

CHARITABLE TRUSTS FOR THE ADVANCEMENT OF RELIGION: JUDICIAL REJECTION OF METAPHYSICAL BENEFITS AND THE EMERGENCE OF PUBLIC INTERACTION

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Introduction

In 1949 the House of Lords decided, in *Gilmour v Coats*,² that evidence of a metaphysical nature was incapable of establishing the requisite requirement of public benefit necessary to establish as charitable trusts for the advancement of religion. So, when a court is deciding whether a particular purpose is religious they must insist that there be some metaphysical element to that belief system.³ But when looking for a resulting public benefit they are precluded from finding it within that metaphysical element. Due to the reluctance of many judges to apply this seemingly contradictory decision, which would if applied restrict charitable status to religious groups who confer secular (non-religious) benefits upon the public, they have invented the concept of “public interaction”. It will be argued that this judicial technique for determining the existence of a public benefit emanating from certain religious purposes is unsatisfactory and clearly

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² [1949] AC 426.

³ Dillon J held, in *Re South Place Ethical Society* [1980] 1 WLR 1566 at 1572, that “two of the essential attributes of religion are faith and worship: faith in a god and worship of that god”.

undermines the precedent established in *Gilmour*. Furthermore, consequential to the inconsistent application of the principle, certain religious groups seem to benefit from its application while others appear to suffer.

The paper will begin by outlining the various benefits emanating from religious trusts which have been recognised by the courts over the years. A discussion of the principles established in *Gilmour* will follow, before focusing attention on three different types of religious gift: those to religious communities; those for the celebration of masses; and those which facilitate the publication and distribution of religious writings. In conclusion three possible reforms of the law in this area will be proposed, reforms which are seriously needed.

First, Second and Third Order Benefits

The recognised benefits resulting from religious trusts can be grouped into three categories, or "orders". First order benefits seem to come in two forms. Firstly there are those which Newark⁴ terms "Divine Bounty" and consist of the material benefits⁵ and spiritual benefits⁶ to be gained through worship and sacrifice. Secondly there is what Newark terms "Inspirational Edification", which is the edification and inspiration to be gained by the public from the worship of a god by others. These were the metaphysical benefits whose existence the House of Lords refused to accept in *Gilmour*. Second order benefits, which provide the central focal point of this paper, again come in two forms. The first, Newark's "Corporate Devotional Edification", describes the edification derived from corporate worship, although Newark himself admits that it may be difficult to discern of exactly what this edification consists. The second kind result from having religious people at large in the community and the court will assume that their example of religious living provides an indirect benefit to the public. Both types of second order benefits have an element of public interaction as their constituent part. Finally, third order benefits are benefits of a secular nature, for example, acts which advance education or help the poor, or acts which provide various other practical civic benefits. Bearing these concepts in mind let us proceed to discuss the judicial techniques which determine the finding of such benefits.

⁴ Newark, F H, 'Public Benefit and Religious Trusts', (1946) 62 LQR 234.

⁵ Fair weather, peace from war, etc.

⁶ Inner peace with one's self, existence beyond the grave, etc.

Gilmour v Coats

In *Gilmour* the income of a trust fund was applied to advance the purposes of a Carmelite convent if those purposes were charitable. The convent consisted of an association of strictly cloistered and purely contemplative nuns who devoted their lives entirely to worship, prayers and meditation. The nuns engaged in no external activities. Three arguments were put forward by counsel on behalf of the convent to establish the necessary public benefit, arguments which were indebted to the work of Professor Newark.⁷ Firstly, that the prayers of the sisters and the sanctity of their lives brought Divine Grace on mankind in general, according to the evidence submitted by Cardinal Griffin, and this should be accepted as true by the courts notwithstanding the lack of conventional proof. This argument relied heavily on the “magnitude and importance” of the Christian Church.⁸ Secondly, that the holiness of the sisters’ lives afforded edification by example, inspiring other Roman Catholics to turn their minds towards spiritual matters. Finally, and an argument which was not raised in the lower courts, that the life led by the nuns was regarded by Roman Catholics as the highest kind of religious life, and that admission to the convent is open to that section of the public, thus affording Roman Catholics the opportunity to live the fullest and most intense religious life.

In dealing with the first argument, which he considered the mainstay of the Prioress’s case, Lord Simonds stated: “Whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community?”⁹ PW Edge¹⁰ points out that both Lord Simonds and Lord de Parcq reinterpreted Counsel’s argument as including a point which Counsel expressly argued was wrong. Lord Simonds said:

“It is no doubt true that the advancement of religion is, generally speaking, one of the heads of charity. But it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing what they cannot prove: the court can only act on proof. A gift to ... cloistered nuns in the belief that their prayers will benefit the world at large does

7 Op. cit.

8 Op. cit. at 433.

9 Op. cit. at 446.

10 Edge, P W and Loughrey, J, ‘Religious Charities and the Juridification of the Charity Commission’, (2001), 21(1) Legal Studies 36-64.

not from that belief alone derive validity any more than does the belief of any other donor for any other purpose.”¹¹

The House, therefore, took it as read that the courts have no jurisdiction to accept or reject spiritual benefits on the basis that some religious systems are true and others are not. Rather, and rightly so, they preferred to decide the different issue of whether the courts should either accept or reject all spiritual benefits, thus treating all religions the same. The House clearly decided that all spiritual benefits should be rejected.¹² Indeed, if the Courts did decide to exercise a jurisdiction in spiritual truth, deciding which religions were of such magnitude and importance to warrant the Courts accepting the benefits flowing therefrom could be considered discriminatory towards smaller religious groups. Such an approach would clearly be in conflict with a number of articles in the Human Rights Act 1998: for example, Article 9 (freedom of religion and freedom to manifest religion or belief) and Article 10 (freedom of expression).

In response to Counsel’s second argument, the House thought that the alleged public benefit in this case was too “vague and intangible” to satisfy the prescribed test.¹³ Lord de Parcq, while accepting that the proposed benefit was too remote, put forward a more general problem posed by religious example as a public benefit:

“If there were evidence before a court concerning religious acts which the creed of a particular church commended, or enjoyed as duties, and if it were said on behalf of one party to a dispute that these acts resulted in the edification of many, and on behalf of another, that they aroused in the hearts of no less a number of persons feelings injurious to the advancement of religion, it must surely be conceded that no court could properly attempt the task of deciding between the disputants.”¹⁴

Lord de Parcq’s comments would appear to suggest that the example of a religious life could never fulfil the requirement of public benefit. Indeed, if the House had accepted this argument the reasoning would have opened the door for

¹¹ Op. cit. at 446.

¹² See also *Re Joy* (1889) 60 L.T. 175; *A-G v Delaney* (1876) Ir.R. 10 CL.104. By implication, the House also appear to have rejected all spiritual disbenefits, thus accepting as true the spiritual assertions of some atheists.

¹³ Per Lord Simmonds, op. cit. at 453-4.

¹⁴ Op. cit. at 453-4.

a number of purposes to be recognised as charitable which had hitherto been denied such status; for example, the long established principle that private prayer is not a charitable purpose.¹⁵ Acceptance of this argument could have also dramatically affected the status of the gifts discussed in the following sections, as will be seen.

In dealing with Counsel's final argument, and rejecting an analogy between education and advancement of religion, Lord Simonds stated that the convent could not rely on this sole purpose to gain charitable status. He considered it absurd to find the community to be non-charitable, but allow a gift to enable it to be maintained by recruitment from the outside world. By rejecting this argument, the House appear to have indirectly suggested that any benefit resulting from religious activities must affect a wider section of the public, rather than be limited to the adherents of the particular religion.¹⁶

A straightforward application of the principles established in *Gilmour* would seemingly result in the abolition of charitable trusts for the advancement of religion. If charitable status was limited to those religious organisations who confer third order benefits upon the public, these organisations could be recognised as charitable under one or more of the other heads of charity, thus making any spiritual motive ancillary. Religious groups, when applying for charitable status to further their purposes, would be judged on the good work they do for the community, rather than on how big their following is or whether they believe in some supernatural being.

Picarda¹⁷ questions what the "cognizable evidence" was that the House were referring to in *Gilmour*, quoting *dicta* from two Irish cases supporting his confusion.¹⁸ With respect to Picarda and the Irish judges, cognizable means that which is perceptible or clearly identifiable. Simply put, the House appear to have been referring to perceptible and clearly identifiable acts which confer perceptible and clearly identifiable benefits upon the public (i.e. third order benefits).

¹⁵ See for example *Yeap Cheah Neo v Ong Chen Neo* (1875) LR 6 PC 381.

¹⁶ The Vice Chancellor's third point in *Re Hetherington* (see below) would seem to support the view that a benefit confined to the members of a particular religion is not a public benefit. Also, it was stated by Cross J in *Neville Estates Ltd v Madden* (see below) that the members of the Catford Synagogue were not in themselves a section of the public.

¹⁷ Picarda, H, *The Law and Practice Relating to Charities* 3rd Ed Butterworths 1995 at 112.

¹⁸ *Valuation Comrs. v Trustees, Newry Christian Brothers* [1971] NI. 114 at 128, per Lord MacDermott LCJ; and *Belfast City Young Men's Christian Association v Valuation Comrs* [1969] N.I. 3 at 30, per McVeigh LJ.

Because the House rejected any possible benefit flowing from the example of religious living and seem to have established that the members of a religion do not amount to a section of the public, the reasoning that justifies the public interaction principle not only makes a mockery of the rule of precedent but also makes the law look like an ass.

Gifts to Religious Communities

In *Neville Estates v Madden*¹⁹ Cross J recognised charitable status, notwithstanding the fact that Catford Synagogue was not open to the public as of right. He pointed out a fundamental difference between the members of the Synagogue and an enclosed order of nuns, in that the former spend their lives in the world while the latter live secluded from the world: "The court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens."²⁰ The distinction that Cross J observed in *Neville Estates* is clearly apparent. However, on closer inspection there are arguments to suggest that the substance of this distinction is elusive, if not illusory. Furthermore, it is clearly contrary to the reasoning in *Gilmour v Coats*.

The mere fact that these individuals live within the community and mix with their fellow citizens is weak evidence upon which to assume a public benefit, and is certainly not susceptible to legal proof. It is also difficult to discern exactly who their example of religious living would benefit. It would most certainly not benefit agnostics, atheists or the unconcerned, and those members of the public who follow a different faith may well disagree or be offended by the life they live. It is submitted that the only people who would benefit would be those attending the synagogue and, as *Gilmour* established, these individuals do not (and should not) constitute a section of the public. If they did, any individual could invent a religion to follow, and so long as they believed in a god and interacted with the public in some way they could reap the enviable benefits of charitable status, the absence of any secular public benefit notwithstanding.

Moreover, if Cross J was entitled to assume the existence of a public benefit where one could not be established by legal proof, why did the House of Lords feel that they were precluded from doing the same in *Gilmour*? Perhaps one reason was that the House felt it was time to reject the existence of first and

¹⁹ [1962] Ch. 832.

²⁰ *Ibid*, per Cross J at 852-3. The case of *Re Banfield* [1968] 1 WLR 846, where Goff J held that the Pilsdon Community House was charitable as it opened out to reach the community, also seems to support this line of reasoning.

second order benefits, thus requiring all religious organisations to prove that they confer some tangible benefit upon the public in order to justify the privileges of charitable status. However, could the fact that the nuns did not interact with the public have been the determining factor? In relation to the second argument put forward in *Gilmour*, it is difficult to see why the example set by the members of the convent was any less vague and intangible than that set by the members of the synagogue. The mere fact that the members of the synagogue are in contact with the public is scanty justification for the different outcomes. There is also no evidence to suggest that the lack of public interaction in *Gilmour* formed any part of the ratio.

If the reasoning in *Neville Estates* takes hold, the implications could be significant. It would seem that the only religious bodies which would be denied charitable status under this reasoning would be those of the enclosed type. Indeed, as was stated above, all those cases involving private prayer could attain charitable status on the ground that the adherents return to live in the community, thus extending their example of religious living to others. The reasoning could also have a similar impact on other types of religious purpose if applied with any consistency, as will be seen in the two sections that follow.

Bequests for the Saying of Masses

Bequests for the saying of masses provide a vivid illustration of the courts' inability to establish a consistent line of reasoning when dealing with questions of public benefit. One case in particular illustrates how the courts have applied the public interaction rule with a great deal of inconsistency, seemingly discriminating against certain types of religious ceremony for no justifiable reason.

In *Re Hetherington (decd)*²¹ the testatrix by her will, made in holograph form, left inter alia, £2000 to the Roman Catholic Church Bishop of Westminster for masses for the repose of the souls of my husband and my parents and my sisters and also myself when I die" and the residue of her estate to the Roman Catholic Church, Golders Green "for masses for my soul". Sir Nicolas Browne-Wilkinson V-C summarised the principles established by the case thus:²²

- (1) A trust for the advancement of religion is prima facie charitable and assumed to be for the public benefit unless it can be shown that the

²¹ *Gibbs v McDonnell* [1989] 2 All ER 129.

²² *Ibid.*, at 134-135.

particular trust in question cannot operate so as to confer a legally recognised benefit on the public, as in *Gilmour*.

- (2) The celebration of a religious rite in public does confer a sufficient public benefit because of the edifying and improving effect of such celebration on the members of the public who attend (i.e. public interaction).
- (3) The celebration of a religious rite in private does not contain the necessary element of public benefit since any benefit to be gained from prayer or example is incapable of proof in the legal sense, and any element of edification is limited to a private, not public, class of those present at the celebration.
- (4) Where there is a gift for a religious purpose which could be carried out in a way which is beneficial to the public (i.e. by public masses) but could also be carried out in a way which would not confer a sufficient element of public benefit (i.e. by private masses) the gift is to be construed as a gift to be carried out by the methods that are charitable, all non-charitable methods being excluded.

The evidence in *Re Hetherington* suggested that the masses would be said in public and therefore the gift was held to be charitable under a benign interpretation. When the act is performed in public, the courts identify the public benefit within the edifying and improving effect it has on the people present (Corporate Devotional Edification); we can assume that this edifying and improving effect is of a spiritual nature.

It was said in the previous section (regarding the reasoning in *Neville Estates*) that there was some difficulty in establishing exactly who the example of religious living would benefit and it was suggested that any benefit would be confined solely to the members. Similarly, it is fair to assume that those people present at the mass would be limited to individuals who already recognise and believe in the purposes of the mass. Non-believers, if present, would clearly lack any metaphysical appreciation of the event which would prevent any spiritual edification or improvement resulting. In other words, the mass would only be beneficial to believers because non-believers would have little interest in attending such a service, other than a purely educational one. The decision represents another instance of a lower court disregarding a precedent set by the House of Lords.

It is also interesting to note that the court in *Re Hetherington* did not adopt the same reasoning applied in *Neville Estates*. If they had, it would not have mattered whether the mass was said in public or in private, so long as those saying the

mass returned to live in the community afterwards. There appears to be no reason why the courts have differentiated between members attending a synagogue and members partaking in the saying of masses. Perhaps the court in *Re Hetherington* were reluctant to apply the public interaction principle, for fear of undermining the established rule which denies charitable status to groups who participate in private prayer. The next section will expose the advantageous position enjoyed by authors of religious writings and the fact that they will rarely be denied charitable status. Another possible extension of the *Neville Estates* principle will also be considered.

Religious Writings

The general footing on which the courts proceed in this area is that they will not assess the rationality of religious writings. Any gift to facilitate the publication and circulation of religious writings will be charitable, unless immoral. This area of religious trusts provides evidence that the requirement of public benefit has been superseded by that of public interaction, for it seems that if a purpose is for the advancement of religion and there is some kind of public interaction, it is presumed to be beneficial to the public.

The approach of the courts can be illustrated by considering two cases. In *Thornton v Howe*²³ a trust to publish the sacred writings of Joanna Southcott was upheld as charitable, notwithstanding the fact that Romilly MR considered the work foolish, incoherent and confused. Because the writings had the purpose of extending the influence of Christianity, this was sufficient to enable the court to recognise charitable status. The decision in this case has been described as the high water mark of toleration. Another case where the theological merit of religious writings has been brought into question was *Re Watson*.²⁴ In this case the writings consisted of commentaries on the Scriptures and were "fundamentalist and Pauline ... in inspiration, with considerable Calvinistic elements".²⁵ The Professor of Moral and Social Theology at King's College London swore an affidavit in which he said that the intrinsic worth of the writings was nil and that they were unlikely to extend the knowledge of the Christian religion. After rejecting the submissions of Counsel for the next of kin, who argued that there was insufficient evidence to prove a public benefit, Plowman J

²³ (1862) 31 Beav. 14.

²⁴ [1973] 1 WLR 1472.

²⁵ *Ibid.*, at 1476.

put forward the following propositions: first, the court does not prefer one religion to another; second, if the nature of the purpose is religious the court assumes a public benefit unless the contrary is shown; and third, the only way of disproving a public benefit is to show that the doctrines inculcated are "adverse to the very foundations of all religion and that they are subversive of all morality".²⁶

Identifying the public benefit emanating from such writings is far from easy. The result of this approach is that the publication of religious writings, no matter how ridiculous or outlandish they may be, will always enjoy the advantages of charitable status because their publication will ensure the presence of public interaction. A point raised both in relation to religious communities and masses can be made here. Who exactly benefits from the publication of such writings? Again, it would seem that any benefit to be gained, in a religious sense, would be confined to believers. The only benefit to be gained by non-believers would be an educational one, if those individuals were not offended by the writings that is. If one accepts that the House in *Gilmour* were rejecting the possibility that the adherents to a religion can constitute a section of the public, the wider ramifications of the decision appear to have gone unnoticed, even apparently by the court which decided the case.

One final point relates to the reasoning applied in *Neville Estates*, and its possible application to trusts which facilitate the publication and distribution of religious writings. If the reasoning in this case was applied in *Re Watson* and *Thornton* it would not have mattered whether the works were published or not; the element of public interaction could have been established from the fact that the author of the work lived within the community and extended his or her example of religious living to the world at large. This reasoning, although tenuous, shows the potential extent to which the element of public interaction can supplement the requirement of secular public benefit and confer charitable status on organisations who provide no tangible benefits to the community whatsoever. It would seem that in future, if such reasoning takes hold, the only religious organisations which would be denied charitable status (along with those whose activities are unlawful or whose doctrines are subversive of all morality) would be those of the enclosed type, like *Gilmour*.

Conclusion

It is submitted that the element of public interaction identified in all the aforementioned cases does not provide perceptible and clearly identifiable evidence establishing a public benefit. In accepting that the House in *Gilmour*

were rejecting the existence of first and second order benefits, the answer to the question of what is and what is not cognizable becomes obvious.

Having established that the concept of public interaction is clearly a weak basis upon which to establish, indeed assume, a public benefit, it would seem that the courts are faced with a number of options. They could continue with the current line of reasoning, perhaps making some minor alterations to deal with the inconsistencies which have arisen between different religious purposes. The other two options are far more dramatic. Secondly, the courts could accept the existence of first order benefits, which in practice would make the test for any public benefit redundant and would allow many strange and obscure belief systems to enjoy the advantages of charitable status, so long as there was some supernatural element present. Finally, and conversely, they could reject the existence of second order benefits, thus abolishing charitable status for such trusts. Each proposed course of reformation warrants closer examination.

It is submitted that the current approach adopted by the courts is unsatisfactory, and if continued unchanged, will result in certain religious groups suffering discrimination as a consequence of the inconsistent application of the public interaction principle. If the reasoning in *Neville Estates* was applied consistently, however, almost all religious organisations would gain charitable status, so long as they involved themselves in some kind of public interaction. This would result in many religious bodies who do not confer secular benefits on the public specifically designing their activities so as to interact with the public; for example, the nuns in *Gilmour* could produce leaflets to distribute among the public or walk around the local park once a week.

The result of the courts accepting the existence of first order benefits would be to abandon the test of public benefit altogether. The courts would have to accept a religion's own evaluation of the benefits flowing from its activities and regard them as established fact, no matter how unlikely their existence might be. This would result in many obscure and senseless religious organisations gaining charitable status to support their activities at the expense of all non-charitable organisations and individuals; a situation not likely to be welcomed with open arms by such a religiously homogenous society.²⁷ The approach of providing

²⁷ P W Edge makes the point well: "Would a Christian necessarily want to support Islamic proselytising, and vice versa? Or an atheist, teachings in Jewish theology? Subsidising religious organisations can, effectively, require committed persons to support religious organisations they passionately believe to be in error. This problem would not be resolved by extending charitable status to all belief systems; indeed, the problem would be aggravated." P W Edge, 'Charitable Status for the Advancement of Religion: An Abolitionist's View', *The Charity Law and Practice Review* Volume 3, 1995/96, Issue 1, at p 32.

public support to any religious organisations without requiring a benefit in return, let alone a benefit which offsets the public loss incurred, is seriously open to objection. A more significant problem lies in preventing fraudulent misuse of charitable status. Organisations could design their purposes to appear religious, when in reality they seek charitable status purely for the fiscal benefits. The only positive result of allowing first order benefits to establish a public benefit would be that all religious groups would be treated equally. However, there is another way of achieving this equality.

The final solution suggested would be for the courts to reject second order benefits. The consequence, as stated earlier, would be the abolition of charitable trusts for the advancement of religion. All those religious organisations conferring tangible benefits on the public could gain charitable status for these activities under one or more of the other heads. Such an approach would certainly avoid the problems associated with those mentioned above, but the reality of such a fundamental step is very doubtful. The main obstacle would appear to be the fact that a purpose trust, to be valid, must be charitable. Therefore, organisations unable to claim charitable status under one of the other three remaining heads of charity would become, *ipso facto*, invalid. This obstacle could, however, be overcome by providing a statutory framework establishing special rules to be applied to non-charitable religious purpose trusts. Thus, if such organisations were immune from the beneficiary principle and the rule against perpetual duration, they could still receive donations from their members and the public, although these donations would be subject to normal taxation of course. However, I question whether such purposes should be immune from these long standing principles of equitable law, considering that there are a multitude of far worthier purposes that are not.

Not only is the principle of public interaction a baseless premise upon which to assume a public benefit, not that a benefit should ever be *assumed*, the courts have found it difficult to apply the principle with any consistency. This may be because it has never been explicitly recognised and explained as a legitimate judicial technique, or it may be because the principle is just fundamentally flawed. Perhaps the courts avoid confronting the issue head on, in order to avoid having to reconcile their reasoning with or distinguish it from the reasoning in *Gilmour*. Credit must be given to the creators of the principle, for it has furtively side-stepped the immense restrictions placed on religious charitable trusts by the aforementioned decision. It remains to be seen whether a future court will ever again attempt to restrict charitable status to those organisations who provide public benefits which are tangible. Unfortunately, however, the teachings of history suggest that any such attempt will not receive a very warm welcome from the courts of England.