CHARITIES AND PUBLIC BENEFIT – FROM CONFUSION TO LIGHT?

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The Charities Act 2006 provides that an institution is only a charity if it has a charitable purpose *and* is for the public benefit.[2] The Act does not define 'public benefit' but specifically retains the existing law.[3] The Act does make a change, however, in that it removes the presumption that charities for the relief of poverty, the advancement of education or the advancement of religion are for the public benefit.[4] Guidance as to the operation of the public benefit requirement is required to be produced by the Charity Commission.[5] The present law on public benefit is far from clear, even before problems raised by the removal of the presumption are considered, and it is generally agreed that the Commission have not been set an easy task.[6] It is the purpose of this article to explore the reasons for the present state of confusion in the law; to show the need for future consistency; to consider the call for clarity of approach; and then to try to draw out some general rules which form the existing law on public benefit. Those general rules are then tested for consistency by being applied to four hypothetical organisations. Finally, the article suggests some overarching principles to govern the future application and development of the law of public benefit.

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2 Charities Act 2006, s.2(1).The charitable purposes are listed in s.2(2).

3 *Ibid*. s.3(3).

4 *Ibid*. s.3(2).

5 *Ibid*. s.4(1).

6 See Charity Commission, *Charities and Public Benefit* (2008). It is not the purpose of this article to subject that Guidance to critical analysis.

Confusion reigns

Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd*[7], when considering whether a trust to provide for the education of the children of employees of a particular employer was charitable, said:[8]

> '*No one who has been versed for many years in this difficult and very artificial branch of the law can be unaware of its illogicalities*.'

This view has been echoed by commentators. Thus G.H.L. Fridman writing in 1953 said:[9]

> '*The concept of public benefit is intangible and nebulous; its effects can only be represented as variable and unpredictable. Imprecision has resulted in illogical and capricious decisions, sometimes impossible to reconcile*.'

Over 50 years later, regrettably, confusion still reigns as the well publicised disagreement, during the discussion on the draft Charities Bill, over the effect of the removal of the presumption of public benefit illustrates. The Charity Commissioners submitted evidence that the removal of the presumption of public benefit would not affect the charitable status of those institutions, in particular independent schools, which relied on the presumption. In their view, the exceptions to the general public benefit principle were embedded in the law and would not be changed.[10] The Charity Law Association, on the contrary, took the view that the removal of the presumption of public benefit would require all charities to pass the public benefit test[11] as did the Minister.[12] The Charity Commissioners and the Home Office were then placed in the position of having to publish a joint statement to solve the impasse.[13]

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7 [1951] AC 297

8 *Ibid.*, 307 and see *Gilmour v Coats* [1049] AC 426, 449 *per* Lord Simonds.

9 G H L Fridman, 'Charities and Public Benefit', (1953) 31 Can B Rev 537, 539; see also S G Maurice, 'The Public Element in Charitable Trusts' (1951) 15 Conv 338, 341

10 Report of the Joint Committee on the Draft Charities Bill, Vol II (2004) HL Paper 167-11 HC Paper 660-11, Ev 191 para 19. See also the evidence of Professor Peter Luxton and Hubert Picarda QC, Report Vol 111 (2004) HL Paper 167-111 HC Paper 660-111 Ev 591 and 625.

11 Ibid., Ev 60.

12 Fiona Mactaggart MP, Parliamentary Under-Secretary of State for Race Equality, Community Policy and Civil Renewal, Report of the Joint Committee on the Draft Charities Bill, Vol 11 (2004) HL Paper 167-11 HC Paper 660-11 Ev 312 (Q 1071)

13 See Report of the Joint Committee on the Draft Charities Bill, Vol 1 (2004) HL Paper 167-1 HC Paper 660-1 p24.

There are a number of reasons for the confusion in the law as it relates to public benefit. Whilst it is now generally accepted[14] that the requirement of public benefit comprises three[15] elements, namely: benefit as opposed to harm; benefit for the community or a section thereof; and no undue private benefit, these three elements are often not distinguished by the courts. There is a particular problem in relation to charities under the old fourth head, 'other purposes beneficial to the community', where consideration of the question as to whether there is benefit or harm tends to get subsumed into the question as to whether there is a charitable purpose.[16]

The requirement that an institution, in order to be charitable, must be of public character dates from at least 1767.[17] Thus many of the cases on public benefit were heard against a social and economic background very different from that of today. The courts have recognised that what was considered to be a benefit in one age may now be considered to be a harm.[18] On the other hand, the courts have also stated that it would be unwise to overrule or even cast doubt on old cases simply to bring consistency to the law of charity.[19] The result is, inevitably, a collection of case law which is difficult to reconcile. The courts have accepted that the long history of charity law has led to different standards of public benefit for different categories of charity.[20]

Another consequence of the age of many of the cases is that they tend to be decisions restricted very much to facts of the particular case. More recent decisions, of which *McGovern v Attorney General*[21] is a good example, have analysed the law on public benefit and endeavoured to set out the principles in a more general way to be applied in particular areas.[22] There are number of leading House of Lords cases which deal with specific aspects of public benefit but here the problem tends to be

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14 See H Picarda, *The Law and Practice Relating to Charities* 3rd ed (1999) p 19 *et seq*; J Warburton, *Tudor on Charities* 9th ed (2003) p 7 *et seq*.

15 A fourth element of 'People on low incomes must be able to benefit' was proposed by the Charity Commission in their *Draft Public Benefit Guidance* (2007) but was not generally accepted – see A-M Piper and J Coleman, 'Who benefits' [2007] NLJ Spring/Summer Charities Appeals Supplement p 5. *Charities and Public Benefit* (2008) includes a sub-principle that 'people in poverty must not be excluded from the opportunity to benefit'.

16 See, for example, Re Price [1943] Ch 422; Re Wedgwood [1915] 1 Ch 113.

17 See *Jones v Williams* (1767) Amb 651, 652.

18 National Anti-Vivisection Society v IRC [1948] AC 31, 69, 74 per Lord Simonds.

19 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 309 *per* Lord Simonds.

20 *Gilmour v Coats* [1949] AC 426, 449 *per* Lord Simonds.

21 [1981] 3 All ER 493, 504 *per* Slade J.

22 But cf. *IRC v Oldham Training and Enterprise Council* [1996] STC 1218.

not only that there are dissenting speeches[23] but that there can also be difficulty in reconciling differences in approach of those Law Lords in the majority.[24]

It was a well established principle that where a purpose appeared to be for the relief of poverty, or the advancement of education or the advancement of religion, the courts would assume it to be charitable unless the contrary was shown.[25] As a result, many cases in the area of poverty, education and religion simply failed to discuss at all the question of public benefit – even if, with hindsight, it might have been relevant. For example, in 1827 it was held that a school for the education of sons of gentlemen was charitable on the simple ground that all schools of learning were charitable[26] and in 1973 a trust to publish and distribute the works of a Mr H G Hobbs, which were of a religious character, was held to be charitable although there was evidence that the intrinsic value of the works was nil.[27] The confirmation in *Dingle v Turner*[28] that a trust for the relief of poverty may be charitable even if the potential beneficiaries are a private class, whether linked by family or employment, continued the lack of judicial consideration of public benefit in that area.

There is a particular problem with the first element of public benefit. To answer the question of whether a purpose provides benefit or harm invokes a value judgement. There are two problems arising from this; changing values and judicial attitudes. The courts have made it clear that the social values to be applied in testing whether a purpose is charitable change over time.[29] It has been argued that the courts have taken a utilitarian approach when making that value judgment.[30] Certainly, the courts have frequently stated that an objective, and not a subjective, approach should be taken to the question of benefit and harm[31] and require evidence of alleged

23 See *National Anti-Vivisection Society v IRC* [1948] AC 31; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

24 See S G Maurice 'The Public Element in Charitable Trusts' (1951) 15 Conv 328; P S Atiyah, 'Public Benefit in Charities' (1958) 21 MLR 138; T G Watkin, 'Charity: The Purport of "Purpose"', [1978] Conv 277; D J Hayton, 'Dingle v Turner' [1972] Conv. 209

25 *National Anti-Vivisection Society v IRC* [1948] 31, 65 *per* Lord Simonds.

26 *Attorney-General v The Earl of Lonsdale* (1827) 1 Sim 105 applied, similarly with no consideration of public benefit, in *Brighton College v Marriott* [1926] AC 192, 204 *per* Lord Blanesburgh.

27 *Re Watson* [1973] 1 WLR 1472 and see the discussion in P M Smith, 'Religious Charities and the Charities Act 2006' (2007) 9 CLPR 57.

28 [1972] AC 601.

29 *National Anti-Vivisection Society v IRC* [1948] AC 31, 74 *per* Lord Simonds; *IRC v McMullen* [1981] AC 1, 15 *per* Lord Hailsham of St Marylebone.

30 H Cohen, 'Charities – A Utilitarian Perspective' (1983) 36 CLP 241.

31 See the text below at fn 44

benefit or harm.

However, it is not hard to find cases where individual judicial views intrude into the assessment of the evidence. Thus Lord Wright[32] stated, considering the benefits of anti-vivisection:

> '*Harvey was only able to publish in 1628 his great work De motu cordis because he had been given deer from the Royal Park for purposes of vivisection. Countless millions have benefited from that discovery. I do not minimise the sufferings of the unfortunate deer*.'

And Harman LJ[33] when considering the evidence in relation to the public benefit of an art collection said, after agreeing that the private opinion of the judge was irrelevant:

> '*I can conceive of no useful object to be served by foisting upon the public this mass of junk*.'

In the light of all these factors, it is hardly surprising that the law as to public benefit is the subject of confusion and, in particular, lacks consistent application between the various heads of charity.

The need for consistency

It has already been noted[34] that section 3 of the 2006 Act retains the existing law as to public benefit but also goes on specifically to provide that it must not be presumed that any particular purpose is for the public benefit. This raises the obvious question as to how the existing law should be interpreted and applied in the future. The Explanatory Notes to the 2006 Act give no indication as to how that question should be answered; they merely paraphrase the section. It is necessary to look at the debates on the Bill to find the thinking behind the section. The Government's view of the effect of section 3 was set out by the Minister for the Cabinet Office, Hilary Armstrong MP, on the second reading of the Bill:[35]

> '*The Bill abolishes that presumption. That will create a level playing field on which all charities will have to show that they are for the public benefit. To do so, an organisation will have to show that it generates identifiable*

32 *National Anti-Vivisection Society v IRC* [1948] AC 31, 48.

33 *Re Pinion* [1965] Ch 85, 107

34 See the text at fns 2 and 3 above.

35 *Hansard* HC Vol 448 col 24 (26 June 2006); see also *Hansard* HC Standing Committee A col 46 (4 July 2006), Edward Miliband MP Parliamentary Secretary, Cabinet Office.

> *benefits that reach or are available to a sufficiently large section of the public. Given the great diversity of charitable endeavour, the nature of those benefits and how they reach the public will vary greatly.'*

This suggests that the intention of the section is that there should be a positive obligation on all charities to show public benefit in terms of both benefit not harm and that potential beneficiaries comprise a sufficient section on the community.

The argument that the same obligation to show public benefit lies on all charities is strengthened when it is appreciated that a number of purposes which were in one of the old first three heads of charity, and thus had the benefit of the presumption, now appear in one of the new heads. Thus a number of purposes which came under the head of the relief of poverty, for example provision of flats at low rent for the elderly[36], now come within head (j), the relief of need.[37] Similarly, many charities which now come within head (f), the advancement of the arts, culture, heritage and science, were established with purposes for the advancement of education.[38]

It is arguable that the courts would, in any event, have been obliged to stop applying any presumption of public benefit in order to make the law compliant with ECHR principles. It is provided by Art. 1 to Protocol 1 of the ECHR that every legal person is entitled to the peaceful enjoyment of his possessions. To deny charitable status is to deny access to fiscal benefits. Thus any decision on as to charitable statute gives rise to a potential breach of Art 1 Protocol 1. The Article, however, is qualified by the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. Accordingly, in order to avoid any breach of Art 1 Protocol 1, any rule which seeks to differentiate between organisations as to charitable status must be prescribed by law, have a legitimate aim, be necessary in a democratic society and not be discriminatory.[39] The law as to the requirement of public benefit can only comply with these requirements if it is applied, without discrimination, to all types of charitable purposes, that is to say, without any presumption of public benefit being made in respect of some charitable purposes and not others..

The call for clarity

It is now clear that the same public benefit test applies equally to all charities. That test is, however, based on the existing law. Common sense indicates that the present

36 *Re Cottam* [1955] 1 WLR 1299.

37 By s 2(3)(e) Charities Act 2006 relief of need includes provision of accommodation.

38 See, for example, *British Museum v White* (1826) 2 Sim & St 594; *Royal Choral Society v IRC* [1943] 2 All ER 101.

39 See *Belgium Linguistic case* (1968) (No 2) 1 EHRR 252 paras 9-10.

confused state of the law in relation to public benefit cannot be allowed to continue. There are over 180,000 registered charities and over 5,000 organisations seek to join them on the register each year.[40] They are entitled to a clear and consistent set of rules to determine whether they retain, or can attain, charitable status. During the discussion of public benefit on the debate on the Bill Gary Streeter MP said:[41]

> '*The common cry from the House has been for clarity*'.

Total clarity is obviously not possible. As the Minister pointed out,[42] the charity sector is very diverse. New charitable purposes are constantly arising. Throughout the passage of the Bill requests were made for more detailed provisions as to public benefit. These were resisted on the grounds of difficulty of interpretation and of the need to apply the criterion to a wide range of purposes.[43] What is required are not detailed rules for every eventuality but a set of general principles or rules which can be applied to determine if the public benefit requirement has been complied with by particular organisations with charitable purposes. Despite the inconsistent approach across different purposes and some illogical development of the law on public benefit, it is possible to draw out from the existing law some general rules both as to overall approach and as to each of the three elements of benefit not harm, benefit to the community or a section thereof and no undue private benefit.

General rules

At the highest level of the overall approach to be taken to the requirement of public benefit, the courts have been consistent since 1923 when Russell J. said in *Re Hummeltenberg:*[44]

> '*In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it.*'

The courts have stressed that the test is an objective, not a subjective, one.[45] The

40 Charity Commission, Annual Report 2005-2006 pp 4-5.

41 Hansard HC Vol 448 col 92 (26 June 2006)

42 See the text at fn 34 above.

43 Hansard HC Vol 448 col 26, Hilary Armstrong MP, Minister for the Cabinet Office (26 June 2006)

44 [1923] 1 Ch 237, 242. Approved in *National Anti-Vivisection Society v IRC* [1948] AC 31, 44 *per* Lord Wright, 66 *per* Lord Simonds; *Gilmour v Coats* [1949] 426, 456 *per* Lord Reid.

45 *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, 396.

courts have also pointed out that what is required is evidence that there *may* be public benefit from the particular purpose, not that there *must* be.[46]

In determining whether there is benefit as opposed to harm the courts have taken a wide view as to what can amount to a 'benefit' and recognised both tangible and intangible benefit. For example, the mental or moral improvement of mankind has been accepted as an intangible benefit[47] as has, in relation to animal charities, the discouragement of cruelty.[48] Similarly, the courts have considered both tangible and intangible harm. For example, in the context of the Recreational Charities Act 1958, it was said that the proviso of requiring public benefit excludes facilities of 'an undesirable nature'.[49] The courts have consistently recognised indirect as well as direct benefit and, in some instances, such as that as a home of rest for nurses for a particular hospital, have accepted indirect benefit alone as sufficient to satisfy the requirement of public benefit.[50] Nor have the courts restricted the requirement of benefit to this country. In the case of a valid charitable trust for purposes abroad, there is no requirement for a benefit here.[51]

There is an important limit, however, to the courts' wide view as to what can amount to benefit. Any benefit must be proved.[52] If the alleged benefit is incapable of being shown, the requirement of public benefit is not satisfied.[53] The courts have indicated that there are limits, in particular, as to what will be acceptable as an intangible benefit.[54] It has been said that 'approval by the common understanding of enlightened opinion for the time being' is necessary before an intangible benefit can be taken to constitute a sufficient benefit and that a proposed benefit must not be too vague and remote.[55] Thus the benefit of intercessory prayer has been held not to amount to a public benefit in law.[56]

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46 *Re Price* [1943] 1 Ch 422, 432 *per* Cohen J.

47 *Re Price* [1943] 1 Ch 422

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

49 *Guild v IRC* [1992] 2 All ER 10, 17 *per* Lord Keith.

50 *Re White's Will Trust* [1951] 1 All ER 528. See also *Re Resch's Will Trusts* [1969] 1 AC 514.

51 *Re Carapiet's Trusts* [2002] EWHC 1304

52 *Gilmour v Coats* [1949] AC 426, 446 *per* Lord Simonds

53 *McGovern v Att.-Gen.* [1981] 3 All ER 493, 504 *per* Slade J.

54 *Gilmour v Coats* [1949] AC 426, 461 *per* Lord Reid.

55 *National Anti-Vivisection Society v IRC* [1948] AC 31, 49 *per* Lord Wright and see also *In re Shaw* [1957] 1 WLR 729, 740 *per* Harman J ('generally accepted').

56 *Gilmour v Coats* [1949] AC 426.

It is not sufficient simply for some element of benefit to be shown. The courts have stated that the determination of whether the public benefit requirement is satisfied by any particular purpose requires all the alleged elements of benefit and harm, whether tangible or intangible, direct or indirect, to be weighed and balanced.[57] It has been stated that in carrying out such a balancing exercise greater weight is given to tangible benefits.[58]

The basic rule of the second part of the public benefit requirement was stated by Lord Wrenbury in *Verge v Somerville:*[59]

> *'To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the grounds of perpetuity, a first enquiry must be whether it is public – whether it is for the benefit of the community or of an appreciably important class of the community. 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*.'

Unless the benefits of the charitable purpose are available to the whole community, the court thus requires a distinction to be made between a section of the community and a fluctuating body of private individuals.[60] The courts recognise that this is not an easy distinction to make[61] but have laid down a number of rules to assist in identifying when there is a valid section of the community.

First, the criterion which distinguishes the class of potential beneficiaries must not be an arbitrary one unconnected with the purpose of the trust.[62] An important distinction was made by Viscount Simonds in *IRC v Baddeley*:[63]

> *'[The distinction] between a form of relief extended to the whole of the community yet by its very nature advantageous only to a few and a form of*

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57 *National Anti-Vivisection Society v IRC* [1948] AC 31, 47 *per* Lord Wright.

58 *Ibid*, 49 *per* Lord Wright.

59 [1924] AC 496, 499; applied in *Williams Trustees v IRC* [1947] AC 447, 457 *per* Lord Simonds; *IRC v Baddeley* [1955] AC 572, 591 *per* Viscount Simonds, 608 *per* Lord Reid; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 314 *per* Lord MacDermott

60 *IRC v Baddeley* [1955] AC 572, 593 *per* Viscount Simonds; *Dingle v Turner* [1972] AC 601, 623 *per* Lord Cross.

61 Ibid.

62 *IRC v Baddeley* [1955] AC 572, 593 *per* Viscount Simonds. See also *Davies v Perpetual Trustee Co* [1959] AC 439, 456 *per* Lord Morton of Henryton.

63 [1955] AC 572, 592.

> *relief accorded to a selected few out of a larger number equally willing and able to take advantage of it.'*

The courts have not held that a requirement for a beneficiary to make a payment before receiving a benefit is automatically to be regarded as an arbitrary criterion defining the class and thus excluding public benefit. It is well accepted that benefits may be provided by way of bargain as well as bounty[64] and charities are increasingly charging for their services. The courts have, however, stated that an organisation is not a charity if it excludes the poor.[65] In a case[66] concerning a hospital which made charges to patients, the court was concerned to ensure that the poor, taking account of medical benefit schemes and the level of charges, were not excluded. If follows that if charges are set at a level which, in all the circumstances, effectively excludes the poor and creates a section of the community defined by reference to ability to pay, there will be an arbitrary criterion unconnected to the purpose of the charity and no public benefit.

Secondly, the number of potential beneficiaries must not be numerically negligible.[67] Care must be taken with this rule in the light of the distinction made by Viscount Simonds in *IRC v Baddeley*.[68] The nature of the purpose in question, for example the relief of persons with a rare disease or affected by a disaster of limited impact[69], may legitimately cause the group of potential beneficiaries to be small. The rule does not apply, in any event, to trusts for the relief of poverty.[70]

Thirdly, it has been held in a number of cases that the quality which distinguishes the members of the class from other members of the community must not depend on relationship to a particular individual[71] - the so-called 'personal nexus' rule. This

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64 See, for example, *Scottish Burial Reform and Cremation Society v Glasgow Corp* [1968] AC 138; *Joseph Rowntree Memorial Trust Housing Association v Att.-Gen.* [1983] 1 All ER 288.

65 *Re Macduff* [1896] 2 Ch 451, 464 *per* Lindley J.

66 *Re Resch's Will Trusts* [1969] 1 AC 514. Cf. [2007] Ch. Com. Dec. September 25 (Odstock Private Care Limited).

67 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306 *per* Lord Simonds.

68 See the text at fn 62 above.

69 *Cross v Lloyd-Greame* (1909) 102 LT 163.

70 *Lily v Hey* (1842) 1 Hare 580; *Re Segleman (deceased)* [1995] 3 All ER 676.

71 *In re Compton* [1945] Ch 123, 128 *per* Lord Greene MR applied in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Davies v Perpetual Trustee Co* [1959] AC 439; *Dingle v Turner* [1972] AC 601.

rule has been criticised by both judges[72] and commentators[73] as making charitable status dependent upon how potential beneficiaries are described. Lord Cross[74] compared a trust for miners employer by the National Coal Board with one for miners in a particular district. The rule was laid down originally by Lord Greene MR in *Re Compton.*[75] In describing a valid section of the community he said:[76]

> '*In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one.*'

It is suggested that this is a better statement of the rule as it allows the true nature of the class to be considered. If the personal link is, in effect, incidental, the public benefit requirement is satisfied. This approach allowed the Court of Appeal in Northern Ireland to find charitable a trust to provide a community centre for the residents of a particular estate although all the residents shared the same landlord.[77] The House of Lords in *Dingle v Turner*[78] confirmed that this rule does not apply to trusts for the relief of poverty and that the exception extended to poor employees of the same employer as well as poor relatives.

Fourthly, it has been held in relation to trusts under the old fourth head that there will not be a section of the community if the potential beneficiaries are defined as a class within a class, for example, the members of a church in a particular town.[79] The reasoning behind the limitation was based on the danger of the class being too small numerically.[80]

Fifthly, the courts have made it clear that a members' club is not a section of the community; it is a self-selected private group.[81] There is no element of public benefit

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72 See *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 317-318 *per* Lord MacDermott; *Dingle v Turner* [1972] AC 601, 623-624 *per* Lord Cross

73 See P S Atiyah, 'Public Benefit in Charities' (1958) 21 MLR 676; M Chesterman, *Charities, Trusts and Social Welfare* (1979) p 153 *et seq.*

74 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 318.

75 [1945] Ch 123.

76 *Ibid.*, 129 and see *In re Tree* [1945] 1 Ch 325, 331 *per* Evershed J ('the essential quality').

77 *Springhill Housing Action Committee v Commissioner for Valuation* [1983] NI 184.

78 [1972] AC 601.

79 *IRC v Baddeley* [1955] AC 572, 591 *per* Viscount Simonds.

80 Reference was made specifically to the concerns expressed in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, see the text at fn 66.

81 *Re South Place Ethical Society* [1980] 3 All ER 918, 923 *per* Dillon J.

in a group devoted to the self-improvement of its own members.[82] The rule recognises practical realities and the courts have stated that the fact that a person cannot receive a benefit, i.e. become a member of the class, unless they pay a small subscription in the form of a contribution to cost does not negate public benefit.[83] On this basis, the existence of a membership scheme to restrict access to facilities, such as a sports centre, which would otherwise be overwhelmed and unsafe, does not mean that there is no public benefit unless there are arbitrary conditions for membership, unconnected with the purpose of the trust. Providing there are no arbitrary conditions, a membership scheme appears to be acceptable even if a member has to be elected by the existing members.[84]

Finally, the courts have stated that there will not be public benefit if the relevant section of the community cannot be identified because the words used to identify the potential beneficiaries are too vague or difficult of interpretation.[85] The courts, however, do not seek absolute certainty in the description of the class and, if necessary, any uncertainty in the phrase used can be cured by a scheme.[86] Thus a gift for the benefit of 'the Black Community' has been upheld.[87]

In relation to the third element of public benefit that there should not be undue private benefits, the courts have also established clear general rules, albeit they might be difficult to apply in individual cases. The existence of private benefit is acceptable if it is an inevitable or incidental result of carrying out the charitable purpose. So the incidental profit gained by a beneficiary whose flat had increased in value did not prevent a housing association providing accommodation specifically designed for the elderly by way of lease from satisfying the public benefit requirement.[88].

The test which the courts apply in this area asks whether the private benefits arise from a collateral or independent purpose or whether they are subsidiary and

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82 See, for example, *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1 Ch 194 and see the text at fn 143 below on the need for altruism.

83 *Ibid*, 202 *per* Lord Greene MR.

84 See *Trustees of the Belfast Young Men's Christian Association v Commissioner of Valuation for Northern Ireland* [1969] NI 3, 11 *per* Lord MacDermott LCJ; cf. *Thompson v Federal Commission of Taxation* (1959) 102 CLR 315.

85 *Keren Kaymeth Le Jisroel Ltd v IRC* [1932] AC 650.

86 *Re Hardy (deceased)* [2007] 1 All ER 747 at [22].

87 *Ibid.*

88 *Joseph Rowntree Memorial Trust Housing Association v Att.-Gen.* [1983] 1 All ER 288, 299 *per* Peter Gibson J and see *The Geologists Association v IRC* (1928) 14 TC 271, 283 *per* Green LJ..

incidental to the main object of the organisation.[89] Thus a professional association which provides substantial benefits to members in the form of enhanced knowledge and expertise as well as benefits to the public in the form of raised standards and education will not be charitable.[90]

The courts have stressed that in determining whether there is undue private benefit it is important to consider precisely what is the purpose of the trust in question. If the main purpose is charitable and the private benefit is an inevitable consequence of carrying out that purpose, the public benefit requirement will be satisfied.[91] Alternatively, if providing private benefits is a main object the public benefit requirement will not be satisfied even if there is some benefit to the wider community.[92]

Consistent application of the general rules

The Charities Act 2006 requires the existing law as to public benefit to be applied without any presumptions.[93] It is clear that the law, in the future, will have to be applied consistently across all heads of charity.[94] This raises the question as to whether, in relation to particular purposes, the law as to public benefit will be applied differently. In an attempt to answer that question the general rules[95] drawn from the existing law of public benefit are applied to four hypothetical organisations; a small religious group; a trust to relieve poverty amongst the employees of a small firm; a school for the sons of bankers and a trust to provide recreational facilities for members of a church in a town.

In the course of debate on the Charities Bill the Government stated that it was clear that religious charities and organisations provided public benefit and that it saw no reason for that to change.[96] The Minister also indicated that the process of passing

89 *Institution of Civil Engineers v IRC* [1932] KB 149, 168 *per* Lord Hanworth applied in *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631, 657 *per* Lord Morton of Henryton; *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, 402 *per* Lord Reid.

90 *The Midland Counties Institution of Engineers v IRC* (1928) 14 TC 285.

91 See *London Hospital Medical College v IRC* [1976] 2 All ER 114, 119 *per* Brightman J.

92 See *IRC v Oldham Training and Enterprise Council* [1996] STC 1218, 1235 *per* Lightman J.

93 Charities Act 2006, s.3.

94 See the text at fns 34-38 above.

95 See the text at fns 43-91 above.

96 *Hansard* HC Standing Committee A col 58 (4 July 2006) Edward Miliband MP Parliamentary Secretary, Cabinet Office.

the public benefit test was not intended to be onerous for individual religious institutions.[97] This reflects the existing law which assumes that there is benefit from people attending places of worship and that 'any religion is at least better than none'.[98]

It would be unsafe, however, to assume that a small religious group would automatically pass the public benefit test. The Act, in effect, shifts the burden of proof. Instead of a religious group being presumed to be for the public benefit, unless evidence is produced to the contrary, that religious group now has to show that it provides public benefit. The law requires that the court weigh and balance all alleged elements of benefit and harm.[99] The effect of this change can be seen by comparing the charitable status of the Unification Church (sometimes known as The Moonies) and the Church of Scientology. The Unification Church retained charitable status in 1988 when the Attorney General discontinued his action to have two trusts associated with the Unification Church removed from the register because of lack of sufficient evidence to rebut the presumption of public benefit.[100] In 1999, the Charity Commissioners when considering the application by the Church of Scientology to be placed on the register of charities, decided that the presumption of public benefit did not apply in the light of the newness of Scientology, judicial and public concerns expressed and the potential effect of the Human Rights Act 1998. The Church of Scientology did not gain charitable status as, on the evidence before the Commissioners, public benefit was not proved.[101]

There will clearly be argument not only as to where the balance lies as to the benefit and harm of a particular set of beliefs but also as to whether certain doctrines, for example, prohibition on the use of modern technology, amount to a benefit or harm.[102] This does not detract from the argument that a small religious group who have no clear set of beliefs from which benefit can be discerned will have considerable difficulty in achieving charitable status. It is submitted that the fact that their writings display a religious tendency, without more, will not be sufficient to satisfy the public benefit criterion.[103]

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97 *Hansard* HC Vol 451 col 1608 (25 October 2006) Edward Miliband MP Parliamentary Secretary, Cabinet Office.

98 *Neville Estates Ltd v Madden* [1962] 1 Ch 832, 853 *per* Cross J.

99 *National Anti-Vivisection Society v IRC* [1948] AC 31, 47 and see the text at fn 56 above.

100 See (1988) 138 NLJ 87.

101 [1999] Ch Com Dec. November 17 (The Church of Scientology). The Human Rights Act 1998 entered into force on 1 October 2000.

102 For further discussion as to possible beliefs which may have difficulty in proving public benefit, see P M Smith, 'Religious Charities and the Charities Act 2006', (2007) 9 CLPR 57, 73.

103 Cf. *Re Watson* [1973] 1 WLR 147, see the text at fn 26 above.

An accepted rule of public benefit is that a self-help group is not a section of the community.[104] In *Neville Estates Ltd v Madden*[105] Cross J recognised[106] that this rule presented a problem for the charitable status of the Catford Synagogue where only members of the synagogue were entitled to attend services. He concluded:[107]

> '*Generally speaking, no doubt, an association which is supported by its members for the purposes of providing benefits for themselves will not be a charity. But I do not think that this principle can apply with full force in the case of trusts for religious purposes. As Lord Simonds pointed out, the law of charity has been built up not logically but empirically, and there is a political background peculiar to religious trusts which may well have influenced the development of the law with regard to them*.'

It is doubtful whether a small religious group with restrictive conditions for membership could continue to rely on that statement.[108] It is submitted that, in the light of the need to apply the law consistently,[109] a general rule of public benefit would not be so easily disapplied. When a more consistent approach to the public benefit test was taken by the Charity Commissioners in relation to the Church of Scientology, the self-help element of their practices was an element in the decision that the public benefit criterion had not been met.[110]

The need for consistent application of the rules in relation to public benefit throws considerable doubt as to whether a small religious organisation would attain charitable status in the future. Compliance with the first element of public benefit will no longer be presumed and effective exemption from the self-help rule can no longer be expected as a matter of course.

The consistent application of the personal nexus rule[111] would mean that a trust to relieve poverty amongst the employees of a small firm fails the public benefit test. The existing law provides an exception for trusts for the relief of poverty.[112]

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104 *Re South Place Ethical Society* [1980] 3 All ER 918, 923 and see the text at fn 80 above.

105 [1962] 1 Ch 832

106 *Ibid.* , 853

107 *Ibid.*, 854.

108 See *IRC v Baddeley* [1955] AC 572, 606 where Lord Reid doubted if the members of a small sect formed 'an appreciably important section of the community'.

109 See the text at fns 34-38 above.

110 [1999] Ch Com Dec November 17 (The Church of Scientology) p 48.

111 See the text at fn 70 above.

112 *Dingle v Turner* [1972] AC 601 and see the text at fn 77 above.

However, as Lord Greene MR pointed out in *In re Compton*[113] when the exception was established in the poor relations cases in the eighteenth and early nineteenth centuries the essential nature of public benefit was not clearly appreciated. It is debatable whether the exception will survive.[114]

The courts have consistently expressed dissatisfaction with the exception to the general rule. In *Dingle v Turner*[115] Lord Cross stated[116] that he considered the 'poor relations', 'poor members' and 'poor employees' cases to be anomalous. Earlier in *Oppenheim v Tobacco Securities Trust Co Ltd*[117] Lord Simonds had said:[118]

> '*It is not for me to say what fate might await these cases if in a poverty case this House had to consider them.*'

He continued, however, that it would be unwise to cast doubt on old cases in order to introduce a greater degree of harmony into the law of charity. That statement was, of course, made before the present drive for consistency stemming from the need to comply with ECHR principles and the changes made by the 2006 Act.[119] Certainly, the courts in Northern Ireland[120] and Australia[121] have been concerned not to extend the exception beyond trusts for the relief of poverty to those for the relief of the aged. In Canada, the Court of Appeal has refused to apply the poor employee cases.[122]

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113 [1945] Ch 123, 129.

114 The Charity Commission appears to assume that it will – Charity Commission, *Analysis of the Law underpinning Charities and Public Benefit* (2008), para. 3.49. See also, Sanders A, 'The Mystery of Public Benefit' (2007) 10/2 CLPR 33.

115 [1972] AC 601.

116 *Ibid.*, 623; see also *Re Compton* [1945] Ch 123, 130, 140 *per* Lord Greene MR.

117 [1951] AC 297.

118 *Ibid*., 308

119 See the text at fns 34-38 above.

120 See *Re Dunlop* [1984] NI 408, 423 *per* Carswell J and N Dawson, 'Old Presbyterian Persons. A Sufficient Section of the Community?' [1987] Conv. 114.

121 See *City of Hawthorn v Victorian Welfare Association* [1970] VR 205; *Church of England Property Trust, Diocese of Canberra and Goulburn v Imlay Shire Council* [1971] 2 NSWLR 216.

122 See *In re Cox dec'd* [1955] AC 627, 639.

The benefit alleged to flow from trusts for the relief of poverty amongst poor relations is that they show the importance of altruism.[123] That argument is difficult to apply to a trust for the relief of poverty amongst employees where the employers will inevitably benefit.[124]

The exception appears even more anomalous now that the relief of need is a separate head of charity. If the existing law as to public benefit is retained, a trust to relieve poverty amongst poor employees will be charitable but a trust to relieve ill health, which may well be contributed to by poverty, amongst poor employees will not. It is considered that the sum of these anomalies points towards lack of charitable status for a trust to relieve poverty amongst the employees of a small firm.

Two completely opposite views have been expressed in relation to educational organisations such as a school for the sons of bankers. On the one hand it has been said that any educational purpose which is acceptable as a charitable purpose must inevitably be for the public benefit. Public benefit is inherent in the purpose. No further proof of public benefit, in the sense of benefit rather than harm, is required and the removal of the presumption will not change the law in that respect.[125] On the other hand the Government has stated that all institutions, including private schools, will have to show that they provide benefit. In relation to schools, the Government have also stated that they do not believe that indirect benefit in the form of saving state money by educating pupils is enough to justify charitable status and that there is a need to 'raise the bar' of the contribution such schools make to public benefit.[126]

In relation to the first part of public benefit it is not considered that the consistent application of the general rules would cause a school for the sons of bankers any major difficulties. Benefit would have to be shown but benefit is provided in the form of education of the pupils at the school who take their education out into the community. Where the removal of the presumption would have effect is if the school taught in a non-standard way, for example that all lessons, whatever the weather, were held outdoors. In that case, the possible benefit to the public of boys being educated would have to be weighed against the possible harm to individual boys from having all lessons outdoors.

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123 *Re Scarisbrick* [1951] Ch 622, 639 *per* Evershed MR; *Re Compton* [1945] Ch 123, 139 *per* Lord Greene MR.

124 See Report of the Goodman Committee, *Charity Law and Voluntary Organisations* (1976) para 38.

125 See Report of the Joint Committee on the Draft Charities Bill, Vol III (2004) HL paper 167-111 HC paper 660-111 Ev 591 (Professor Peter Luxton) and Ev 625 (Hubert Picarda QC)

126 *Hansard* HC Vol 448 col 96 (26 June 2006) Edward Miliband MP, Parliamentary Secretary, Cabinet Office.

In relation to a section of the community, it is said that the public benefit test is satisfied by a trust to educate the children of people following a certain trade or profession.[127] However, examination of the authorities used to support the proposition shows that it should not be assumed that all such trusts will pass the public benefit test. One case[128] was concerned solely with the general principles of determining charitable purposes and another[129] with the question of whether there was a breach of a restrictive covenant. In neither case was there any discussion of public benefit or finding in relation to the trust in question. *Hall v Derby Sanitary Authority*[130] did hold that an orphanage founded and used to board, clothe and educate the children of deceased railway servants was charitable and there was some discussion of the need for charities to be public. The decision, however, turned simply on the fact that there were a very large number of railway servants; public was equated simply with size of class.

The designation of the class of potential beneficiaries as the children of bankers would appear to breach the general rule that the distinguishing criterion must not be an arbitrary one unconnected to the purposes of the trust.[131] Regardless of any question of consistent application, the courts appear to be of the view that the rule does apply to educational trusts. In *Davies v Perpetual Trustee Co*[132] , which concerned a college to educate certain Presbyterians boys, Lord Morton of Henryton said, obiter:[133]

> '*Moreover the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator had in mind*.'

It is submitted, therefore that a school for the sons of bankers may face difficulties in complying with the rules of public benefit as they relate to a section of the community. There may also be a problem if the level of fees charged were such that they defined the class of potential beneficiaries by ability to pay and this imposed a (further) arbitrary criterion unconnected with the purpose of education.[134]

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127 See, for example H Picarda, *The Law and Practice Relating to Charities* 3rd ed (1999) p.67; J Warburton, *Tudor on Charities* 9th ed (2003) p. 72

128 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

129 *German v Chapman* (1887) 7 Ch D 271.

130 (1885) 16 QBD 163.

131 *IRC v Baddeley* [1955] AC 572, 593 and see the text at fn 61 above.

132 [1959] AC 439.

133 *Ibid.*, 456.

134 See the text at fn 65 above and Charity Commission, *Charities and Public Benefit* (2008) section F10.

A trust to provide recreational facilities for members of a church in a town breaches the present rule for old fourth head purposes that there is not a section of the community if the potential members are defined as a class within a class.[135] By contrast it has long been accepted that religious and educational charities can validly restrict their potential beneficiaries to members of a religious order in a particular town.[136]

The class within a class rule was the subject of a strong dissenting speech by Lord Reid in *IRC v Baddeley*[137] who said[138]:

> *'I can see no justification in principle or authority for holding that when dealing with one deed for one charitable purpose the members of the Methodist or any other church are a section of the community, but when dealing with another deed for a different charitable purpose they are only a fluctuating body of private individuals.'*

Lord Reid cited with approval Lord Wrenbury's statement in *Verge v Somverville*[139], when considering an old fourth head purpose, 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.'*

In the light of this judicial conflict of opinion it is perhaps not surprising to find that the Charity Commissioners registered a recreational trust for Welsh people in London. They did so, however, without consideration of the class within a class point.[140] It is debatable therefore whether the strict application of the class within a class rule applying only to old fourth head charities can continue if there is to be consistent application of the public benefit test.

Two other rules may be relevant. The designation of potential beneficiaries as members of a religion in a town would appear to breach the general rule that a criterion which differentiates the potential beneficiaries from other members of the community must not be an arbitrary one unconnected with the purposes of the

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135 *IRC v Baddeley* [1955] AC 572, 591and see the text at fn 78 above.

136 *Ibid.*, 606.

137 [1955] AC 572.

138 *Ibid.* , 612-613, rejecting the reasoning of Babington LJ in *London Presbyterian Church House Trust v IRC* (1946) 27 TC 431.

139 [1924] AC 496, 500.

140 [1972] Ch Com Rep paras 71-80 (the trust was that considered in *Williams Trustees v IRC* [1947] AC 447 restricted to charitable purposes) and see Charity Commission, *Analysis of the law underpinning Charities and Public Benefit* (2008) para. 3.10 *et seq*..

charity.[141] The general rule that the size of the class must not be numerically negligible[142] may also be relevant. It is suggested that consistent application of the rules would lead to the situation that a class within a class would satisfy the public benefit test if the resulting class was not small. Overall, it is considered that consistency in relation to the general rules would lead to it being more likely that a trust to provide recreational facilities for members of a church in a town would comply with the public benefit requirement.

Overarching principles

There is obviously considerable room for debate as to how even the general rules which form the law on public benefit will be applied in the future. One approach to the problem is to look for overarching principles which might be expected to guide and underpin any future consideration of the law of public benefit. Case law and commentary indicate that in addition to consistency which has already been considered[143], altruism, the importance of purpose, balance and flexibility are all relevant principles.

The principle of altruism lies behind the general rule that a self-help group is not charitable[144] and the personal nexus rule.[145] The relevance of this overarching principle has been highlighted on a number of occasions by the judiciary. The principle was specifically referred to by Lord MacDermott in *Dingle v Turner*[146] when considering a trust for poor employees of a company. Lord Cross[147] in the same case spoke about discouraging company fringe benefits from attaining charitable status. In seeking to determine whether a police athletic association was charitable, Lord Normand was concerned that the purposes were 'self-regarding'[148] – the opposite of altruism. In *Re South Place Ethical Society*[149] Dillon J was fortified

141 *Ibid.*, 593 and see the text at fn 61 above. See also *Att-Gen v Cahill* [1969] 1 NSWR 85.

142 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 396 and see the text at fn 66 above.

143 See the text at fns 34-38 above.

144 *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1 Ch 194, 202 and see the text at fn 81 above.

145 *Re Compton* [1945] Ch 123, 128 and see the text at fns 70-76 above.

146 [1972] AC 601, 614.

147 *Ibid.*, 625 and see *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] 1Ch 194, 206 *per* Lord Green .

148 *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, 394.

149 [1980] 3 All ER 918

in his decision to find the Society charitable by the fact that it was 'outward-looking'.[150] The overarching principle was probably best expressed by Lord MacDermott in *National Deposit Friendly Society Trustee v Skegness Urban District Council*[151] when he said:

> '*[B]ut there can be no doubt that unselfishness and benevolence are still of the essence of legal charity*'.

The overarching principle of altruism has also been recognised by the courts in Australia. Sugarman J in *Perpetual Trustee Co v Ferguson*[152] said:

> '*Ultimately, one must always get back to the question of whether what is sought by the settler or testator is to take advantage of the favoured position of charities in order to carry out what is essentially a private purpose*.'

Reviews of the definition of charity have highlighted the importance of altruism.[153] The principle was considered so important in Australia that it was proposed that the definition of charity be changed to require the dominant purpose of a charitable purpose should be altruistic.[154] That proposal was subsequently rejected as it was considered that it added little to the existing definition of charity.[155] The idea was also rejected in this country.[156]

Commentators have also recognised that a wider principle stands behind the general rules. A L Guest said in relation to the personal nexus rule as laid down in the *Oppenheim*[157] case:[158]

> '*It may be suggested, however, that the rule is not quite as arbitrary as it seems, and that it is based on the principle that charity must not begin and end at home*.'

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150 *Ibid.*, 928.

151 [1959] AC 293, 315.

152 (1951) 51 SR (NSW) 256, 263.

153 See, for example, Report of the Goodman Committee, *Charity Law and Voluntary Organisations* (1976), para 28.

154 *Report of the Inquiry into the Definition of Charities and Related Organisations.* (2001)

155 Board of Taxation, Consultation on the Definition of Charity (2003).

156 Cabinet Office, *Private Action, Public Benefit. A Review of Charities and the Wider Not for Profit Sector* (2002) para 4.16.

157 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951 AC 297.

158 A L Guest, 'Case note on the Oppenheim case' (1951) 67 LQR 164.

M Chesterman has pointed out[159] that in certain areas of charity law the idea of altruism appears to be lacking, for example, in fee paying schools and hospitals. That did not cause him to reject altruism as an overarching principle but led him to call for 'a requirement of substantial disinterestedness' to be more clearly articulated and more uniformly imposed.

It is inevitable that the charitable purpose must be at the heart of the first element of public benefit. Only benefits and harm arising, whether directly or indirectly, from the purpose in question can be relevant.[160] The courts have, however, stressed that the purpose is also the key to determining if the other two elements of public benefit, section of the community and no undue private benefit, have been satisfied.

The courts have long stated that a criterion which distinguishes a class of potential beneficiaries must not be an arbitrary one unconnected with the purpose of the trust.[161] The overall importance of purpose when determining whether a particular group is a section of the community was set out by Lord Cross in *Dingle v Turner*:[162]

> '*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*.'

When faced with the difficulties of applying the personal nexus rule, Gibson LJ in *Springhill Housing Action Committee v Commissioner of Valuation*[163] concluded:

> '*All of which leaves one very much on the high seas with the purpose of the trust as the only reliable compass*.'

The courts have also focussed on purpose to determine the potential beneficiaries. *Re White's Will Trusts*[164] concerned a trust 'for the Royal Infirmary Sheffield, to be applied by them for the purposes of a home of rest for the nurses of that institution.'

159 M Chesterman, *Charities Trusts and Social Welfare* (1979) p 347 *et seq.*

160 See Charity Commission, *Draft Public Benefit Guidance* (2007) p 19 and the Response of the Charity Law Association (2007) p 17 pointing that the *Draft Public Benefit* Guidance, incorrectly, does not limit 'disbenefits' to those flowing from the charitable purpose.

161 *IRC v Baddeley* [1955] AC 572, 593 and see the text at fn 61 above.

162 [1972] AC 601, 624

163 [1983] NI 184, 192 and see the text at fn 76 above.

164 [1951] 1 All ER 528.

It was argued that the potential beneficiaries were the nurses who were a private class as they shared the same employer. Harman J. said:[165]

> '*It is said, therefore, that this is not a charity because it lacks the element of public benefit which is essential to validate a charitable gift. If one considers only the nurses, I think there is a great of force in that view. If, however, one considers the hospital, it seems to me to lose its force. This is really a gift to increase the efficiency of the Royal Infirmary at Sheffield*.'

The correct construction of the purpose of the trust has also been recognised as important in determining whether there is undue private benefit. *London Hospital Medical College v IRC*[166] concerned the charitable status of the London Hospital Club, a students' union. Students clearly enjoyed benefits from the union but Brightman J. found the union to be charitable and set out[167] the test based on the true purpose of the union:

> '*In the present case, if the union exists to further and does further the educational purposes of the college, the union is charitable notwithstanding the personal benefits conferred on the union members*.'

It is suggested that if the overarching principle of the importance of purpose is applied, the problem of the class within a class rule for a section of the community largely disappears. The members of a particular church within a town are a section of the community for a religious organisation as the criterion is linked to the purpose. They are not a section of the community for, say, an organisation providing recreational facilities, as the criterion of membership of a particular church is not linked to the purpose, ie it is an arbitrary criterion. A class within a class may be a section of the community when the purpose meets a need of that particular group.[168]

The third overarching principle is that of taking a balanced or overall and contextual view of the question of public benefit. Lord Wright in *National Anti-Vivisection Society v IRC*[169] set out such an approach to the first element of public benefit when he said:[170]

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165 *Ibid.*, 530.

166 [1976] 2 All ER 113

167 *Ibid.*, 119.

168 See Charity Commission, *Decisions Vol 4* (1995) p 17-21 (recreational trusts meeting the needs of a particular racial minority group within an area charitable)

169 [1948] AC 31

170 *Ibid.*, 47, see also 49 ('balancing values').

> '*The whole complex of resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated would or would not be beneficial to the community*.'

When considering the second element of public benefit in *Dingle v Turner*[171] Lord Cross said:[172]

> '*In truth whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree*.'

Taking a balanced or overall approach to the individual elements of public benefit allows some of the difficulties and inconsistencies of the general rules to be reconciled. For example, the Court of Appeal in New Zealand took an overall contextual approach to find that the Maori beneficiaries of a land claim support fund were a section of the public even though there was a relationship of common descent.[173]

Lord Greene MR in *Re Hobourn Aero Components Ltd's Air Raid Distress Fund*[174] took this overarching principle beyond the individual elements to the public benefit requirements as a whole when considering the effect of potential beneficiaries being required to contribute funds to the relevant organisation. He said:[175]

> '*It is all a question in theses cases of the real paramount and governing nature of the transaction.*'

That phrase was echoed by Carswell J in *In re Dunlop*[176] when he said that to constitute a charity there must be 'a paramount public purpose'.

This overarching principle stresses the earlier principle of the importance of purpose but takes it a step further in allowing the court to balance all three elements of public benefit once the true purpose has been determined. Thus, for example, the fact that there are a small number of potential beneficiaries can be balanced against the wider

171 [1972] AC 601

172 *Ibid.*, 624.

173 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

174 [1946] 1 Ch 194

175 *Ibid*., 202.

176 [1984] 408, 405

indirect benefit to the community from the work or presence of that group.[177]

The courts have long recognised that the law of charity has to adapt to new social circumstances and problems.[178] *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector*[179] is but one of a number of reports on charities and the voluntary sector which have recognised that charities make an important and growing contribution by innovating new ways of tackling social problems. Charities are not only very diverse in terms of purpose but also in terms of size. There are over 35,000 charities with an income of less than £1,000 and year and over 650 with an income of over £10M a year.[180] The Government clearly intends that situation to continue. On the second reading of the Charities Bill, Hilary Armstrong MP, Minister for the Cabinet Office, said that one of the aims of the Bill was 'to encourage a vibrant and diverse sector'.[181]

Diverse and innovative work by charities can only be supported and sustained if a final overarching principle of flexibility is adopted. Too strict an adherence to proof of benefit under the first element of public benefit raises the danger of strangling at birth new and innovative ways of dealing with particular social problems.[182] Similarly, lack of flexibility in relation to the third element may prevent valuable developments in community regeneration.

Conclusion

The Charities Act 2006 raises the importance of public benefit but leaves that requirement for charitable status dependent on the existing law. The law of public benefit is capable of rational development to support a valuable and diverse charitable sector if the temptation to argue about detailed inconsistencies is resisted. The general rules must be applied in accordance with the overarching principles of consistency, altruism, purpose, balance and flexibility.

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177 See *Re Dunlop* [1984] NI 408, 426 *per* Carswell J; *Neville Estates Ltd v Madden* [1962] Ch 832, 853 *per* Cross J, see the text at fn 106 above; *Re White's Will Trusts* [1951] 1 All ER 528, 530 *per Harman J* , see the text at fn 163 above.

178 See *Scottish Burial Reform and Creation Society v Glasgow Corp* [1968] AC 138, 154 *per* Lord Wilbeforce.

179 Cabinet Office, Strategy Unit, (2002), para 3.1

180 Charity Commission, *Income of Registered Main Charities in England and Wales, March 2007.*

181 *Hansard* HC Vol 448 col 21 (26 June 2006)

182 See K Atkinson, L Platt and J Warburton, 'Other Charitable Purposes' in Charity Law Association, *For the Public Benefit* (2007)