CAMILLE AND HENRY DREYFUS FOUNDATION INC v INLAND REVENUE COMMISSIONERS

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Introduction

This article considers *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners*,[2] referred to hereafter as '*Camille*', which decided that a foreign charity was not a qualifying charity for the purpose of English charity tax reliefs. It was decided in 1956 by the House of Lords and is significant because although a tax case it has influenced the legal definition of charity ever since. The case left open a number of issues. First, can a foreign charity which derives all its income and carries out all its activities in the England and Wales successfully argue that it is a charity? Second, can a foreign charity establish an English charity which it controls to raise funds in England and Wales and transfer those funds back to the foreign charity? References in this article to a 'foreign charity' generally refer to a non-Finance Act 2010 charity; in other words non EU or Norway and Iceland charities. Charities recognised by the Finance Act 2010 are explained later in this article.

It is a timely moment to revisit these issues because the territorial limits under English law have been widened out by the Finance Act 2010 for the purpose of EU charities claiming charity tax relief and operating in England and Wales. This development adds a qualification to the *Camille* decison which also needs to be explained.

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2 [1956] AC 39 (HL).

The Facts

The facts are straightforward. In this case a corporation was a body incorporated in the State of New York. The territory in which the corporation principally operated was the USA but it could operate abroad. Its objects were exclusively charitable according to the law of the United Kingdom. These objects could be summarised as the advancement of education in the science of chemistry and chemical engineering. There were restrictions in the corporation's certificate of incorporation restricting its income from providing benefit for any private member or individual and stipulating that no member, director, officer or employee of the corporation could be lawfully entitled to receive any pecuniary profit any kind except reasonable compensation for services in effecting one or more of its purposes. The corporation was resident outside the United Kingdom and had never conducted any operations in the United Kingdom. The corporation applied to the Inland Revenue for exemption from income tax in respect of the corporation's income derived from certain royalties in the United Kingdom on the grounds that the corporation was 'a body of persons' 'established for charitable purposes only' under section 37(1) (b) of the Income Tax Act, 1918 and entiltled to a tax exemption.

The Decision

Although a House of Lords decision, one has to look back to the Court of Appeal[3] to see the reasoning that was accepted by the House of Lords. In the Court of Appeal,[4] Lord Evershed MR said that as a matter of principle some charitable purposes such as the advancement of religion and the relief of poverty would be regarded as being for the benefit of the community of England and Wales if carried out overseas but could see considerable difficulties where the purposes were for the provision of soldiers or the repair of bridges or causeways in a foreign country.[5] He concluded[6] that 'for charitable purposes only' means for purposes which are for what the laws of England and Wales define as charitable and that a body could not be so established unless it is so constituted or regulated and subject to the jurisdiction of the Courts of England and Wales which alone define and regulate those purposes.

3 *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1954] Ch 672 (CA).

4 ibid 684-685.

5 ibid 685.

6 ibid.

However, Lord Evershed MR acknowledged[7] that there might be some scenarios where a foreign institution which derived all its income in England and Wales and carried out all its activities in England and Wales might successfully argue that it was a charity. This has yet to be accepted in English law but it might be possible to make a case using the general principle of charitable intent to create an English charity regardless of its form.

Charitable Intent

It is argued that where a 'foreign charity' holds property in England and Wales and there is charitable intent to carry out charitable purposes such an institution can be a charity. First, it will not have a governing document in a form commonly found in England and Wales but that is not fatal. According to English law an institution can be a charity without any formal governing document (or one expressed to be subject to English law). Second, nor does an institution need to be structured as a trust or corporate body. Third, it is also possible that a foreign charity could be a sham and in reality an English charity.

Taking the first point, the Court has never set great store by governing documents so long as it can satisfy itself that there is property subject to a charitable trust[8] or a charitable company.[9] They have been described as a[10] 'mechanism provided for the time being and from time to time for holding its property and managing its affairs,' and[11] 'mere machinery for achieving the purposes'.

In *Re Vernon's Will Trusts*,[12] the fact that a charity had ceased to exist did not prevent the Court from applying a legacy *cy-près* where the purposes of the charity were carried on by another body. Buckley J said:[13]

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7 ibid 684-685.

8 *Re Bennett* [1960] Ch 18 (HC) 26 (Vaisey J).

9 Even though a charitable company does not hold its general property on trust it does hold its property subject to a legal obligation to apply its property for charitable purposes: see *Liverpool and District Hospital for Diseases of the Heart v AG* [1981] 1 Ch 193 (HC). Further Charities Act 2011, s 353(1)(a) defines 'trusts' in relation to a charity as meaning the provisions establishing it as a charity and regulating its purposes and administration whether those provisions take effect by way of trust or not.

10 *Re Vernon's Will Trusts* [1972] Ch 286 (HC) 304.

11 ibid.

12 *Vernon's* (n 10).

13 ibid 304.

> In such cases the law regards the charity, an abstract conception distinct from the institutional mechanism provided for holding and administering the fund of the charity … .

It should also be noted that the *cy-près* power contained in Section 62 Charities Act 2011 confers a power on the Commission to alter[14] 'the original purposes of the charitable gift'. It is not necessarily a power to amend the purposes as set out in the governing instrument of the charity. It could involve a scheme with new charitable objects and administrative provisions[15] or it could involve transferring the property to another charity.[16] The emphasis in section 62 Charities Act 2011 is on the intention of the donor and the effective application of property for charity.

It is also an established legal principle that the purposes and administrative provisions of a charity's governing instrument may change but the charity remains in being and can, for example, receive legacies left to it in a will prior to the date when the changes were made.[17] The crucial point being that the intention of the donor is paramount. In this context, the provisions of a governing instrument are regarded as the means to the charitable end:[18]

> … and so long as the charitable end is well established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided.

The Court will give effect to charitable intention where property is given to the charity upon charitable trusts by way of a scheme where the trust machinery has not been provided for by the donor or has failed.[19]
A charity may have an informal governing instrument where, for example, it is constituted by oral trusts.[20]

It possible that a charity's governing instrument (formal or informal) is not expressed to be subject to English law or even the jurisdiction of the English Courts but its property is nevertheless preserved for charity. It is therefore more important to look at the intention of the donor rather than the governing instrument to determine whether property is held for charitable purposes.

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14 Charities Act 1993, s 13(1).

15 ibid, ss 13 and 16(1)(a).

16 ibid, ss 13 and 14B(2)(b).

17 *Re Lucas* [1948] Ch 424 (CA) 426-427 (Lord Greene MR).

18 *Re Faraker* [1912] 2 Ch 488 (CA) 495 (Farwell LJ).

19 *Paice v Archbishop of Canterbury* (1807) 14 Ves 36, 83; *Re Burley* [1910] 1 Ch 205 (HC).

20 ibid.

Taking the second point, where property is given to charity without being constituted as a corporate body[21] or as a trust then the Court will have no jurisdiction[22] and the Crown as *parens patriae* will act as the constitutional trustee[23] and apply the property by way of Royal Sign Manual.
Thirdly, the court is entitled to look at the common intent of the parties to see if the charity is in fact a sham. The leading case on the law of sham is *Snook v London and West Riding Investments*[24] where Diplock LJ summed up a sham in the following terms:

> It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give third parties or the court the appearance of creating between parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

Diplock LJ stressed that there must be a common intention:[25]

> But one thing I think is clear in legal principle, morality and the authorities … that for acts or documents to be a 'sham' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of the 'shammer' affect the rights of a party whom he deceived.

So, for example, where a foreign charity is set up for the purpose of avoiding the English court's jurisdiction the court would be entitled to look beyond the document and look at the true intention which in this context would be to create an English charity.

Accepting that a foreign charity with English charitable purposes holding property in England and Wales can be a charity for the purposes of English law resolves the problem identified in *Guadiya Mission v Brahmachary*.[26] In this case, Oliver J pointed out that it was illogical for the breakaway group to be accepted as within jurisdiction because it was governed by a registered English charity but not another

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21 See n 10.

22 *Bennett* (n 8) 26 (Vaisey J).

23 *Paice v Archbishop of Canterbury* (1807) 14 Ves 364, 372 (Lord Eldon).

24 *Snook v London & West Riding Investments* [1967] 2 QB 786 (CA) 802.

25 ibid. See also *Hitch v Stone* [2001] STC 214 (CA).

26 [1998] Ch 341 (CA).

part of the congregation pursuing similar charitable activities in the same place and at the same time but governed by a foreign charity. It also resolves the problem of supervision. If foreign charities are not subject to the jurisdiction of the High Court then this could create an opportunity for those wishing to avoid the supervision of the High Court and the Charity Commission by establishing a charity in a less assiduous foreign jurisdiction and conducting all or part of its operations there.

Having established that in certain circumstances a foreign charity can be a charity for the purposes of English law, the next question is whether there are any particular arguments or legal principles that could justify refusing foreign institutions with English charitable purposes recognition that they are charities, in certain circumstances, according to English charity law.

What Are the Arguments for Restricting Charitable Status to Institutions Which Have Governing Documents That Are Expressed To Be Subject to English Jurisdiction?

A few arguments for restricting charitable status to institutions with governing documents that are subject to the English jurisdiction (either expressly or by implication) have been raised and range from administrative difficulty caused by ascertaining the relevant foreign law as to the purposes and then determining whether those purposes are charitable according to English law,[27] through to an encroachment upon the sovereignty of a foreign state.[28] Neither presents obstacles.

The 'encroachment of sovereignty' argument is only a theoretical objection because where foreign charities holding property and carrying out their activities in England and Wales are in reality English charities then the court is just applying its jurisdiction over an English charity.

The objection that there would be administrative difficulty caused by ascertaining the relevant foreign law is not a difficulty at all because the English court, in ascertaining whether foreign purposes were charitable according to English law, would only be carrying out the same analysis as it does when determining whether any purposes can be charitable accordingly to English law.

Developments in the law of taxation make the idea of acceptance of a foreign charity holding property in England and Wales more of an acceptable proposition.

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27 *Camille* (n 3) 702-703 (Jenkins LJ).

28 *Guadiya* (n 26) 356 (Leggatt LJ).

'Charity' for the Purposes of Tax Reliefs

Camille was a tax case concerned with whether a foreign charity with charitable purposes identical to those accepted as charitable in English law could claim English tax reliefs. The decision was that they could not but recent European cases have to a certain extent moved the debate on. In the *Stauffer* case[29] an Italian foundation which had charitable status in Italy owned commercial premises in Germany. The foundation would have been entitled to tax exemption in Germany because the German tax code did not require the charitable purposes to be for the benefit of German nationals. It was nevertheless taxed on its rental income in Germany because its seat and management were in Italy. The foundation succeeded in its argument that under article 73 b of the EC Treaty (now article 56) any restriction on capital movements between Member States was forbidden and, in this case, the fact that tax exemption for rental income applied only to charitable foundations which had their seats in Germany constituted an obstacle to the free movement of capital.

The *Stauffer* case was followed by the the Persche[30] decision which concerned a German resident who sought in his tax return to deduct as a special expense the value of towelling and other articles which he had donated to a children's home in Portugal that was recognised there as a charity but was refused on the ground that the relevant German law, which provided for such deduction if certain conditions were met, only applied in the case of charities established in Germany. The European Court of Justice held that where a taxpayer claimed a deduction for tax purposes of a gift to a body established and recognised as charitable in another member state, article 56 precluded legislation of a member state which, in relation to charitable gifts, allowed a tax deduction only for gifts to charitable bodies established in that state without giving the taxpayer the opportunity to show that a gift made to a charitable body established in another member state satisfied the requirements imposed by the legislation for the grant of the deduction.

The effect of these decisions was that the UK Government passed legislation to create a new definition of 'charity' for the purpose of charity tax reliefs. This is contained in the Finance Act 2010 and requires a charitable company or charitable trust[31] to be: (a) established for charitable purposes only, (b) meet the jurisdiction condition, (c) meet the registration condition, and (d) meet the management condition.[32]

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29 *Centro di Musicologia Walter Stauffer v Finanzamt Munchen fur Korperschaften* [2009] 2 CMLR 31 (ECJ).

30 *Persche v Finanzamt Ludenscheid* [2009] PTSR 915 (ECJ).

31 Finance Act 2006, sch 6 pt 1(2).

32 ibid sch 6 pt 1(1)(a)-(d).

Established for Charitable Purposes Only

The definition of charitable purposes is now contained in the Charities Act 2011,[33] being charitable purposes which are defined in a list of charitable purposes[34] contained in the Act which must be for the benefit of the public.[35] However, unlike the Charities Act 2011,[36] the definition applies regardless of where the institution is established.[37]

The Jurisdiction Condition

The institution meets the jurisdiction condition if it is subject to the control of either a court in the UK or any other court in the EU[38] or another country specified in regulations.[39]

Registration Condition

To meet the registration condition[40] an institution needs to satisfy any registration requirement under the Charities Act 2011[41] or that the institution has complied with any equivalent registration requirement under the law of a territory outside England and Wales.[42] Further, in order to be registered as a charity the charity needs to satisfy the conditions of the Finance Act 2010 because Section 1 Charities Act 2011 says that the definition of 'charity' 'does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment'. In this case 'any other enactment' means the Finance Act 2010.

Management Condition

Unlike any requirement to be a charity under the Charities Act 2011 or the common law, to be recognised as a charity by HMRC the institution must have

33 Charities Act 2011, s 1.

34 ibid s 3(1).

35 ibid s 1(b).

36 ibid s 2(1)(b).

37 Finance Act 2010, sch 6 pt 1(4)(b).

38 ibid sch 6 pt 2(1)(a) and (b).

39 To date these have added Norway and Iceland.

40 Finance Act 2010, sch 6 pt 3.

41 Under Charities Act 2011, s 30.

42 Finance Act 2010, sch 6 pt 3(3).

managers which are fit and proper persons.[43] The management condition will be treated as being met if HMRC consider that the failure to meet the management condition has not prejudiced the charitable purposes of the institution[44] or that it is reasonable in all the circumstances for the condition to be treated as met.[45]

There are three observations that can be made. First, apart from the management condition there seems no reason why foreign charities could not be recognised as charities for all purposes if they were established for charitable purposes within a recognised jurisdiction. Second, as a quid pro quo of this exended recognition it could be argued that the management condition could be extended to become part of the criteria for acceptance as a charity. Third, the acceptance of EU and other countries specified in the regulations are charities for the purpose of charity tax relief begs the question why more countries are not recognised, particularly the Commonwealth counties and the USA which have a common law originally based on English law.

Charity for the Purpose of Charity Law

Having looked at the definition of 'charity' for the purpose of charity tax relief there is a need to look at the definition of charity more generally.

'Charity' is defined in section 1 Charities Act 2011[46] as:

> (1) For the purposes of the law of England and Wales, 'charity' means an institution which:
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> (a) is established for charitable purposes only,[47] and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities[48]
>
> (2) The definition of 'charity' in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.

43 ibid sch 6 pt 4(1).

44 ibid sch 6 pt 5(2)(a).

45 ibid pt 5(2)(b).

46 Charities Act 2011, s 1.

47 ibid s 1(1).

48 ibid s 1(2).

The reference to a definition of 'charity' in another enactment includes the definition of 'charity' contained in the Finance Act 2010.[49]

There are a few important points to make. Although the definition in the Charities Act 2011 is of general application in the sense that it does not just apply to the definition of charity for the purposes of registration it does not prevent the exercise of the Royal Prerogative through the use of the Royal Sign Manual to perfect imperfect charitable donations even though such donations are not subject to the jurisdiction of the Court with respect to charities.

Also it could be argued that the reference in the Charities Act 2011 to the need for charities to be 'subject to the control of the High Court'[50] refers to its jurisdiction over trusts and charitable companies and not to territorial limits.[51] One of the leading decisions[52] on the question of jurisdiction, which involved the court looking at whether jurisdiction had been ousted where a charity's governing document allowed a government minister extensive powers over the charity, concerned an English charity based in England.

Further, support for the idea that a charity need not be within territorial jurisdiction may be found in the judgment of Jacob J in *Re Carapiet*[53] where he observed that 'control of the High Court' did not mean presence within the jurisdiction because equity acts in personam and the Court can make orders and serve those orders against people living abroad.[54]

English Charities Established by Foreign Charities

There are further conceptual problems which were not dealt with by *Camille* but which, as a result of the decision, force non-Finance Act 2010 foreign charities to establish English charities if they want to qualify for tax reliefs. If a foreign charity establishes an English charity to raise funds on its behalf, which will then be transferred back to the foreign charity, the Charity Commission might challenge the charitable status of the English charity if its trustees are the same as those administering the foreign charity. This is because the Charity Commission takes the view that institutions must be independent to be charitable. Their views are set

49 See text to n 33 and n 34, and section entitled 'Established for Charitable Purposes Only', above.

50 Charities Act 2011, s 1(2).

51 See *Guadiya* (n 26).

52 *Construction Industry Training Board v AG* [1973] 1 Ch 173 (CA).

53 [2002] EWHC 1304 (Ch) [34]-[36].

54 ibid [36].

out in RR7 - *The Independence of Charities from the State*[55] which despite the title has more general application.[56] However, in RR7, the Commission appears to confuse a charity trustee's duty[57] to act in the best interests of the charity with the question of an institution being a charity which depends on the institution having charitable purposes according to the laws of England and Wales.[58]

The Commission also claim in RR7[59] that for an institution to be charitable it must exist in order to carry out charitable purposes and not to implement the policies of a government department or to carry out the directions of a government authority.[60] The point being that, according to the Charity Commission, the government is not charitable in law. The same argument could also apply to an English charity controlled by a foreign charity, which also is not recognised as charitable in law, except where provided for in the Finance Act 2010 for tax purposes.

It might be argued that if a charity is established in such a way that there is a high level of involvement by the foreign institution that the trustees are not subject to a legal obligation to carry out charitable purposes because the real objects of the institution are for carrying out the purposes of the foreign charity.[61] This is a doubtful assertion for two reasons. First, a high level of involvement by the foreign institution with English charitable purposes will not, as explained above, be fatal to charitable status.[62] Second, an institution which provides funding for a foreign charity will still be a charity so long as the foreign charity applies these funds for English charitable purposes.[63] This is the case even though its property may fall to be applied *cy-près* for other charitable purposes.[64]

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55 Version 2001.

56 See eg the Charity Commission's inquiry report into the World Children's Fund, dated 23 January 2009.

57 *Bray* v *Ford* [1896] AC 44 (HL).

58 The Charity Commission accepted this in their inquiry into World Children's Fund which is discussed later.

59 Charity Commission, *The Independence of Charities from the State* (RR7, Charity Commission undated).

60 ibid para 5.

61 By analogy with a charity carrying out government policies, see ibid para 6.

62 *Construction Industry Training Board* (n 52). By analogy with a charity carrying out government policies.

63 By analogy with a Government department, or for that matter a foreign government see: *Re Robinson* [1931] 2 Ch 122 (HC) where it was held that a gift to the Government of the German Reich, for the purposes of relieving wounded soldiers.

64 Charities Act 2011, s 62(1)(e)(i) provides for a *cy-près* application of charitable property where the original purposes, in whole or in part, have since they were laid down 'been adequately provided for by other means'.

The real issue in this type of case is not charitable status but rather a problem of governance. Classically an English subsidiary will be constituted as a charitable company limited by guarantee with the foreign charity as its sole member. This gives the foreign charity the right to appoint and remove trustees and amend the company's articles. In order to avoid conflicts of interest a majority of the trustees need to be independent from the foreign charity and that a quorum of the trustees can be formed with a majority of independent trustees. The trustees of the English charity need to exercise their discretion independently from the foreign charity as failure to do so would amount to a breach of trust. The Charity Commission inquiry into World Children's Fund covered these types of issues.[65] World Children's Fund entered into a contract with its parent World Children's Fund Europe CH whereby all income raised in the UK was remitted to the Swiss Foundation for distribution for charitable purposes. It was established by the Charity Commission that at the time the contract was entered into two of the three trustees of the English charity were also two of the three directors of the Swiss Foundation. The inquiry found that there were conflicts of interest and the Charity Commission required additional independent trustees to be appointed onto the board of the English charity and that the contract to remit all income to the Swiss Foundation be terminated so that the English trustees decided where the income of their charity was distributed.

The more serious problem for an English charity controlled by a non-Finance Act 2010 foreign parent could be a challenge by HMRC on the basis that its support of a foreign charity was non-charitable expenditure.[66]

Conclusion

In certain circumstances, despite *Camille*, it is open to the court to argue that a non-Finance Act 2010 foreign charity holding property in England and Wales is a charity for the purposes of English law. Where a non-Finance Act 2010 foreign charity establishes an English charity in England and Wales it will not face a loss of charitable status if the trustees simply channel funds back to the foreign charity but they might face questions of governance. *Camille* did not deal with these issues.

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65 See S Lloyd, 'Overseas relations' Charity Finance, May 2009, 40-41.

66 Although it will be charitable expenditure if the trustees take reasonable steps in the circumstances to ensure that they payment will be applied for charitable purposes; see Income Tax Act 2007, s 543(1)(f), pt 10.