

IS THERE SUCH A THING AS 'CHARITY'?

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Is there such a thing as 'charity'? Of course there is, you may think: those things which come within the definition in *Pemsel's* case.² This article is in fact concerned in the main with a different question, one which has not been properly addressed by any of the relevant leading texts, and one which might cause confusion. That question is whether there is a structure which, when its purposes are exclusively charitable, can properly be described as "a charity". This will be considered first. There are, however, in some of the relevant case law, several problematic dicta to which reference will then be made.

(1) Is there such a thing as 'charity'?

The current authors of *Snell's Equity* 29th ed (1990) think (see p. 143) that 'There is.....no such legal entity as "charity".... The question, strictly speaking, is not whether a "charity" exists, but whether the trusts on which property is held are trusts for charitable purposes, or, where the organisation is incorporated, whether the objects of the corporation are charitable.' The problem is that *Snell* appears to have failed to take into account the definition of a charity for the purposes of the Charities Act 1993 (the 1993 Act), which is contained in section 96(1) of that Act, and is as follows: 'except in so far as the context otherwise requires, ... 'charity' means any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities'. According to section 97(1), 'institution' includes any trust or undertaking', and '"charitable purposes" means purposes which are exclusively charitable according to the law of England and Wales'. It has to be said that although Picarda, in *The Law and Practice relating to Charities* (1977) (Picarda), and Tudor (*Tudor on Charities*, 7th ed) refer to this definition, in neither of them is it examined closely.

Why, though, might it be necessary to know whether something was a charity? This would probably occur in the main when considering whether an institution needed to register with the Charity Commissioners (the Commissioners), or whether the

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² *Commissioners of Income Tax v Pemsel* [1891] AC 531.

Commissioners had jurisdiction over the affairs of the institution - if an institution is within the definition in section 96(1) then it is *prima facie* subject to the jurisdiction of the Commissioners, and required by section 3(5) of the 1993 Act to register with them as a charity. It should be stated that although certain charities are exempted, by section 3(5)(a) of the 1993 Act, from both the requirement to register as charities with the Commissioners and almost all of their jurisdiction, those which are merely excepted from registration by section 3(5)(b) remain subject to most of the Commissioners' jurisdiction.

The meaning of 'institution' in the context of section 96(1)

What, then, is an 'institution' in this context? Is it the conglomerate of the constitution of the organisation - its conceptual structure - and its property, or is it merely the constitution? It is suggested that it could be viewed as either, but that in this context it makes sense to regard an institution as the constitution as distinct from its property, not least because charities are usually partly fundraising organisations, and because it is their activities, as well as their property, which need to be subject to the jurisdiction of the Commissioners. This suggested interpretation is supported by the use in section 96(1) of the wording "any institution, corporate or not", since a corporate body is usually thought of by lawyers as distinct from its property, and by the inclusion by section 97(1) of a trust within the meaning of an 'institution', since a trust is a relationship to property, and the trust's property is usually thought of as being distinct from the trust. Further, several provisions of the 1993 Act support the interpretation suggested here: section 18(1)(b), which applies *inter alia* to property "coming to the charity", section 3(4), which refers to the removal from the register of "any charity which ceases to exist or does not operate"³ and section 3(5)(c), which clearly distinguishes between a charity and its property. On the basis of this suggested interpretation, an organisation whose purposes are exclusively charitable but which has not yet obtained any property could properly be regarded as a charity.

But what about the phrase "subject to the control of the High Court in the exercise of its jurisdiction with respect to charities"? Would one not expect a charity to have property before the jurisdiction of the High Court would be exercised? The answer must be that one would. This certainly explains what Slade J said in *Liverpool and District Hospital for Diseases of the Heart v A-G*⁴ (*Liverpool Hospital v A-G*), where he referred to the so-called rule that the court has no jurisdiction to intervene in the affairs of a charity unless there is a trust, and where he interpreted this to mean that either there must be a trust in the strict traditional sense or the assets in question must be held by a corporate body whose purposes are exclusively charitable. This was, he said, because "the jurisdiction of the court necessarily depends on the existence of a person or body who is subject to [a legal obligation to apply the assets for exclusively charitable purposes] and against whom the court can act in personam so far as necessary for the purposes of

³ cf Picarda *op cit* at p 452.

⁴ [1981] Ch 193.

enforcement."⁵ Yet the question in that case was whether the *cy-près* doctrine could be applied to the assets of a corporate body whose purposes were exclusively charitable on its winding up, and the charity in question clearly held property.

The problem is why Parliament might have seen fit to appear to subject to the jurisdiction of the Commissioners a body whose purposes were exclusively charitable but which held no property if (as must be assumed) it was aware that the jurisdiction of the High Court did not extend to a charitable body unless it held property. Could the phrase "the control of the High Court in the exercise of its jurisdiction with respect to charities" have a meaning unconnected with the question whether a body whose purposes are exclusively charitable holds property or not? The answer is that it could, as can be seen from the Court of Appeal case of *Construction Industry Training Board v A-G*⁶ (the *CITB* case), which is discussed below.

Why should the definition of a charity extend to a body which does not yet hold property?

There are, indeed, good reasons why the jurisdiction of the Commissioners should extend to charities which do not yet hold property. They include the one that unfit persons who do not yet but are likely to hold the property for a charity should be subject to the jurisdiction of the Commissioners, so that any relevant property coming to them can be protected. Further, harm might otherwise be done to charities generally through a public perception that charity trustees are untrustworthy. In addition, it would be odd if the jurisdiction of the Commissioners were to be unavailable merely because of a temporary lack of funds suffered by a charity.

The *CITB* case

In the *CITB* case, the court was not concerned with the question whether a body needs to hold property before it can be subject to "the control of the High Court in the exercise of its jurisdiction with respect to charities", as the Construction Industry Training Board (the *CITB*) clearly held property. The *CITB* was a corporation whose purposes were exclusively charitable, and which was established under a statutory instrument. That instrument gave extensive powers of control of the *CITB*'s operations to the relevant Government minister. The question was whether this had ousted the jurisdiction of the High Court with respect to charities, with the result that the *CITB* did not need to be registered as a charity with the Commissioners. The judgments appear at first sight to differ, but the principles applied can be seen to be in essence similar. Russell LJ gave the leading judgment, and decided that the words "subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities" have the effect of taking a body out of the definition of a charity for the purposes of the forerunner of the 1993 Act - the Charities Act 1960 -

⁵ Ibid at 214 B.

⁶ [1973] Ch 173.

only where the control of the High Court in the exercise of its jurisdiction with respect to charities is ousted by, for example, the terms of the statute which set it up. He decided that the statutory regime under which the CITB was set up did indeed have the effect of removing the CITB from such control. Plowman J agreed with him as to the question of the proper interpretation of the relevant definition in section 45(1) of the 1960 Act (whose terms were, so far as relevant, identical to those of section 96(1) of the 1993 Act), but disagreed with him as to the result on the facts. Buckley LJ dissented as to the proper meaning of the relevant words, but agreed with Plowman J as to the result. According to Buckley LJ, the jurisdiction of the court with respect to charities arises where, in essence, the court's jurisdiction with respect to trusts (as applied to charitable trusts) is applicable. Further, if the exercise of the court's jurisdiction with respect to charities would be in conflict with the provisions of an Act of Parliament (and possibly a Royal Charter) under which the charity in question was established, then the court's jurisdiction will be ousted, albeit not necessarily totally.⁷ He decided that the court's jurisdiction with respect to charities was, on the facts, applicable. These statements of principle cannot be faulted, so far as they go, although, it is suggested, they do not go far enough.

(2) Problematic dicta

There are, however, several problematic dicta in the *CITB* case and the *Liverpool Hospital v A-G* case, the most important of which will be examined before any conclusions will be drawn. The first is the passage of the judgment of Slade J in the *Liverpool Hospital v A-G* case set out above (see footnote 4 above). Taken together with the ruling in that case that a corporate charity does not hold its property as a trustee in the strict traditional sense, it could be used to support an argument that while the Commissioners have the power to act against those who are trustees for the purposes of the 1993 Act - that is, those who have "the general control and management of the administration of a charity" (see section 97(1)) - the court has no such power. This would be because the only "person" against which the court could act would be the corporation, and not the managers. However, it should be noted that what Slade J said in this context was that although the cases cited to him did not show that a company formed under the relevant Companies Act was "a trustee in the strict sense of its corporate assets", those cases did, in his opinion, "clearly establish that such a company is in a position *analogous to that of a trustee* in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs; but that is quite a different matter".⁸ Thus he may have intended that the jurisdiction of the court with respect to charities would extend to the managers of a corporate charity. If he did not, then strong support for the conclusion that another judge might well accept that it does so extend is to be found in the case

⁷ Ibid at 187 C-E.

⁸ [1981] Ch 193, 209G; Slade J's emphasis.

of *Harries v Church of England Commissioners*,⁹ where Sir Donald Nicholls V-C decided that the managers of the Church Commissioners, a corporate charity, should be treated for the purpose of determining their duties in regard to investments as if they were simple trustees.

The same arguments would apply if an attempt was made to enforce orders in respect of the property of a corporate charity against its managers, on the ground that they were fiduciaries. Slade J uttered another problematic dictum in the case of *Liverpool Hospital v A-G* when, in purported reliance on the *CITB* case, he indicated that the terms of a privately instituted charitable trust could oust the jurisdiction of the court.¹⁰ It would be odd indeed if that were so, and it is to be noted that there is no apparent basis for this dictum of Slade J in the *CITB* case.

Conclusions

Firstly, it can be seen that the phrase "the control of the High Court in the exercise of its jurisdiction with respect to charities" could properly be interpreted to mean only what it was determined to mean in the *CITB* case. Thus the question whether a charitable body holds property could properly be said to be irrelevant to the question whether it is a charity for the purposes of the 1993 Act; it is simply unlikely in practice that a charitable body will hold no property. Secondly, as a result, when seeking to ascertain whether an organisation is within the definition of a charity for the purposes of the 1993 Act, it will be necessary to see whether the actions of the body in relation to any property which it currently holds, or in the future might hold, for its general purposes, are subject to such statutory control¹¹ by a person or body as would entitle the High Court to conclude that its jurisdiction with respect to charities had been ousted in any way in relation to the administration of that property.¹² Secondly, if an answer to that question is 'Yes', then it will be necessary to ascertain whether there is a power vested in the relevant person or body to change the constitution of the charitable body and appoint or remove trustees (as defined in section 97(1) of the 1993 Act), such as to entitle the court to conclude that its jurisdiction with respect to charities had been ousted completely.

If, on the other hand, the jurisdiction of the court has been ousted by the statutory framework or Royal Charter under which the activities of the body are regulated, but

⁹ [1992] 1 WLR. 1241.

¹⁰ [1981] Ch 193, 214D.

¹¹ Or possibly (see per Buckley LJ in the *CITB* case, at [1973] Ch 187 C-E) control under a Royal Charter.

¹² If the body were subject to statutory control, then it might also be subject to judicial review. Presumably the availability of judicial review might be a factor which could contribute to the justification for the conclusion that the jurisdiction of the High Court with respect to charities did not extend to the body's activities.

the body holds property for charitable purposes otherwise than under that framework or Charter (and the charitable purposes in question might, but need not, be different from the general purposes of the body), then that will be property which is subject to a charitable trust separate from the trust or equivalent obligation under which any property is or might be held for the body's general purposes, and that separate trust will undoubtedly be a charity within the definition in section 96(1) of the 1993 Act. Thus a body might hold property under different regimes, one of which is subject to the control of the High Court in the exercise of its jurisdiction with respect to charities, and one of which is not.

Whether or not a body is incorporated is, on the above analysis, irrelevant to the question whether it is subject to the jurisdiction of the Commissioners. To that extent at least, the emphasis in *Snell* on the possession by a body of corporate status is misleading.