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AVOIDING BEING PERSONAL: PUBLIC BENEFIT AND THE PERSONAL NEXUS IN EDUCATIONAL TRUSTS

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The principle seems simple enough. In order to be charitable, an educational trust must be of a public character; that is, it must be for the benefit of the community or an appreciably important section of the community.[2] The application of this principle is fraught. The Courts have shied away from giving a clear definition of "public benefit". They have told us that the test is two-fold: firstly, the section of the community must not be negligible in size and, secondly, the relationship of the beneficial class and the "propositus" must not be personal. There are three links in the chain; the grantor "A" leaves money for the education of beneficiaries, who are themselves identified by their relationship to "B" ("the propositus"). The extremes are straightforward; a trust by which I leave a sum of money for the education of my children is not charitable. The relationship between me and my children is clearly personal and therefore not of public benefit. At the other end of the spectrum, a trust establishing a scholarship for the education of children attending a certain school is charitable. Those children could be any children, thus the trust is for the public benefit. That much is good law. Now we come to the grey areas.

The difficulty seems to originate with the evolution of the law of charity. Lord Normand reminds us that "the law of charity has been built up not logically but empirically".[3] Perhaps then we are looking for the unfindable; it might be that there is no clear principle as to why any particular trust is or is not for the public benefit. A lack of a ratio is, however, antithetical to the normal construction of legal argument. Even when faced with an empirical evolution, the case law can and must be subjected to logical analysis.

An example: I was recently instructed to consider this educational trust: "the trustees shall thereafter use the annual income to provide or aid in providing a scholarship to enable a would-be pupil to enter the School. The scholarship shall on each occasion that it is bestowed be awarded to a son or lineal descendant of a former pupil of the School." Is that too personal? Clearly, the purpose of this trust is within the scope

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2 *Tudor on Charities*, 7th Ed p 4.

3 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, at p 309.

of the Statute of Elizabeth. It is for the furtherance of education.[4] The creation of scholarships and bursaries is one of the oldest forms of recognised charity. However, the Charity Commissioners' initial response was that this trust was not sufficiently for the public benefit. They felt it was too personal.

The *Compton* Test and *Oppenheim*

A thorough review of the authorities reveals something of a state of disarray. The general principle is established in *Re Compton* [1945] 1 Ch 123: "a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift."[5] The difficulty is to unravel the repercussions of that statement. In *Re Hobourn Aero Components Limited's Air Raid Distress Fund* [1946] 1 Ch 86, the Court held that a trust set up on a self-help basis was not sufficiently for the public benefit. The trust was specifically established for "self help" and not "public help". Matters became complicated in the subsequent case of *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, which considered a trust for the education of the children of employees of the British-American Tobacco Company Ltd. The number of employees was in excess of 100,000. Nevertheless, the House of Lords decided that they would follow the test in *Re Compton* and that there was a personal relationship between the employees and the company. The personal relationship was through the medium of their contracts of employment. No distinction was made between employees and their children, the fact that the beneficiaries were the children of employees did not alter the personal nexus underlying the trust. The decision in *Oppenheim* was in accordance with the reasoning in *Re Compton* and the earlier case of *Re Drummond* [1914] 2 Ch 90. The exceptional element in the *Oppenheim* case was the sheer number of employees.

A second school of thought emerges in the dissenting judgment of Lord MacDermott. He baulks at the concept that a class as numerous as the employees of a large multi-national company should not be viewed as a section of the community. One can see the logic in that statement. A trust for the education of the occupants of a named town would be charitable. The number of employees of BAT far exceeded the population of many towns. The majority of the House of Lords was true to principle. They maintained that one had to apply a two-stage test. The mere fact that the number of beneficiaries was not negligible was itself necessary but not sufficient. The prior requirement, which would be strictly enforced, was the absence of any personal nexus; a contract of employment was "too personal". Only if one jumped that hurdle would one go on to consider the size of the beneficial class.

Lord MacDermott's Dissent

During the course of argument, hypothetical scenarios were raised by Counsel. Applying the *Re Compton* test in a company context might mean that a trust for the education of the employees of British Rail would not be charitable, whilst a trust for the education of railwaymen would be charitable. In fact the two trusts would be for

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4 Arguably, also for the relief of poverty. This aspect falls outside the scope of this article.

5 The so-called "Founder's kin" cases are best seen as an anomalous exception to this principle; established by their antiquity rather than their logic.

the education of identically the same group of individuals, merely described in different ways.[6] This dilemma was sidestepped by Lord Simonds, who simply said that he was "not impressed by this sort of argument and will consider [such an argument] on its merits, if the occasion should arise". Whilst he was clearly right that the hypotheticals did not fall to be decided in the *Oppenheim* case itself, nevertheless these arguments do expose a problem of principle with the test postulated in *Re Compton*. One would expect that a test should survive the application of reasonable hypotheticals.

Lord Cross, in *Dingle v Turner* [1972] AC 601, approved (by way of dicta) the dissenting speech of Lord MacDermott. He states:

> "If ever I should be called to pronounce on this question - which does not arise at this appeal - I would as at present advised be inclined to draw a distinction between the practical matters of the *Compton* rule and the reasoning by which Lord Greene MR sought to justify it. That reasoning based on the distinction between personal and impersonal relationships - has never seemed to me very satisfactory and I have always - if I may say so - felt the force of the criticism to which my noble and learned friend Lord MacDermott subjected it in his dissenting speech in *Oppenheim*. For my part I would prefer to approach the problem on far broader lines."

Lord MacDermott, supported by Lord Cross, seemed to prefer a case by case approach. One would look at the circumstances of each case and decide whether, on its facts, that specific trust was truly for the public benefit. This amounts to an alternative test. It would have the merit of producing a "fair" result for each trust. With respect, however, the danger of a case by case test is that it is no test of principle at all. For those people who seek to establish educational trusts, it means a lack of certainty. The result would be regular litigation using trust funds to pay for legal fees rather than for the education of the intended beneficiaries.

A third alternative would be legislation. Lord MacDermott called for the intervention of the Legislature. The Nathan Committee on Charitable Trusts did consider the possibility of a statutory change, but rejected it. No such statutory definition of "public benefit" appeared in the Charities Act 1960 or thereafter.

A Principle?

Until *Re Compton* and *Oppenheim* are overruled, they remain good law. Returning to Lord Simonds' observation that the law is developed empirically, one is forced to divine a principle from the existing case law. The scenario in *Re Compton* itself was clearly a personal nexus, the relationship between the beneficiary and the propositus was by blood. In *Oppenheim* it was held that the relationship of employment was sufficiently personal. Assuming that one accepts the *Re Compton* test, the result can be logically supported. The Lords do not explain why a contract of employment is personal. Reasoning *ex post facto*, one can understand why it might be thought to be "special"; an employment contract constitutes a very close relationship of service. Furthermore, returning to the principles of company law, it is a relationship with a

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6 This assumes, of course, an entirely nationalised railway industry and ignores the fact that British Rail is not a limited company.

corporate individual. The British-American Tobacco Company Ltd as a corporate entity is a separate legal person. In that sense, for want of a better analogy, employees are related to the person of the company in a way analogous to the relationship of offspring to a parent. In that sense the general principle of a "personal relationship" is being consistently applied.

The Example

What of my example: "a trust for the education of would-be pupils who are the descendants of old boys of my school"? Lord MacDermott in his dissent in *Oppenheim* stated:

> "I have particularly in mind gifts for the education of certain special classes such, for example, as the daughters of missionaries, the children of those professing a particular faith or accepted as ministers of a particular denomination, or those whose parents have sent them to a particular school for the early stages of their training.[7] I cannot but think that in cases of this sort an analysis of the common quality binding the class to be benefited may reveal a relationship no less personal than that existing between an employer and those in his service."

With respect to Lord MacDermott, one can draw distinctions, albeit not absolutely persuasive ones. Focusing on my example, parents do contract with a private school to educate their children. A contract of employment is, however, of a different nature. Parents purchase a service from a school, i.e., the education of their children. If the purchase of education was deemed "personal", would that same logic not then apply to the purchase of goods? Could a trust for the education of those who shop at a particular High Street store be regarded as personal? Surely not. In an employment contract the "purchase" is inverted, i.e., the employer purchases labour from the employee. The relationship is of a fundamentally different nature; employees "sell" a part of themselves (their time and effort) to their employer. That is a very personal relationship. Furthermore, a school, unlike a company, does not have a separate legal identity.

In a trust for the benefit of the descendants of old boys, the relationship is once removed. The beneficiaries are "would-be pupils" and not "actual pupils". In other words the class of beneficiaries is defined not by its relationship to the school, but by a relationship to an ancestor who is himself defined by his attendance at the named school. The first link, descendant-ancestor, is clearly personal; the second, ancestor-school, is not. Therefore, there is neither a direct contractual nexus nor a personal nexus between the potential pupil and either the named school or the grantor.

Size of the Group

There is an additional question of the size of the group or class who are to be the beneficiaries. The general test establishes that the class qualifying must not be negligible. Nevertheless, the Courts have upheld trusts for such groups as the

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7 All of these have, at various times, been held to be charitable. Most of these decisions precede *Re Compton*.

daughters of missionaries. The class of descendants of old boys of a particular public school is itself likely to be a not insubstantial group. Given the number of pupils who attend a school each year, the long history of many schools and the average number of descendants of each former pupil, one would expect a number amounting to several thousand[8]. Furthermore, it appears from the logic applied in the cases,[9] that the size of the class should be applied as a second stage of the test. If the trust is personal, then whether there be 10, 100, 1000, or 100,000 members of the class, the trust will remain non-charitable. This, of course, does not necessitate the opposite inference; if the trust is impersonal but the class is negligible, it will not be charitable. The difficulty of defining "negligible" is a topic for another article.

Policy Questions

It may be that a further policy factor should be taken into account; the tax consequences of finding a specific trust to be charitable. A parent establishing a trust for the education of his own children amounts to a mechanism by which that individual can escape the payment of tax. The fees would otherwise be paid out of taxed income. A company educating its employees (or their children) through the medium of a trust, similarly avoids the payment of tax. In *Dingle v Turner* Lord Cross makes this point clearly. Whilst a specific trust may be laudable in its object, there seems little reason why the taxpayer should contribute towards the education of the employees of a particular company. If the decision was otherwise, then this would allow an obvious tax-free "fringe benefit". The Inland Revenue would be deprived of substantial sums. This policy-based approach may actually lie behind many of the decisions to date.

Conclusions

Following receipt of a detailed Opinion, the Charity Commissioners were persuaded, contrary to their initial view, that the trust for the education of would- be pupils who are descendants of old boys of a named school was charitable.[10] If we apply reasoned logic to the empirically developed case law, one is left without the benefit of a clear and unassailable test of principle. It seems that the only sensible approach to take is to accept the empirical, i.e., to ask "does a given trust clause fall into an existing charitable category of educational trust?" A trust for the education of my children will be non-charitable. A similar trust once removed, i.e., a trust for the education of the children of AB, will similarly be non-charitable. As the law currently stands, a trust for the education of the employees of my company, or of a specific company, also falls foul of the personal nexus rule. However, the anomalies identified by Lord

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8 By way of example, Westminster School was established in 1560. Its records date from 1656; an approximate calculation based on the archives suggest 11,400 pupils since records were kept. I leave a calculation of the number of descendants to the reader's imagination!

9 Particularly Lord Simonds' comments in *Oppenheim* [1951] AC at 308.

10 For completeness' sake, the actual clause had an additional poverty element which I have not considered in this article. The Opinion sent to the Commissioners covered both aspects and it may have been either the analysis of public benefit (similar to that set out herein) or the additional analysis of the poverty criterion (or both) that persuaded the Commissioners.

MacDermott remain. The test in *Re Compton* cannot be regarded as a satisfactory test. Given the robust speech of Lord Cross, it is to be hoped that the Courts or the Legislature will review the *Re Compton* test. If the test is to remain, a prudent Court would extend the categories of the personal nexus no further.