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ROMAN CATHOLIC RELIGIOUS ORDERS AS CHARITIES

Judith Hill[1]

The purpose of this article is to consider the questions "What is a registered charity?" and "What does it mean to be a charity trustee?" with particular reference to Roman Catholic Religious Orders. These are both large subjects in their own right and will be covered here only in outline. Each question will be taken in turn, starting in each case with a general description of the situation applicable to all charities and then examining the more particular difficulties to which these concepts give rise in the case of Religious Orders, in an attempt to illustrate the general principles by examples.

"Registered Charity"

First, "What is a registered charity?" The simple answer is that a registered charity is a charity which is registered with the Charity Commission, but this does not take matters very far. It begs a number of questions. For example, can a charity be a charity if it is not registered? Why must a charity register? What is the effect of registration? What is the effect of failure to register? And so on.

It is appropriate, perhaps, to go back to first principles. What is a charity? The answer is: A charity is any organisation whose objects are exclusively charitable. This discussion will not examine the definition of what is or is not charitable according to English law. This is an even larger subject on its own than the two already being addressed. In addition, the definition of charity is currently under review and it may well be that the public debate initiated on this subject by the Deakin Report may result in changes to the legal definition of charity. This article will only deal with the current position. Very broadly, the legal definition of charity is an activity which falls under one of the four heads of charity defined by Lord Mcnaghten in the case of *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, namely the relief of poverty, the advancement of

[1] Judith Hill LVO, MA (Cantab), Partner, Farrer & Co, 66 Lincoln's Inn Fields, London WC2A 3LH. Tel: (0171) 242 2022 Fax: (0171) 831 9748.

education, the advancement of religion and other purposes beneficial to the public which fall outside the other three heads.

If, then, an organisation has objects which fall exclusively within that definition, then it will be charitable. The "exclusively" is important. If a charity has objects which are clearly, say, for the advancement of education but nonetheless are drawn so widely that they could possibly include activities which might not be charitable, then the organisation will not be a charity even if the trustees have no intention of going beyond what is charitable in what they actually do. This is because if such an organisation were charitable it would, in theory, be possible for its charitable assets to be applied towards something which was not charitable.

Assuming that an organisation does have charitable objects as described above, then under the terms of s.3 Charities Act 1993 it must register with the Charity Commission unless (a) it is exempt, (b) it is excepted, or (c) it has neither permanent endowment or use or occupation of land and its income is less than £1,000 a year.

Exempt charities are those which are set out in Schedule 2 to the Charities Act 1993, or have been declared an exempt charity by Order since 1993. They tend to be universities, educational bodies, grant-maintained schools, museums, etc. They are readily identified, since they are clearly defined in that Schedule, provided of course one keeps up with the new ones added thereafter (for example, Cranfield University, which became an exempt charity by virtue of the Exempt Charities Order 1993).

Excepted charities are a little more difficult to identify because they are excepted by virtue of a number of diverse statutory instruments. They include voluntary schools and the Boy Scouts and Girl Guides. They also include all charities associated with the Church of England and with the Methodists, Baptists, and Congregational and other non-conformist religions. Some charities connected with the Roman Catholic faith or the Church of Wales have been excepted individually, but such charities are not excepted as a general rule. To be excepted means that a charity is excepted from a requirement to register at the Charity Commission, but the Charity Commission's supervisory role does nonetheless extend to such charities, which is not the case with exempt charities.

Having established in what circumstances a charity must register, this raises two further questions: (a) what does registration do, and (b) what are the consequences of failing to register.

So far as the first question is concerned, it is perhaps more important to understand what registration does not do than what it does. Registration does not **bestow**

charitable status. It merely acknowledges and confirms it in an official form. If an organisation is charitable it will be so whether or not it is registered.

The consequence of this is that failure to register, or indeed removal from the Register, cannot deprive an organisation of charitable status since it exists independently of registration. The practical reason why most charities who are eligible to register would do so is because there are distinct benefits, particularly taxation benefits, attached to charitable status. To be registered makes it much easier to demonstrate to others that an organisation is charitable. If an incentive to register is needed, however, there is one. If an organisation which is charitable fails to apply for registration, then the Charity Commissioners can make an order requiring the trustees of the charity to apply for registration. If they fail to do so, then the Commissioners can apply to the High Court to deal with the trustees in the same way as it would if they had disobeyed an Order of the High Court. Thus, the obligation laid on charity trustees to register is one that can be enforced.

That deals with the narrower interpretation of the question "What is a registered charity?" The question, however, does also imply consideration of such a body's constitution. Having established that an organisation is a registered charity, what does that tell you about the form of its constitution? The answer is that it tells you nothing at all. Under English law there is currently no form of constitution which is specifically designed for a not-for-profit organisation. This situation is also currently under review but at the moment all registered charities use constitutional forms which were primarily intended for some other purpose. The forms adopted by charities are many and varied. The form adopted by any given charity will dictate the way in which that charity organises itself and carries out its administration but has nothing to do with whether or not such a charity is required to register - that, as we have seen, will depend on whether or not it is too small, exempt or excepted.

Types of Constitution

Charities can be constituted as companies, whether limited by shares or by guarantee, as trusts, as Royal Charter bodies, as unincorporated associations, as Industrial and Provident Societies, as corporations established by statute, or simply be established by Charity Commission Scheme.

The most common forms, however, are the trust, the company limited by guarantee, and the unincorporated association. The type of constitution chosen by a charity should reflect its organisational needs. Needless to say, in many cases it does not, either because the size and activities of the charity have changed over the years so that its original constitutional form is no longer the most appropriate

one, or simply because the charity was established in a somewhat haphazard fashion initially and very little thought was given to the constitutional form that would be most appropriate. Where a charity does find itself established with an inappropriate constitutional form, this can be changed and very often is.

Constitution of a Religious Order

Religious Orders, however, as with so many aspects of their activities, bring into the picture an extra dimension. This is because Religious Orders effectively have two constitutions. On the one hand, the entire life of the Order will be governed by its religious constitution established originally by the Order's founder and set out in various forms such as rules, statutes or a constitution. This will describe not only the purposes which the founder had in mind in establishing the Order, but will also cover such matters as the roles and responsibilities of the Superiors of the Province and of the various houses and the constitution of Provincial Councils, etc. At first sight, therefore, it would appear that this constitutional form should be all that any Order requires to run itself and its affairs. That is not, however, the case. This is so for two reasons:

(1) For the Charity Commission to be able to register a constitution it has to be in a constitutional form recognised by English law. Notwithstanding the wide variety of choice listed above, the average constitution of a Religious Order does not really fit into any of those forms. It could only qualify as an unincorporated association, but by and large such constitutions are not in a form which would be easily recognised as an unincorporated association if placed on the Register as such.

(2) The English law relating to charities, and hence the Charity Commission, is not concerned with the life of the members of the Order, or indeed with the administrative structure of the charity, but only with the application of charitable property, and it is that aspect which often is insufficiently dealt with by the religious constitution of an Order.

Consequently, over the years most Religious Orders will have devised a form of constitution which deals with the administration of the charity property (i.e. all the property belonging to the Order) and it is that document which will be registered with the Charity Commission.

This creates two difficulties. First, it leads to the feeling amongst members of the Order that there are, in fact, two separate entities involved. On the one hand, the Order and, on the other hand, the charity. This is all the more understandable because the Order is usually far larger than the English Province which is all that

the Charity Commission registration will cover. This in turn can give rise to a feeling that some property belongs to the charity and other property belongs to the Order. This cannot be right. The requirement to register in the first place attaches to the Order's property as being applied for charitable purposes. Thus all the Order's property must belong to the charity and this rather suggests that for a perfect legal concept the Order (or at least the English Province) must be the same thing as the charity. This is reinforced by the second difficulty referred to above, namely that in reality it is almost impossible to distinguish between the life of the Order and the application of its property. The Order's property is inevitably interwoven with the activities of the members of the Order on a daily basis. They will not only use it to maintain themselves but also to benefit others in accordance with the principles laid down by the Order's founder.

The practical consequence of all this is that the only way in which these two potentially conflicting sources of constitutional rules can be reconciled is for matters to be so arranged that the rules dictating the hierarchy for the decision making process in relation to the application of property reflect (or at least do not compete with) the rules which govern the hierarchy for the decision making process relating to the life of the members of the Order generally.

All too often this is not the case. A Religious Order's property is often held on outdated trusts which are very often simply the trusts which were declared in relation to the first piece of land which was ever purchased in this country by the Order. That will be the document which is registered with the Charity Commission as the Governing Instrument of the charity as a whole.

The terms of this trust document often bear no relation to the rules of the Order and even less to what actually happens in practice.[2] Those who are named as charity trustees in the trust document are, as we shall see, under a duty to be responsible for the final decisions relating to the application of that property. In reality, those who are the trustees at any time are often simply not in a position to make that final decision. This is because, under the rules of the Order, which obviously supersede the provisions of the trust for the Order's purposes, they are required to obey some other person. Where that is the case the best course would be that the constitution registered with the Charity Commission should be reviewed and amended. In considering how that might be done, it is often easier to reflect the rules governing the Order in the form of a corporate structure, i.e. as a company limited by guarantee, than as a trust.

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2 For an example of difficulties which have arisen in this regard, see: *Gunning v Buckfast Abbey Trustees Registered* (1994) *The Times*, 6th July.

"Charity Trustee"

All this brings us neatly to the second question, namely "What is a charity trustee?"

It may be surprising to learn that just because an officer of the charity is called a trustee it does not necessarily mean that he or she is, and if an officer of a charity is called something else, for example a governor, it does not necessarily mean that he or she is not a charity trustee. This rather curious statement is as a result of the definition of charity trustees which is contained in s.97 Charities Act 1993. According to that section "Charity trustees means the persons having the general control and management of the administration of the charity". That means that the people who actually make the final decisions as to how the charity should be run, whatever their title may be, are, for the purposes of the Charities Acts, the charity trustees. This will include the directors of a charitable company, the committee members of a charitable unincorporated association, etc. There may well be within the organisation a group of people who are called "trustees" but whose role is simply to hold and, where appropriate, invest the assets of the charity and who must administer them in accordance with instructions given by another group of people. In that situation the trustees are not the charity trustees for the purposes of the Act - that role falls on the body of individuals who have the power to tell the trustees what to do with their assets.

Responsibilities and Duties of Charity Trustees

What, then, does it mean to be a charity trustee within the definition contained in the Act?

1. The first point a charity trustee should bear in mind is that, by taking on that role, he or she has undertaken, when acting in relation to the charity, a primary duty to the charity. Everything that a charity trustee does must be (in his or her opinion) in the interests of the charity. This can, as we shall see, lead to conflict situations where, by virtue of being a trustee of one charity, the trustee also becomes a trustee of another.

2. A charity trustee is also responsible in the final analysis for everything which the charity does. It is quite difficult for a charity trustee to say that he is not responsible for something that happened because he did not know that it was going on. It is the duty of a charity trustee to ensure that systems are in place to make sure that he does know what is going on.

3. The third consequence of being a charity trustee is that he or she is under an obligation to carry out his or her duties with a very high standard of care. This overrides everything else and can be described as an obligation to exercise, in carrying out the charity's affairs, the standard of care which a prudent businessman would exercise in carrying out his own. This overriding duty encompasses a series of other duties which will not be listed here in detail. The most important might be said to include the following:

   (a) A duty to protect the assets of the trust;

   (b) A duty not to delegate the decision making role;

   (c) A duty not to profit from his trust; and

   (d) A duty to comply with the terms of the trust.

   It is perhaps easiest to understand the implication of all this from some examples of how it works in practice:

   The duty to protect the trust's assets involves a duty to maximise not only those assets but also any potential assets. This can lead to the trustees being required to act in a way that might seem almost immoral. Should the trustees be in the throes of selling some property and have been negotiating with one purchaser to sell at a certain price but have not reached the point of exchanging contracts, if some other purchaser comes along offering more money, then strictly the trustees are under a duty to reject the first purchaser in favour of the second. Similarly, if the charity is offered a gift by someone whose principles the trustees do not regard very highly, they ought in theory nonetheless to accept the gift. Where the donor regularly acts in a way which is in complete contradiction to the purposes of the charity, the Charity Commission might look sympathetically on a request for authorisation to reject the gift, but it would be a rash trustee who would reject it out of hand without the protection of such authority.

   Another example would be the duty of a trustee not to profit from his trust. This means that, as a general rule, unless authorised by the charity's governing instrument, the trustee must act without payment for his work.

   As another example, the duty to comply with the terms of the trust means that trustees must not apply their charitable monies for any purpose which

> falls outside the terms of the trust, even where that purpose is entirely charitable. A trustee of a charity the objects of which are to further education cannot use the funds of that charity to relieve poverty, however charitable such relief might be. Similarly, where an individual leaves a Religious Order there must be some question as to whether or not a substantial payment made to that individual could be justified as complying with the terms of the trusts applicable to the Order's property.

It would, of course, be possible to continue for some time in this vein. Perhaps the examples given are sufficient to show that the legal duties of a trustee do present a large number of practical problems when they are applied to everyday experience.

The duties of trustees are, of course, only enforceable if there are penalties for failure to comply with them.

For most individuals the penalty which is foremost in their minds is that of personal liability. A trustee who acts in breach of trust and as a result causes loss to the trust fund is liable to make good that loss out of his personal assets.

There are, however, other penalties, not least the various powers which the Charity Commission now has under the Charities Act 1993, culminating in its power to remove a trustee of the charity altogether. In addition, many breaches of trust are now, again by virtue of the Charities Act 1993, criminal offences.

Trustees of Religious Orders

Let us now consider the particular application of all this to those who are trustees of Religious Orders.

In many ways a trustee of a Religious Order finds it easier to comply with these duties than somebody who is acting as a trustee on a part-time voluntary basis and whose life is involved in doing many other things. It is easy for a member of a Religious Order to act only in the interests of the charity and, indeed, to know what is going on within it because the charity will be an integral part of his or her life.

Equally, personal liability as a sanction is unlikely to cause major concern to those who own no property of their own.

On the other hand, as we have seen, it can be difficult for a trustee to comply with his duty not to delegate the decision making process to another where he is also under a duty to follow the instructions of his superior.

Another aspect which often does cause concern to members of Religious Orders is the duty of a trustee not to profit from his or her trust. Where it is the trust property which feeds and clothes the trustee, the benefit to that trustee from the trust property is fairly obvious. There is an answer to this problem in the 1933 case of *The Convent of the Blessed Sacrament v IRC* (1933) 18 TC 76. In that case it was decided that the nuns running a school were also the beneficiaries of the charity. It would seem to follow from this, therefore, that members of a charity which is a Religious Order, and who are its trustees, can also be beneficiaries of it and thus entitled to this benefit.

The area, however, where there seems to be the most doubt as to what it means to be a trustee in the context of a Religious Order is in relation to schools run by Roman Catholic Orders. There must be a good deal of doubt as to the legal status of the governors of schools which are owned by Roman Catholic Orders. A situation which is by no means uncommon is one where a Religious Order owns a number of different enterprises, including, say, hospitals, homes, hospices and a school. That school may, depending on funding, fall within a number of different types. At one end of the scale it may be completely independent, being funded by school fees and the Religious Order's own funds. In that case there is no statutory requirement for there to be any governors as such and the problem does not arise. If, however, it is in part funded by the Local Authority or Central Government, then the situation is very different. The various Education Acts require that there should be governors appointed for the school. How they are appointed and by whom and in what proportions the interests are balanced will depend on the type of school in question, but the responsibilities of those governors are by statute the same and range from deciding school policy, through such matters as disciplining and dismissing staff, ensuring that the national curriculum is delivered, approving the school's budget, and controlling the school's premises, to preparing a written annual report for parents. All of this sounds very much like "having the general control and management of the administration" of the school. This, as we have seen, is the definition of what constitutes a charity trustee.

School Governors as Charity Trustees

We have already seen that at one end of the scale falls the totally independent school which can be governed in any way that the charity owning it wishes. At the other end of the scale is the grant-maintained school. The legislation

establishing grant-maintained schools makes it clear that the grant-maintained school is a separate exempt charity. This means that where a school which belonged to a Religious Order has become a grant-maintained school, the legislation has, in effect, removed that school from the ownership of the Order and given it to a new charity which has been established by virtue of the legislation. Precisely what the governing instrument of that charity looks like is another question, but one which falls outside the ambit of this discussion. With a grant-maintained school, therefore, it is quite clear that the governors are the trustees and the charity of which they are trustees is simply the school itself. This will, incidentally, bring its own difficulties for those trustees of the Religious Order who also become governors of the school. As trustees of the Religious Order as a whole, they must have concerns for all the enterprises carried on by the Order and indeed for the needs of the Order itself. These needs may well conflict with the more parochial needs of the individual school. The reconciliation of that conflict can be a very difficult one for those finding themselves in this position.

Difficult though it may be, however, the position is at least clear.

This is by no means the case with other types of school, for example voluntary controlled or voluntary aided schools. As we have seen, they must by law have governors and, as we have also seen, those governors have statutory responsibilities which look very much like the duties of charity trustees. The temptation, therefore, is to say that they must be charity trustees. The problem, of course, is identifying the charity of which they are trustees. The school, being part of a much larger charity, is not usually separately legally constituted and as a matter of legal concept it is difficult to see how they could be trustees of part of a charity which does not have separate trusts declared in relation to it. This might perhaps lead one to suggest that they are **not** charity trustees. This, however, would seem to be contradicted by the 1989 case of *Andrews v The Trustee of the Roman Catholic Diocese of Westminster*. In that case the Court of Appeal held that the trustee of the Religious Order, which was the owner of a voluntary aided school, did not have the power to remove governors who were acting in a way that conflicted with the wishes and interests of the Order. This would suggest that the trustees do not in the case of such schools have the ultimate "general control and management of the administration" of the school, whereas, as we have seen, the governors clearly do.

There does not seem to be a clear legal answer to this conundrum. The difficulty arises as a result of legislation being made by those focusing on one aspect of a situation only. It is clear the legislators did not have in their minds when drafting this legislation the particular problems which confront schools belonging to Roman Catholic Orders in these circumstances.

The pragmatic approach, perhaps, is to say that school governors clearly do have considerable potential liabilities against which they should be protected by insurance. They also have very clear statutory responsibilities with which they must comply. This perhaps means that, from the point of view of the governors themselves, they may not have to worry very much about whether or not they are also charity trustees. Such an unsatisfactory resolution to the problem, however, does leave the Religious Orders in a very uncertain position as to precisely what their role and responsibilities with regard to these schools are.

In summary, therefore, it seems clear that the difficulties which all charity trustees have in interpreting their duties as trustees in practical situations are compounded when those trustees are trustees of a Roman Catholic Religious Order.