charitable corporation was generally going to be a trust because in the former case the status of trustee appeared to have been conferred by the special Act of Parliament. This being so, the case could not be relied upon as being of wider application.

68. In *Re Dominion Students' Hall Trust*,[22] Evershed J considered a charitable company limited by guarantee which maintained a hostel for students. The judge concluded that he had jurisdiction to "administer the trusts of the charity cy-près."[23] Both here, and later in his judgment, the judge referred to the corporation as "the trust."[24] However, Slade J found that Evershed J had not explicitly addressed the question of whether the charity held its assets on trust.[25] Any comment to that effect made in passing by Evershed J must therefore have been *obiter* and not directly determinative.

69. In *Re French Protestant Hospital*, a charitable corporation had been established by Royal Charter.[26] Dankwerts J held that the directors were not technically trustees. Indeed, the charter created no express trusts to be held by the corporation. In spite of this, Dankwerts J did find that the directors

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20 (1889) 43 Ch.D. 420.

21 [1981] Ch 193 at 209 at 206 A-B.

22 [1947] Ch 183.

23 [1947] Ch 183 at 185.

24 [1947] Ch 183 at 187.

25 [1981] Ch 193 at 209 at 206E.

26 [1951] Ch 567.

were in the same fiduciary position as trustees in respect of the affairs of the corporation and so were debarred from making a bye-law enabling the directors to receive remuneration for their services. However, this case dealt with the very specific question of directors' remuneration. Slade J held that this case was "by no means conclusive" of the issue that he had to determine.[27] Indeed, it would be surprising if it followed from the findings of Dankwerts J that a PCC itself must be a trustee, which is the issue at hand.

70. In *Soldiers', Sailors' and Airmen's Families Association v Attorney-General*, the court had to decide the nature and extent of the investment powers of the charity. Cross J said:

> "*One starts with this, that this chartered corporation is a charitable corporation and accordingly it is in the position of a trustee with regard to its funds. That was submitted by counsel for the Attorney-General and conceded by counsel for the association*."[28]

71. Whilst the proposition that a charity must have trustees seemed obvious to the Attorney-General, it was by no means clear to Slade J. As the judgment proceeded on the basis of a concession to that effect by counsel, the case was found by Slade J to be "of limited assistance".[29]

72. In *Construction Industry Training Board v Attorney-General*, Buckley LJ expressed the opinion that the jurisdiction of the High Court to intervene in the affairs of a charitable corporation was:

> *" ... a branch of the court's jurisdiction in relation to trusts ... In every such case, the court would be acting upon the basis that the property affected is not in the beneficial ownership of the persons or body in whom its legal ownership is vested but is devoted to charitable purposes, that is to say, is held upon charitable trusts."*[30]

73. That looks like an elegant and conclusive analysis. However, the same judge returned to the subject in *Von Ernst & Cie SA v Inland Revenue Commissioners*.[31] The case concerned capital transfer tax and turned on the

27 [1981] Ch 193 at 209 at 207A.

28 [1968] 1 WLR 313 at 317.

29 [1981] 1 Ch 193 at 207.

30 [1973] Ch 173 at 186-7.

31 [1980] 1 WLR 468.

meaning of the words "benefit" and "beneficially entitled" in paragraph 3(2) of Schedule 7 to the Finance Act 1975.

74. In his judgment, Buckley LJ reviewed *Re French Protestant Hospital*, *Soldiers', Sailors' and Airmen's Families Association*, *Construction Industry Training Board* (all cited above) and *Re Finger's Will Trusts*.[32] The last case concerned whether a bequest made to a charitable association that had ceased to exist in the testatrix's lifetime was capable of being applied *cy-près*.

75. In *Von Ernst*, Buckley LJ made it clear that he did not derive much assistance from authority and that the words of the statute fell to be construed within its four corners. He made it plain that he did not come to his decision on the broader basis that a corporate charity was, *ex hypothesi*, a trustee of its funds.

76. The Court of Appeal in *Von Ernst* did not speak with one voice on this matter. Buckley LJ said that:

> " *... a company incorporated for exclusively charitable purposes is in the position of a trustee of its funds or at least in an analogous position.*"[33]

77. Bridge LJ was, however, of the opposite opinion:

> " *... a company formed under the Companies Acts, though its objects may be exclusively charitable, is nevertheless not a trustee of its assets.*"[34]

78. Templeman LJ did not address this point in his judgment. There was thus no single binding ratio on this.

79. In the *Liverpool Hospital* case, Slade J considered all these precedents and drew the following conclusion:

> *"In my judgment, however, none of the authorities on which Mr Mummery has relied ... establish that a company formed under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets, so that on a winding up these assets do not fall to be dealt with in accordance with the provisions of section*

32 [1972] Ch 286.

33 [1980] 1 WLR 468 at 479.

34 [1980] 1 WLR 468 at 475.

> *257 et seq. of that Act. They do in my opinion, clearly establish that such a company is in a position* analogous to that of a trustee *in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs; but that is a quite different matter. The conclusion that a company incorporated for charitable purposes is not a trustee in the strict sense of its corporate assets, in my judgment, derives strong support from the following considerations."*[35]

80. Slade J went on to approve of the judgment of Lord Parker in *Bowman v Secular Society*:

> *"The only possible argument in favour of the testator's intention to create a trust rests upon this: The society is a body corporate ... Its funds can only be applied for purposes contemplated by the memorandum and articles as originally framed or altered under its statutory powers. A gift to it must, it may be said, be considered as a gift for those purposes, and therefore the society is a trustee for the purposes of the subject matter of the gift. This argument is, in my opinion, quite fallacious. The fact that a donor has certain objects in view in making a gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. If I give property to a limited company to be applied at its discretion for any of the purposes authorized by its memorandum and articles, the company takes the gift as absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion for any lawful purpose ... If a gift to a corporation expressed to be made for its corporate purposes is nevertheless an absolute gift to the corporation, it would be quite illogical to hold that any implication as to the donor's objects in making a gift to the corporation could create a trust. The argument, in fact, involves the proposition that no limited company can take a gift otherwise than as a trustee*."[36]

81. Slade J noted that this case did not concern a charitable corporation but that, in any event, Lord Parker's observations were wide enough to encompass charitable corporations. He said that it was clear from the judgment cited above that charitable companies were present to Lord Parker's mind. If he had thought that different principles applied to charitable companies, he would have said so.

82. There are, furthermore, provisions within the Charities Acts that suggest that there is a difference between a charity and a trust.

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35 [1981] 1 Ch 193 at 209F-G.

36 [1917] AC 406 at 440-41.

83. Section 28(8) of the Charities Act 1960 defines "charity proceedings" as

> *"proceedings in any court in England or Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes."*

84. Section 46 of the same Act defines "trusts" in the context of the Act as:

> *"the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect* ***by way of trust or not****."*(emphasis added)

85. Rather significantly for current purposes, section 45(2) of the same Act excludes from the definition of "charity":

> *"any ecclesiastical corporation (that is to say, any corporation in the Church of England, whether sole or aggregate, which is established for spiritual purposes) in respect of the corporate property of the corporation, except to a corporation aggregate having some purposes which are not ecclesiastical in respect of its corporate property held for those purposes."*

86. Considering this last provision, Slade J observed that, but for it, the effect of the Act would be to provide for a charity to exist "*even with respect to the corporate property of an ecclesiastical corporation*."[37]

87. Of course, these provisions have not survived the later attentions of the legislature. Those provisions of the Charities Act 1960 that were not repealed by the Charities Act 1993 were finally repealed by the Charities Act 2003.

88. Thus, section 1(1) of the Charities Act 2006 provides that:

> *"For the purposes of the law of England and Wales, "charity" means an institution which—*
>
> *(a) is established for charitable purposes only, and*
>
> *(b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities."*

37 [1981] Ch 193 at 211 D-E.

89. It is submitted that this definition does not displace the understanding apparent in section 28(8) of the Charities Act 1960 that a thing may be a charity without being a trust. It would appear that the word "institution" is deliberately used so as to avoid specificity as to the vehicle of the charity.

90. Significantly, section 46 of the Charities Act 1960 dealing with trusts is re-enacted in section 97(1) of the Charities Act 1993:

> *"'trusts' in relation to a charity, means the provisions establishing it as a charity and regulating its purposes and administration,* ***whether those provisions take effect by way of trust or not****, and in relation to other institutions has a corresponding meaning."*(emphasis added)

91. The effect of this provision, taken together with CA 1993 s. 96(1), is surely to perpetuate the understanding that a trust may be a charity but that a charity need not be trust.

92. Section 45(2) of the Charities Act 1960, dealing with ecclesiastical property, is likewise re-enacted in section 96(2) of the Charities Act 1993.

93. Returning to a point that has already been made concerning linguistic confusion, it is also worth noting that, by section 97(1) of the Charities Act (cf. s.78(2)(c) of the Charities Act 2006, "charity trustees" are defined as:

> *"the persons having the general control and management of the administration of a charity"*

94. It does not, of course, follow from this that the people who control and manage a charity are trustees in the sense that the term is used in equity and the Trustee Act 2000. It is simply that the legislature has elected to use the term "charity trustees" to designate people who run charities. This is a quite different thing. A charity trustee is not necessarily a charitable trustee.

95. It is critical to grasp this point. The use of the word "charity trustee" has become pervasive in charitable circles. But, if the Charities Acts had intended to constitute all people who run charities as trustees, then it could have done so by an explicit enactment. It is not to be supposed that so important a thing would have been effected in the interpretation sections of a statute.

96. Furthermore, since precisely the same definition of "charity trustees" was to be found at s. 46(1) of the Charities Act 1960, one would have to argue that *Liverpool and District Hospital* was decided *per incuriam* and that Slade J had failed to consider the possibility that this definition in fact operated to

constitute as trustees all persons who controlled and managed charities. Whilst it is true that these words were not considered in the case, this does not seem a promising line of argument.

Conclusions on incorporated charities

97. What may be concluded from this review of the common law and statute relating to incorporated associations?

98. First, the courts have jurisdiction to intervene in the workings of charitable corporations, for example to restrain improper behaviour on the part of the directors.

99. Secondly, the courts have jurisdiction to impose schemes of *cy-près* on charitable corporations.

100. Thirdly, it does not follow from the fact that the courts have this jurisdiction that charitable corporations must be trusts.

101. Finally, there is no reason to see why a PCC, which is also an incorporated association, should be differentiated from the incorporated bodies discussed in the cases above. It is true that a PCC has neither articles nor memorandum but this tends rather to support the case being made here. It means that there is even less by way of indication of explicit trusteeship. Indeed, were it not for section 4(1) of the Charities Act 1993, one might have been forgiven for thinking that a PCC was not a charity in the first place.

Individual PCC members

102. If the PCC is not itself a trustee, that conclusion ought by itself to dispose of the proposition that PCC members are trustees. If there is no trust property, and nothing of which the PCC in its corporate persona may be a trustee, then plainly there is nothing of which the members may be trustees either. It is hard to see how individual members of a PCC could, in their personal capacity, become trustees if the PCC itself is not one and there is no trust fund.

103. We may leave aside for present purposes the situation that might arise of individual PCC members accepting specific property on expressly declared trusts, charitable or otherwise. Plainly they would be trustees of such property. It must be said, however, that such a contingency seems unlikely.

How would one know that these individuals took as PCC members rather than merely as individuals?

104. The Legal Advisory Commission ("LAC") of the Church of England has considered in some little detail the position of PCC members and has opined that:

> "*the position of a member of a PCC is analogous to that of a trustee of trust property who holds the trust assets for the benefit of the beneficiaries or for the advancement of charitable purposes*."[38]

105. The first thing to note is that the LAC's opinion cites only one case: *Harries v Church Commissioners*.[39]

106. Furthermore, that case was not about PCCs or their members. It concerned the Church Commissioners. They are, by virtue of the Church Commissioners Measure 1947, a corporate body. Thus, although they are referred to in the plural, they are in law a single legal person.

107. In a passage that is of some importance, the Court stated that,

> "*…the assets in question are held by the commissioners as a corporate body's property and applicable in accordance with its constitution. The assets are not, strictly, vested in trustees and held by them upon defined trusts …*"

108. We seem here to be dealing with very much the same kind of situation as that which was considered in the cases relating to charitable corporations discussed above. Indeed, Sir Donald Nicholls V-C, giving the judgment of the court, explicitly cited the *Liverpool and District Hospital* case as authority.[40] The case is not cited in the opinion of the LAC.

109. *Harries' Case* is therefore not authority for the proposition as stated by the LAC. The Church Commissioners have a special constitution as set out in the Church Commissioners Measure 1947 as amended; the decision of the court nowhere states that the Commission's members are individually trustees. It is therefore hard to see how it can be of relevance to PCCs in any way at all.

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38 *Legal Opinions Concerning The Church of England* 8, (Church House Publishing: London, 2007), 139.

39 [1992] 1 WLR 1241.

40 [1992] 1 WLR 1241 at 1245 G-H.

110. The LAC opinion goes on to say that,

> *"The duties of a trustee apply to all persons who occupy a fiduciary position analogous to that of a trustee. The duties have been held to apply, for example, to directors of a company in relation to the company's assets."*

111. If and to the extent that this formulation seeks to equate the duties of a fiduciary with those of a trustee, it is submitted that it is simply wrong: a trustee is a fiduciary but a fiduciary need not be a trustee.

112. To the extent that it approximates the role of PCC members to that of a trustee, then the question is: what is really meant by "analogous"? This is not an immediately recognizable legal capacity. One either is or is not a trustee or a fiduciary.

113. Of course, we may recall the use of the word "analogous" from the judgment of Buckley LJ in *Von Ernst & Cie SA v Inland Revenue Commissioners*.[41]

114. However, this was used of the corporation, not its directors or members. It appears that there is no direct authority to say that the members of a charitable corporation that is in a position analogous to a trustee are themselves personally in a position analogous to that of a trustee.

115. As a matter of common sense, of course, it will be seen straightaway that it is meaningless to speak of a corporation as a trustee, or an analogue to a trustee, since that corporation must act in the material world through its flesh-and-blood members.

116. So let us consider further what appears to have been meant by Buckley LJ when he used the word "analogous". Slade J took it to mean that the position was "such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs."[42]

117. This, of course, is a narrow definition. As we saw in the corporation cases, a court of equity will intervene to ensure that charitable corporations deal with their assets charitably and also to apply a *cy-près* scheme if necessary.

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41 [1980] 1 WLR 468 at 479.

42 *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] 1 Ch 193 at 209G.

118. But that is a very minimal definition of the trustee analogy. It simply means that there is a basis for a court of conscience to intervene to prevent the assets being distributed otherwise than charitably.

119. What is important to recognize here is that this cannot be taken, without more, as an indication that a natural person in a position analogous to a trustee has the high duties of a proper trustee – for example the investment duties set out in statute and the Trustee Act 2000.

120. There is no warrant for such a conclusion. Were it otherwise, the judges need not have used the word "analogous". They could simply have stated that directors of charitable corporations were in the *same* position as a trustee, or that they *were trustees*.

121. For the sake of completeness, it ought to be noted that the question of the liability of individual PCC members was discussed by the consistory court in *Re St. Thomas à Becket, Framfield*.[43] That case, however, dealt with the liability of PCC members carrying out works without lawful faculty authority. It arose purely under the faculty jurisdiction and has no direct application to the broader question of trusteeship.

122. Thus we may conclude as follows with regard to PCCs:

(i) PCCs are not obviously charities, but we must treat them as such because of the effect of legislation;

(ii) PCCs may be charities, but it does not follow that they are thereby constituted as trusts;

(iii) PCCs as incorporated legal persons are not automatically trustees;

(iv) Individual members of PCCs are not automatically trustees either;

(iv) PCC members may be in a position analogous to that of a trustee;

(v) Analogy is not identity and the equation with trusteeship stops at grounding the jurisdiction of the court;

(vi) PCC members may be fiduciaries, but they do not have the wider common law or statutory duties of trustees.

General conclusion

123. We have seen that neither the PCC nor its members need be viewed as charitable trustees merely because the PCC is registered as a charity. This conclusion would seem to be inescapable.

43 [1989] 1 WLR 689.

124. It follows from this that PCCs do not need to worry about arranging courses of trustee training, much as that might be to the chagrin of organizations who provide such training.

125. It also follows that PCC members, whilst they have a fiduciary duty not to misappropriate charitable property, do not have the more onerous duties of trustees so far as investment and spending decisions are concerned.

126. The impact of this finding is not, of course, limited to PCCs or their members. Any institution that is registered as a charity needs to think beyond the simplistic equation of charity with trust. Whether the institution or those who control it have the full duties of charitable trustees will depend entirely upon whether that institution was originally constituted as a trust. Registration as a charity has no necessary bearing upon the answer to that question.