The Charity Law & Practice Review

# THE SPIRIT OF THE GIFT

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At the recent NCVO International Charity Law Conference Professor Rob Atkinson of Florida State University contended strongly that the doctrine of cy-près was in need of fundamental reform. He urged that trustees should be legally empowered to use the assets committed to their management in whatever way they determined would most advance the public good.[2] Christopher McCall QC however, replied firmly that no such dramatic reform was needed.[3] That view had previously been taken in the White Paper, "Charities: A Framework for the Future" which concluded that legislation in this area was inappropriate as the doctrine of cy-près has inbuilt flexibility.[4] It is the purpose of this article to consider, with particular reference to the concept of "the spirit of the gift", whether that conclusion was correct and whether the doctrine of cy-près is able to ensure that the contribution charities make to the wellbeing of the community remains a valid and relevant one.[5]

## The doctrine

The doctrine of cy-près provides that wherever a clear intention to devote property to charity has been shown, effect must be given to it. The law distinguishes between the charitable intention and the mode of executing it and makes provision for the charitable intention to be carried into effect cy-près, that is to say by substituting for the mode indicated by the donor another mode as similar as

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2 See (1993) 44 Hastings LJ 1111, "Reforming Cy-près Reform".

3 See his paper, "Cy-près reform - A contrary view".

4 (1989) Cm 694, p 37.

5 See [1993] Ch Comm Rep p 1, where the Chief Charity Commissioner referred to the importance of charities' contribution to the wellbeing of the community.

possible to the mode indicated.[6] The doctrine is limited in that it will only apply where the mode or purpose specified has become impossible or impracticable to perform. Further, if the original gift fails *ab initio* the doctrine will not apply unless the donor has shown a general, as opposed to a particular, charitable intention.

The requirement of impossibility or impracticability meant that a charity had to be virtually deprived of its objects before the doctrine could be applied. Thus property held for "the redemption of British slaves in Turkey or Barbary"[7] could be applied cy-près but not funds held to provide stockings for poor maidservants, as the purpose was still possible albeit inexpedient, uneconomic and inefficient.[8] Despite the occasional liberal interpretation of "impossibility" and "impracticability" by the courts,[9] statutory intervention was necessary to relax this condition and to render the doctrine a useful tool for ensuring the effective use of charitable resources.

## Statutory amendment

The need for statutory amendment of the doctrine of cy-près was recognised by 1853. The Bill introduced in that year, which was to become the Charitable Trusts Act 1853, contained a clause which would, *inter alia*, have permitted the Charity Commissioners to apply property cy-près where they were satisfied that the charity had no beneficial results. Unfortunately, that clause did not survive the passage of the Bill. The application of the doctrine as it applied to educational trusts was relaxed by the Endowed Schools Acts 1869 to 1948 and, as it applied to charitable trusts in the City of London, by the City of London Parochial Charities Act 1883. Any general relaxation of the condition of impossibility or impracticability had to wait until the Charities Act 1960.

The Nathan Committee, reporting in 1952, recommended[10] that the doctrine of cy-près should be relaxed to allow alteration by scheme in circumstances falling

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6 See *Mills v Farmer* (1815) 19 Ves. 483, 485 and Tudor *Charities* 7th ed. p 215.

7 *Ironmongers Co v Att-Gen* (1844) 10 Cl. & F 485.

8 The principle was that if the charity could be administered according to the directions of the founder it must be so administered - see *Re Weir Hospital* [1910] 2 Ch 124, 133 per Cozens-Hardy MR.

9 See *Re Campden Charities* (1881) 18 Ch D 310; *Re Dominion Student Hall Trust* [1947] Ch 183.

10 Report of the Committee on the Law and Practice relating to Charitable Trusts (1952) Cmd 8710, p 91.

short of the original objects having become impracticable, by prescribing circumstances in which obsolescence could be assumed. They further recommended that limitation should be placed on the power to alter objects by requiring the scheme-making authority to have special regard to "the spirit of the intention of the founders".[11] The resultant legislation was section 13 of the Charities Act 1960, now section 13 of the Charities Act 1993. Section 13(1) provides as follows:

> "Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows:
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> (a) where the original purposes, in whole or in part:
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> (i) have been as far as may be fulfilled; or
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> (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or
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> (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or
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> (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or
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> (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or
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> (e) where the original purposes, in whole or in part, have, since they were laid down:
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> (i) been adequately provided for by other means; or

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[11] The words were taken from the Education (Scotland) Act 1946 s.116 which gave the Secretary of State power to frame schemes for educational endowments in Scotland.

(ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the sprit of the gift."

Although section 13 extended the doctrine of cy-près by specifying circumstances beyond impossibility and impracticability in which the doctrine could apply,[12] a considerable problem remained in relation to small charities whose objects were no longer useful or practicable but for whom full scheme-making procedures were inappropriate. The Charities Act 1985 introduced new and simpler mechanisms to allow certain local charities for the poor to alter their objects and to allow small charities to amalgamate or, if endowed, to spend capital as income by resolution of the trustees. Before objects could be altered or funds transferred the trustees were bound to have regard to "the spirit of the gift".[13]

The provisions of the 1985 Act were not used to the extent anticipated and the problem with small outdated charities remained. Sections 43 and 44 of the Charities Act 1992[14] therefore widened the application of the original provisions by removing restrictions as to the type of charities and raising monetary limits. Moreover, the requirement for trustees to have regard to "the spirit of the gift" before transferring funds to another charity or modifying objects was removed; trustees merely have to consider whether the existing purposes have ceased to be conducive to a suitable and effective application of the charity's resources.[15] Charities with more substantial resources still have to comply with section 13 before any alteration to their objects can be made.

## The spirit of the gift

Four of the five circumstances set out in section 13(1) in which property may be applied cy-près require that attention be given to "the spirit of the gift". The meaning of this limitation on the exercise of the doctrine of cy-près was considered

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12 *Re Lepton's Charity* [1972] 1 Ch 276, 284 per Pennycuick VC; *Forrest v Att-Gen for Victoria* [1986] V R 187, 190 per Nathan J.

13 Charities Act 1985 ss.2(2)(b), 3(2)(b).

14 Now ss.74 and 75 of the Charities Act 1993.

15 See Charities Act 1993, s.74(4)(a), (5)(a). It has now been accepted in principle that even this condition should be removed - Deregulation Report of the Charities and Voluntary Organisations Task Force (1994) p 17.

in *Re Lepton's Charity*.[16] The case concerned a charity established in 1715 under which land was held on trust to pay the minister of a chapel £3 a year, out of then total rental income of £5, and the rest of the income to the poor; at the date of the hearing the income had risen to £791. Pennycuick VC considered that the "spirit of the gift" was equivalent in meaning to the basic intention underlying the gift, that intention being ascertainable from the terms of the relevant instrument read in the light of admissible evidence.[17] On that basis he was able to hold that for the minister to take £3 a year out of a total income of £791 was not within the spirit of the gift; the underlying intention being that the income was to be divided in such a manner that the minister took what was then a clear three-fifths of it. The doctrine of cy-près could thus be applied and the amount payable to the minister was increased to an agreed sum of £100 which Pennycuick VC accepted was reasonable.

The meaning of "the spirit of the gift" was considered further in *Peggs v Lamb*[18] a case involving two ancient charities for the benefit of the freemen and widows of the borough of Huntingdon, the documents to which had been lost. The absence of the founding documents did not preclude the existence of any spirit of the gift and hence the limitation on the exercise of the doctrine of cy-près. The spirit of the gift had to be inferred.[19] In the particular case, Morrit J considered that the original basic intention or spirit of the gift was the benefit of the borough of Huntingdon and, accordingly, directed the settlement of a scheme under section 13(1)(d) extending the class of beneficiaries from the freemen to the inhabitants as a whole.

Clearly, the requirement to consider the spirit of the gift when determining whether a cy-près occasion has arisen within section 13(1) is capable of operating as a brake on the use of the doctrine of cy-près. This was tacitly recognised by Parliament when the condition was removed from the small charities provisions.[20] The limitation remains, however, in section 13 and a rigid approach to the search for the basic intention underlying the gift could severely limit the use of that section as a means of updating charities. For example, if Morrit J had held, as was urged upon him, that the spirit of the gift in *Peggs v Lamb* was the benefit of

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16 [1972] Ch 276.

17 ibid, 285. Pennycuick VC had regard to *Re Campden Charities* (1881) 18 Ch D 310. In that case James LJ referred, at p 333, to 'the spirit of Lady Campden's gift' and Jessel MR, at p 328, to 'the principal object which the testatrix had in view'.

18 [1994] 2 All ER 15.

19 ibid, 36.

20 See the text at fn. 15 above.

the freemen, it would not have been possible to apply the property cy-près until the number of freemen was reduced to such number that they could no longer be said to be a section of the public.[21] The effect of a flexible approach to the concept of the spirit of the gift can be seen from the way in which the Australian equivalent of section 13 has been interpreted.

### *Forrest v Attorney-General for Victoria*

Section 2 of the Charities Act 1978 of the State of Victoria is identical in terms to section 13 of the Charities Act 1993. The section was considered in *Forrest v Attorney-General for Victoria*[22] in connection with an application that a scheme be settled in respect of the will of Hans Henri Hecht. The testator had died in 1965 and his will directed that the balance of his residuary estate should be held as a common fund in perpetuity and the income therefrom paid to authorised charities; authorised charities being, in effect, charities extant at the date of the testator's death. The trustees wished to invoke the cy-près doctrine to remove the condition restricting the class of recipients to those charities in being in 1965.

Nathan J accepted the definition of "spirit of the gift" in *Re Lepton's Charity*[23] and held that the intention of the testator was that his estate should be administered in perpetuity for the widest possible class of beneficiaries. In coming to this conclusion he considered the terms of the will and concluded that the closure of the class of potential recipients was directed to avoid duties and maximise the amounts to be distributed to charities. Even though only twenty years had elapsed since the testator's death, Nathan J held that the original purpose could no longer be put into effect in the spirit of the gift and that the equivalent of section 13(1)(a) and (e) applied, allowing the property to be applied cy-près as requested by the trustees.

In considering the concept of the spirit of the gift, Nathan J placed as much emphasis on the effect of subsequent events as on the original underlying intention. He said this:[24]

> "The words of s.2, "spirit of the gift" effect a shift in emphasis in the application of the cy-près doctrine; that is, away from the common law position of requiring the impossibility or

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21 ibid, 36. A case for a scheme could then have been made out using s.13(1)(e)(ii).

22 [1986] VR 187.

23 [1972] Ch 276. See the text at fn. 17 above.

24 [1986] VR 187, 190.

> impracticability of the testator's original objective being achieved to those circumstances which frustrate the purposes as revealed by the terms of the will, or by evidence, being attained. The spirit of the gift is apparent by the testamentary terms directed to such matters as the nature of the class or class of recipients, the location or times at which gifts are to be made or the age, sex or status of the recipients. The list of frustrating events can never be closed."

In the instant case it was the limitation to charities existing at the date of the testator's death which was frustrating the testator's fundamental purpose or objective of benefiting all Victorian charities when the significant decrease in the number of eligible charities and the number of charities which had come into being since the testator's death was borne in mind.

**Implications**

Two implications would seem to follow from Nathan J's approach to finding the spirit of the gift. First, by highlighting the individual terms of the instrument from which the spirit of the gift may be derived, he has made it possible for the courts to say that a cy-près occasion has arisen when a particular element of the gift becomes impossible to carry out even though it may still be possible to carry out the trust within a wider general view of the spirit of the gift.

Secondly, by placing greater emphasis on the effect of subsequent events when determining whether the purposes can be carried out within the spirit of the gift, Nathan J has allowed the effect of a change of circumstances to be considered at any time; if the result is to frustrate the underlying intention of the donor, the property may be applied cy-près. The overall effect is to promote wider possible use of the cy-près doctrine by allowing a cy-près occasion to arise if the particular charity has not been in existence for a long period of time.

It has been argued that there should be some time during which the original objects of a charity are safeguarded from alteration, otherwise there would be a fatal discouragement to would-be donors. The Nathan Committee, having considered changes caused by such matters as nationalisation, statutory benefits and new towns which can have an immediate drastic effect on charities, recommended that there should be no period of limitation if a scheme was proposed by the trustees and agreed by the founder, if living, otherwise the cy-près doctrine should not apply within 35 years of the foundation of the charity.[25] Interestingly, even that limited period of immunity from alteration was not included in section 13. An application

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[25] Report of the Committee on the Law and Practice relating to Charitable Trusts (1952) Cmd 8710, p 80-81.

of the cy-près doctrine within twenty years of foundation, as occurred in *Forrest v Attorney-General for Victoria*[26] is, thus, arguably within the intent of the section.

## General charitable intention

The flexible approach by the courts, both in England and in Australia, to the concept of the spirit of the gift does not represent a sudden change in attitude to the doctrine of cy-près. A similar less rigid approach to the search for a general charitable intention in the case of initial failure of a gift has already emerged with a resulting increase in the circumstances in which the doctrine of cy-près can be used.[27] The courts had always sought from the relevant document a paramount object beyond the terms of the particular gift, with the consequence that where the donor had left detailed directions it was very difficult to find a general charitable intention and apply the property cy-près.[28] Beginning with *Attorney-General for New South Wales v Perpetual Trustee Co Ltd*[29] an alternative approach appeared, which was to concentrate on the gift itself and ask whether a modification of the scheme in the instrument, to enable the gift to be carried into effect at the relevant time, would frustrate the donor's plan or project.

The first use of the alternative approach by the English courts[30] was the case of *Re Lysaght*,[31] which concerned a testatrix who had left money to the Royal College of Surgeons to establish and maintain studentships with a direction that any such student should not be of the Jewish or Roman Catholic faith. Buckley J held that the testatrix had a general charitable intention to found medical studentships; the direction excluding Jews and Roman Catholics was not essential to her

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26 [1986] VR 187.

27 See [1982] Conv 231 (Warburton).

28 See *Re Taylor* (1888) 58 LT 538, 543 per Kay J; *Re Wilson* [1913] 1 Ch 314, 320 per Parker J.

29 (1940) 63 CLR 209, per Dixon and Evatt JJ.

30 For the use of the approach in other jurisdictions, see *In re Steele* [1976] NI 66 (requirement that land be used for grazing only and not let not essential to a trust to maintain and repair a church); *Shorthouses Trustees v Aberdeen Medico-Chirurgical Society* [1977] SLT 148 (use of certain property and a particular name not essential to the paramount intention to relieve a certain class of doctor); *Re Rowell* (1982) 31 SASR 361 (existence of a particular institution not essential); *Re Stewart's Will Trusts* [1983] 11 NIJB (use of a certain hymn book not essential to a trust for the support of clergy).

31 [1966] Ch 191.

paramount intention. This case was regarded as an exception[32] until the decision of Vinelott J in *Re Woodhams deceased*[33] in 1981.

*Re Woodhams* provides a good example of the alternative approach and a more flexible use of the doctrine of cy-près. In that case the testator left moneys to provide scholarships at two music colleges. The scholarships were to be restricted to absolute orphans of British nationality from named children's homes. The colleges were only prepared to become trustees if the restrictions relating to orphans from named homes was removed. Vinelott J held that the testator's intention was to further musical education by founding scholarships at the two colleges. Although the testator had chosen orphans from named homes, that was not an essential part of his scheme. The property was accordingly applied cy-près. It is extremely doubtful, if the older approach to the question of a general charitable intention had been taken, whether the property could have been saved for charity.[34]

**New purposes**

There is little point in extending the circumstances in which the cy-près doctrine may be used if the new purposes for which the property is applied subsequently are themselves of little benefit to the community. A problem stems from the fact that, strictly, the charitable funds should be applied for purposes which are as near as possible to the original objects.[35] No amendment to this requirement was made by section 13. The Charity Commissioners, who now settle most schemes, reviewed their guidelines in 1989 on the selection of new purposes.[36] The new guidelines indicate a need to consider practicalities, the situation of the charity in the community and the needs of the community. They also stress that it is essential not to erect artificial barriers to a flexible use of the doctrine, for example, by rigidly insisting that a charity whose purposes fall under one head of

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32 See Tudor, *Charities*, 6th ed p 247.

33 [1981] 1 WLR 493. See also [1983] Ch Comm Rep para 57 (will of Sarah Mary Collard).

34 Compare *Re Crowe deceased* [1979] Ch Comm Rep para 40 where Slade J applied the old approach and refused to find a general charitable intention on the part of a testatrix who left money to provide one scholarship in Spanish or Russian at a school and the trustees refused to act because Russian was not taught and the income was sufficient for a number of scholarships.

35 *Cook v Duckenfield* (1743) 2 Atk 562, 569; *Att-Gen v Whitchurch* (1896) 3 Ves 114; *Att-Gen v Ironmongers' Co* (1844) 10 Cl & F 908, 922; *Glasgow College v Att-Gen* (1848) 1 HLC 800.

36 [1989] Ch Comm Rep para 73 et seq.

charity[37] cannot be schemed so that its new purposes fall under a different head of charity.

Normally, where a local school was closed, the funds would be applied cy-près for educational purposes in a wider area. A more flexible approach now allows such funds to be applied for other non-educational purposes in the same area where the local nature of the trust is clearly apparent. The Charity Commissioners no longer regard any particular element of a charitable trust as unalterable. Thus age limits and sex qualifications in educational charities, for example, need not place an unnecessary restriction on the purposes to which the property may be schemed.[38] It is unlikely, however, that the Commissioners would agree to a scheme which widened both the beneficiary class and area of benefit of a charity unless very clear reasons were made out.[39]

## Conclusion

The White Paper considered that the problem with the doctrine of cy-près lay not so much with the doctrine itself, which has inbuilt flexibility, nor in the scope of the existing legislation, as in the doctrine's application.[40] That problem now appears to have been recognised by both the courts and the Charity Commissioners. The broad and flexible approach adopted by the courts to the concept of the spirit of the gift is but one aspect of the courts' changing attitude to the doctrine of cy-près. The Charity Commissioners' review of their guidelines means that the new purposes selected once a cy-près occasion has arisen are more likely to serve the present needs of the community. In the light of this, it is submitted that it was correct not to legislate further and that Christopher McCall QC was right in resisting Professor Rob Atkinson's proposals for drastic reform; the doctrine of cy-près is fully capable of ensuring that charitable funds are applied for today's needs.

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37 i.e., the fourfold Macnaghten classification of charity laid down in *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531.

38 See [1989] Ch Comm Rep para 75.

39 By analogy with the Commissioners' reluctance to sanction transfers of property under section 74(2) of the 1993 Act from local charities with specified classes of beneficiaries to Community Trusts.

40 "Charities: A Framework For The Future". (1989) Cm 694 p 37.