The Charity Law & Practice Review

CHARITY AND A QUESTION OF SPORT

Peter Smith[1]

It is perhaps not surprising that the vision of the owner of an ocean racing yacht holding a trophy aloft in triumph should not commend itself to the court in *Re Nottage*[2] as meriting all the fiscal advantages which go with charitable status. Yet this late nineteenth century case established the principle that sport is not in itself a charitable activity: a principle which has become so firmly entrenched in the law's approach to cases concerning sport that attempts to circumvent it in clearly deserving cases have lead to confusion and inconsistency.

Advancement of Education

One way of avoiding the problems of sport which appealed to the courts was not to call it sport at all, but education. Thus in *Re Dupree's Deed Trusts*[3] the encouragement of the game of chess was held to be charitable as educational, inasmuch that it encouraged 'the qualities of foresight, concentration, memory and ingenuity', evidence having been adduced that it was 'a most useful training for the mind'. But such an approach had its limitations, for education appears to have been seen by the courts only as the development of the mind, not the body, and therefore only those activities which were cerebral in character, though they might involve competition, mental stamina, tactics, gamesmanship, etc., could legitimately be described as educational. So what of the national sports such as football and cricket, or athletics, how could these be educational? A partial solution was found by the House of Lords in *IRC v McMullen*:[4] the playing of sport is educational and therefore charitable if it is carried on in the context of

---

1 Peter Smith LLB, PhD, Barrister, Lecturer, Department of Law, University of Exeter. A Paper delivered to the 3rd Annual Conference of the Charity Law Association, Bristol, October 1997.

2 [1895] 2 Ch 649.

3 [1945] 1 Ch 16.

4 [1981] AC 1.

formal education in a school or university. Education as a whole, it may be argued, includes physical as well as spiritual, moral and mental elements, and therefore sport might be seen as an integral part of a young person's education. As Lord Hailsham put it:[5]

> "I reject any idea which would cramp the education of the young within the school or university syllabus, confine it within the school or university campus, limit it to formal instruction, or render it devoid of pleasure in the exercise of skill."

Such an approach had indeed been signalled many years earlier in the case of *Re Mariette*[6] where a gift to a school to build fives courts and fund an athletics prize had been held to be charitable on the ground that it furthered the educational development of the pupils in the widest sense.

But all these arguments that education imports the development of the body as well as the mind suddenly seem to disappear as soon as the young man or woman leaves school or university. And certainly as he or she leaves youth behind. No longer is the playing of sport charitable. But why? Has the game materially altered in some way, are the benefits to the participants any less? And what of education which we are now being told is a lifelong thing? Surely what is sufficiently beneficial to the educational development of young people is equally applicable to those who are older or who no longer enjoy education in a formal setting.

At least after *McMullen* we are able to deduce that sport in these rather special circumstances involving young people may be regarded as ancillary to educational purposes which are undoubtedly charitable, so that gifts to promote sport might in this way come within the ambit of charity. There does seem to have been some movement away from the strict requirement of linkage with formal education or some educational establishment, so long as young people of school or university age can still be said to be educated both in mind and body by the activity. A good example of this was the registration of The Cliff Richard Tennis Development Trust in 1991, which aimed to promote and facilitate the playing of tennis amongst schoolchildren.[7] Yet we must tread warily, for instantly another problem emerges, as it appears to be fatal to the charitable status of the sporting activity if the participants actually enjoy it, and engage in the sport for their own satisfaction. Here again the long arm of *Re Nottage* continues to influence judicial thinking. As Lopes LJ had suggested in that case:

---

5 At p 18.

6 [1915] 2 Ch 284.

7 Charity Commissioners Annual Report 1991, p 13, para 74.

> "[A] gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such a sport or game is to some extent beneficial to the public."

This is very evident in the case of *IRC v City of Glasgow Police Athletic Association.*[8] Though it was argued that by increasing the fitness and efficiency of the Glasgow police force, the public thereby would have derived a benefit from its existence, the association failed to establish charitable status, and the reason for this was quite clearly that their lordships considered that the members were deriving a personal benefit to which the public good was quite incidental. As Lord Reid put it:[9]

> "It may well be that considerations of public interest were the primary cause of the association being established and maintained: but I think that it is clear that all or most of the activities of the association are designed in the first place to confer benefits on its members by affording them recreation and enjoyment."

If the encouragement of sport seems to have been hedged around with such restrictions because of the focus on the participants, their youth (or lack of it) or the personal benefits which they might derive from it, then another avenue of possible development was opened up by the notion of providing recreational facilities in which sporting activities might take place.

Recreation

As long ago as the Charitable Uses Act of 1888, it was recognised by the legislature that the provision of land for use as a park or recreation ground by the public was charitable. Thus, in the case of *Re Hadden*[10] it was held that a gift of land to establish playing fields, parks and a gymnasium to give open-air recreation to as many people as possible was a valid charitable trust, in so far as it was aimed at benefiting the health and welfare of the locality. One area of dispute concerning such gifts, however, focused on whether the recreational facilities thus provided had to be in the open air to qualify. The Court of Appeal in Northern Ireland in *Valuation Commissioner for Northern Ireland v Lurgan Borough Council*[11] rejected the suggestion that an indoor swimming pool fell

---

8 [1953] AC 380.

9 At p 402.

10 [1932] 1 Ch 133.

11 [1968] NI 104.

within this category, Lord MacDermott LCJ taking the view that mere recreational facilities may not be regarded as charitable unless they are provided in the open air. The absurdity of such a distinction, however, is self-evident, and has not received any support. Indeed, on the contrary, the Charity Commissioners have not accepted this as an accurate statement of the legal position, and have decided that an indoor public ice-skating rink was charitable irrespective of the Recreational Charities Act.[12] This therefore appears not to be an issue, and many gifts for recreational purposes, such as village halls, appear to have tacitly relied on this understanding of the law. Thus recreation grounds,[13] open spaces[14] and childrens' playgrounds,[15] for the use of the public at large or the local community as a whole, have all attracted charitable status, and I would premise that this would extend to other community recreational facilities such as swimming pools, keep-fit centres, etc. The distinction between the provision of facilities and the encouragement of sport itself, however, is I believe somewhat artificial, and it is, in my view, slightly difficult to reconcile how a gift to promote the coaching of cricketers can be held not to be charitable,[16] when the provision of indoor cricket facilities would be charitable.

Yet again there were limits drawn across the way in which the law might be permitted to develop in this direction, and these emerged in the case of *IRC v Baddeley* in 1955,[17] when it became clear that the courts were not prepared to extrapolate general principles from the particular rules relating to land given for use by the community for recreation. Their lordships concluded that the provision of a playing field and recently buildings 'for the promotion of the moral social and physical well-being of persons resident in the County Boroughs of West Ham and Leyton in the County of Essex who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church....' failed as a charity as these were not purposes which were exclusively charitable in nature, being tainted by the inclusion of 'social' activities. There was therefore little real discussion of the possibility of this being a recreational charity. Viscount Simonds, however, suggested that a gift of land for use as a recreation ground by the community at large or by local inhabitants would constitute a valid charity, but reserved his opinion where such facilities were confined to a group comprising

---

12 *Oxford Ice Skating Association:* Charity Commissioners Annual Report 1984, pp 10-11, paras 19-25.

13 *Re Hadden*, supra; *Re Morgan* [1955] 1 WLR 738.

14 *IRC v City of London* [1953] 1 WLR 652.

15 *Re Chesters* (1934), unreported, but cited in *IRC v Baddeley* [1955] AC 572 at 596.

16 *Re Patten* [1929] 2 Ch 276.

17 [1955] AC 572.

members or potential members of a particular church.[18] Indeed, considerable doubts were raised in the case as to whether such a restricted group could ever satisfy the test of public benefit.

The case threw into high relief the non-charitable nature of social and recreational activities, and questioned the basis of the charitable status of many organisations which had hitherto believed they were charitable, such as village halls and Women's Institutes.

Recreational Charities Act

The response of the legislature was the Recreational Charities Act 1958. Here was an opportunity for sensible change to undo many of the rigours of the *Re Nottage* approach. But what we got was a curiously drafted Act where the notion of 'social welfare' was dragged into the equation of what might be regarded as a recreational purpose. Although it is clear that recreational and sporting facilities may now in principle be charitable, strict limits are applied as to what sort of gifts can qualify, for the facilities must either be available to the public at large (or female members of the public) or to people who have a need of such facilities by virtue of youth, age, infirmity or disablement, poverty or social and economic circumstances. Fall outside these criteria, and your gift to provide sporting or recreational facilities once again fails to be recognised as charitable. Nevertheless, the courts have now sensibly resiled from the requirement of social deprivation,[19] and recreational and sporting facilities open to the public generally, such as multi-sport centres, can now be charitable.[20]

There are therefore a number of ways in which charitable status might be extended to sporting gifts. But the limitations imposed on each of these are nicely shown in the application of Birchfield Harriers for registration as a charity, as taken from the Report of the Commissioners for 1989.[21]

As is well known, Birchfield Harriers is an athletic club based in Birmingham which enjoys an international reputation. The object of the club was expressed to be 'to encourage and promote interest in athletics for both sexes from the age of 10 years upwards'. Most members lived locally, many of whom were unemployed and from ethnic minorities. Some lived at a distance, but were attracted to the club by the competitive atmosphere and its national and international reputation.

---

18 At p 589.

19 See *IRC v McMullen* [1978] 1 WLR 664, [1979] 1 WLR 130.

20 *Guild v IRC* [1992] 2 AC 310.

21 Charity Commissioners Annual Report 1989, pp 13-16, paras 48-55.

The Charity Commissioners rejected the application, first of all on the basis of *Re Nottage* that the encouragement of mere sport was not of itself charitable, and there was an insufficient element of instruction to bring it within the scope of an educational purpose.[22] Secondly, that there was a 'thin but discernible line' between gifts whose main purpose was to improve the health and welfare of the public at large by the provision of recreational facilities for the community as in *Re Hadden,* and gifts whose main purpose was to encourage competitive sport for the benefit of the spectators or the enjoyment of the participants, and this club came into the latter category;[23] and thirdly, that it could not succeed under the Recreational Charities Act, as the requirements for social welfare as defined in the Act were not satisfied, nor was the necessary public benefit present as the facilities were available only to the club members.[24]

Now I am not criticising the Commissioners' decision in this case: given the law as I have tried to explain it, I think the result was a perfectly correct one. What I am critical of is the law which is incapable of recognising such an organisation as charitable when there would probably be very considerable support from the general public for some financial assistance from public funds for such an organisation. This is very different from the provision of a trophy for wealthy yacht owners to compete for, yet the law, it seems, cannot see that difference. Here is an organisation which contributes very substantially to the sport of athletics in this country, which gives pleasure to millions, and which provides a local outlet and a focus for young talented athletes, a good proportion of whom are from under- privileged backgrounds. It would of course have failed on the short ground that as a club with a defined membership, it was not open to the public at large or a section of the public, but to the extent that the law was incapable of recognising this activity as a charitable purpose because it was not carried out in the context of any formal education, was primarily aimed at encouraging excellence in the individual athlete, and was open to people who may not need these facilities by virtue of any of the criteria by which social welfare is defined in the Recreational Charities Act, this seems not to be in accord with what many people would see as being purposes worthy of charitable support. It is charitable for young people to play chess, but not, it seems, to learn to compete for their country.

I do believe that an opportunity was lost with the Recreational Charities Act 1958. I do not see why sport per se should not be made a charitable purpose, subject to the checks and controls which already exist with respect to those purposes beneficial to the community and the requirement of public benefit appropriate to that head of charity. This would seem to be consistent with the wish expressed

---

22 Para 52.

23 Para 54.

24 Para 55.

by the Commissioners as far back as 1985 to try to act 'constructively and imaginatively' when looking to see whether a purpose might be charitable within the spirit of the Elizabethan preamble.[25] It would also, I think, give sufficient scope to reject those gifts as charitable where, though peripheral to a sport, the actual purpose has little or no real value to the public at large. Of course, there may still be some problems; in particular it may be anticipated that a line would have to be drawn where a gift was to provide equipment and facilities which by their nature would benefit only the individual concerned or the privileged few whose interest was more in the personal enjoyment derived from the use of that equipment or facilities, notwithstanding that this may be in a competitive environment: I cannot see, for example, it being acceptable for a multi-million pound ocean-going yacht to receive charitable relief simply because from time to time it is sailed competitively, and I think it unlikely that any truly public element could be shown. Perhaps this takes us back where we started, to the provision of a trophy in a somewhat elitist sport where the public benefit test would be hard to satisfy. But if the educational and personal developmental aspects of physical sport could be appreciated as much as the benefits to the mind from education, then perhaps it would not be too great a step to make gifts to encourage training in a sport charitable, notwithstanding that the immediate goal may be individual excellence. This appears to be the post- *McMullen* line adopted by the Charity Commissioners, at least as far as young people are concerned, which can be seen in the registration of The Cliff Richard Tennis Development Trust mentioned earlier, and other similar activities such as skiing and rowing.[26]

If the encouragement of such sporting activities were itself to be made a charitable purpose, it would of course be subject to the test of public benefit.

Public Benefit

As it stands at present, spectators, however numerous, cannot supply that public benefit. There is the possibility of an indirect benefit which might be conferred on the public at large where the activity has a morally edifying or spiritually

---

25 Charity Commissioners Annual Report 1985, p 12, para 27.

26 Hubert Picarda QC, *The Law and Practice Relating to Charities*, 2nd. ed., London, 1995, p 120, nn 14 & 15.

uplifting effect on the public,[27] but it is doubtful that sport could be perceived as having that effect. Enjoyable, entertaining to the spectators, perhaps, but not primarily aimed at conferring any spiritual or moral benefits by example. Yet here there may be a disjunction between the law and public perception, for many would see it as strange that though a comparative few may enjoy looking at art or listening to classical music, which might be charitable, those millions who may derive great enjoyment from watching a sport are not recognised as satisfying any test of public benefit.

Conclusion

The Government today is looking at ways in which our young athletes and sportsmen and women might be encouraged and supported to compete more successfully on the world stage; an aim which is manifestly approved by the vast majority of the population of this country. As far back as 1976 the Goodman Committee[28] recommended that gifts for sporting purposes should be charitable. Perhaps the time has now come.

---

27 This is the basis of the animal cases, e.g. *Re Wedgwood* [1915] 1 Ch 113, per Swinfen-Eday LJ at p 122: they 'stimulate humane and generous sentiments in man towards the lower animals, and by this means to promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race', and of course finds direct expression in *Neville Estates Ltd v Madden*, [1962] Ch 832, where the local inhabitants were said to have received a benefit from observing members of the Jewish community attending its synagogue in Catford. Even this idea of 'edification by example' was once thought doubtful as being too vague, remote and intangible: Lord Simonds in *Gilmour v Coats* [1949] AC 426, at pp 446-7. See also Lord du Parcq at p 453.

28 Goodman Committee Report on Charity Law and Voluntary Organisations, p 38.