The Charity Law & Practice Review

TRUSTS FOR SPORT AFTER *GUILD v IRC*

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The extent to which the promotion or encouragement of sport, or the provision of sporting facilities, can be considered charitable has always been unclear.[2]

The Common Law Position

Trusts for the encouragement or promotion of a particular sport may be indirectly beneficial to the community, but on examining the preamble to the Charitable Uses Act 1601[3] it can be seen that no reference is made to recreational purposes. On general principles, therefore, such a trust will not be charitable and will not receive the tax and other benefits of charitable status.

For example, it has been accepted since *Re Nottage* [1895] 2 Ch 649 (where the gift was to provide an annual cup for the best yacht of the season) that a trust to promote sport is not charitable.[4] Also, trusts for angling[5] and cricket[6] have been held to be not charitable.

However, it has always been the case that if a trust was not purely for sporting purposes but had about it some ulterior objective, then it might be saved as a charitable gift. Thus, if the sporting facilities were for school children or students of higher education, then the gift could be considered as a trust to advance education and therefore be charitable. In *Re Mariette* [1915] 2 Ch 284 the development of the body was considered to merit equal attention as development of the mind, and thus provision of sports facilities at a public school was charitable.

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2 See D. Evans, "Sport and Charitable Status" (1986) 1 Trust L & P 22; Hubert Picarda "Sporting Charity" (1988) *New Law Journal Annual Charities Review* iv-viii.

3 Commonly known as the Statute of Elizabeth I.

4 The gift would have failed here anyway due to lack of public benefit.

5 *Re Clifford* (1911) 106 LT 14.

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

The status of the Football Association Youth Trust arose in *IRC v McMullen* [1981] AC 1, HL. The objects of the trust were to provide facilities for pupils of schools and universities in any part of the United Kingdom to play association football and other games, thereby ensuring that due attention was given to their physical education. The House of Lords held that this was a valid educational charity. Lord Hailsham cautioned against seeking to extend the concept of the educational charity too far[7], but children's outings[8], chess prizes[9], and the furtherance of the Boy Scouts movement by the purchase of camping sites[10] have all been held to be educational charities.

If the recreational facilities are provided for a public purpose such as the greater efficiency of the armed forces, then they will be considered charitable.[11]

It is also the case that the provision of land for use as a recreational ground by the community at large or by the inhabitants of a particular area is charitable.[12]

Problems arose in 1955, however, with the decision of the House of Lords in *IRC v Baddeley* [1955] AC 572, HL. Land was conveyed:

> "for the promotion of the religious, social and physical well-being of persons resident in .... West Ham and Leyton .... by the provision of facilities for the religious services and instruction and for the social and physical training and recreation of .... persons who .... are members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided .... and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons."

Other land was also conveyed but with the addition of moral rather than religious purposes.

The inclusion of a social element was fatal. This prevented the object from being exclusively charitable. In addition, some of the judges[13] considered that the purposes did not satisfy the requirement of public benefit. The *Baddeley* decision threw doubt on a number of institutions which had previously been considered to be charitable; boys' clubs, women's institutes, and village halls had been thought to be charitable but, as they were for "social" purposes, after *Baddeley* they could no longer be

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7 See his reference to the "slippery slope" argument at [1981] AC 1, 19.

8 *Re Mellody* [1918] 1 Ch 228.

9 *Re Dupree's Deed Trusts* [1945] Ch 16.

10 *Re Webber* [1954] 1 WLR 1500.

11 *Re Gray* [1925] Ch 362.

12 *Re Hadden* [1932] 1 Ch 133.

13 Viscount Simonds at p. 593 and Lord Somervell at p. 616.

considered legally charitable.

The Recreational Charities Act 1958

Parliament intervened and passed the Recreational Charities Act in 1958 (RCA) which effectively restored the status quo to a number of trusts whose status had been rendered doubtful as a result of *Baddeley*.[14] The Act saves, in certain circumstances, gifts made in the interests of social welfare. Section 1 of the Act provides:

> "(1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.
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> (2) The requirements of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless -
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> (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
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> (b) either -
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> (i) those persons have need of such facilities as aforesaid by reasons of their youth, age, infirmity or disablement, poverty or social and economic circumstances, or
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> (ii) the facilities are to be available to the members or female members of the public at large.
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> (3) Subject to the said requirement, subsection (1) of this section applies in particular to the provision of facilities at village halls, community centres and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity."

The Act does not validate gifts which are purely for sport unless they satisfy the tests

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[14] Note that the RCA does not remove one of the objections to charitable status found in *Baddeley* - i.e., that the facilities were not provided for the public, but for a limited class of persons - those resident in West Ham and Leyton and selected from within that class by reference to a particular creed.

in s.1. The use of the expression "social welfare" has been used in other statutes[15], but is not free from doubt. The recent House of Lords decision in *Guild v IRC* [1992] 2 All ER 10 is therefore of great significance.

The Facts in *Guild v IRC*

The testator left a will in which, after bequeathing a number of pecuniary legacies, he provided as follows:

> "And I leave the whole, rest residue and remainder of my said means and estate to the Town Council of North Berwick for the use in connection with the Sports Centre in North Berwick or some similar purpose in connection with sport."

The Town Council of North Berwick was no longer in existence at the date of the testator's death and in *Russell's Executor v Balden* [1989] SLT 177, CS, Lord Jauncey had held that the bequest in question had not fallen into intestacy. In due course the executor presented a *cy-près* scheme to the Inner House of the Court of Session for its approval and an interlocutor granting such approval was pronounced by the First Division in June 1988.

In June 1990 the Inland Revenue issued a notice of determination in respect of capital transfer tax in relation to the transfer of value which was deemed to have occurred on the death of the testator. It stated that such part of that transfer of value as was attributable to the property comprised in the bequest of the residuary estate in the will was not an exempt transfer for the purposes of para 10 of sch 6 to the Finance Act 1975, by which transfers of value attributable to property which was given to charities were exempt from CTT.[16]

The executor appealed against the notice of determination.[17] The First Division, dismissing the appeal, held, inter alia, that although the first part of the bequest (the direction that the residue be used in connection with the sports centre in North Berwick) was for charitable purposes by virtue of s.1 of the RCA, the second part of the bequest (the alternative direction that the residue be used for some similar purpose in connection with sport) was not limited to those characteristics of the sports centre which made it charitable under s.1. Accordingly, the bequest as a whole was not "for charitable purposes only" under para 10(3) of sch 6 to the 1975 Act.

The executor appealed to the House of Lords.

The House of Lords Decision in *Guild v IRC*

Lord Keith gave the main judgment of the House of Lords with which the other judges concurred.

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15 See, for example, s.8(1)(a) of the Rating and Valuation (Miscellaneous Provisions) Act 1955, now repealed.

16 This was the Act, in force at the testator's death, which introduced CTT.

17 [1991] STC 281, CS.

The House of Lords was hearing an appeal from the Scottish Court of Session and Lord Keith first commented that a Scottish court, when faced with the task of construing and applying the words "charity" and "charitable" in a United Kingdom tax statute, must do so in accordance with the technical meaning of these words in English law.[18] For tax purposes only the English law of charity is regarded as part of the law of Scotland, and therefore the appellant could invoke the RCA in his claim to the exemption from tax.

(1) The First Part of the Bequest

Counsel for the respondents argued that the facilities of the sports centre were not provided "in the interests of social welfare" as required by subs.(1) because they did not meet the condition laid down in subs.(2)(a), namely that they should be "provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended." The reason why it was said that this condition was not met was that on a proper construction it involved that the facilities should be provided with the object of meeting a need for such facilities in people who suffered from a position of relative social disadvantage.

Reliance was placed on a passage from the judgment of Walton J in *IRC v McMullen* [1978] 1 WLR 664 at p.675.[19] Walton J held that the trust was not valid as one for the advancement of education nor did it satisfy s.1 of the RCA, since the words "social welfare" indicated some sort of deprivation which falls to be alleviated. Walton J considered that the facilities must be provided with the object of improving the conditions of life for persons for whom the facilities are primarily intended. In other words, they must be to some extent and in some way deprived persons.

When *McMullen* went to the Court of Appeal[20] the majority (Stamp and Orr LJJ) affirmed the judgment of Walton J on both points, but Bridge LJ dissented. As regards the RCA point he said at pp. 142-143:

> "I cannot accept the judge's view that the interests of social welfare can only be served in relation to some `deprived' class. The judge found this view reinforced by the requirement of subsection (2)(a) of section 1 that the facilities must be provided `with the object of improving the conditions of life for the persons for whom the facilities are primarily intended.' .... I can see no reason to conclude that only the deprived can have their conditions of life improved. Hyde Park improves the conditions of life for residents in Mayfair and Belgravia as much as for those in Pimlico or the Portobello Road."

Opinion on this point was reserved in the House of Lords where it was held that the trust was an educational charity, as is explained above.

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[18] *Special Comrs of Income Tax v Pemsel* [1981] AC 531, HL; *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, HL.

[19] For the facts of this case see supra under "The Common Law position".

[20] [1979] 1 WLR 130.

Lord Keith then referred to dicta of Lord Macdermott LCJ in *Comrs of Valuation for Northern Ireland v Lurgan Borough Council* [1968] NI 104, CA, at p.126 where he made the point that s.1(2) of the Act does not exactly contain a definition of "social welfare" but that it does state the essential elements which must be present if the requirement that the facilities should be provided in the interests of social welfare is to be met. Lord Keith agreed and considered it difficult to envisage a case where, although these essential elements are present, yet the facilities are not provided in the interests of social welfare.

He also considered that the reference to "social welfare" in subs.(1) could not be held to colour subs.(2)(a) to the effect that the persons for whom the facilities are primarily intended must be confined to those persons who suffer from some form of social deprivation. He said that this follows from the alternative conditions expressed in subs.(2)(b) - if it suffices that the facilities are to be available to the members of the public at large, as subs.(2)(b)(ii) provides, it must necessarily be inferred that the persons for whom the facilities are primarily intended are not to be confined to those who have need of them by reason of one of the forms of social deprivation mentioned in subs.(2)(b)(i).

In his opinion, the view expressed by Bridge LJ in *IRC v McMullen* was clearly correct and that of Walton J in the same case was incorrect.

He therefore rejected the argument that facilities are not provided in the interests of social welfare unless they are provided with the object of improving the conditions of life for persons who suffer from some form of social deprivation. It would suffice if they are provided with the object of improving the conditions of life for members of the community generally.

Accordingly, the first part of the bequest was charitable within the meaning of s.1.

(2) The Second Part of the Bequest

In order to determine whether the second part of the bequest was so widely expressed as to admit the possibility of the funds being applied to provide some benefit of a non-charitable nature, it was necessary to ascertain the testator's intention in using the words "some similar purpose in connection with sport." The adjective "similar" connoted points of resemblance between one thing and another but those points of resemblance with the sports centre could not be related only to the location in North Berwick or to the connection with sport. It had to be ascertained by reference to the characteristics possessed by the sports centre which lay in the nature of the facilities it provided and the fact that those facilities were available to the public at large. On a benignant construction, it could be inferred that the testator's intention was that any other purpose to which the town council might apply the funds should also display those characteristics.

Accordingly, since the first part of the bequest was charitable within the meaning of s.1, the second part was also charitable for that purpose.

The executor's appeal was therefore allowed.

Comment

The decision in *Guild* is welcomed as an authoritative House of Lords judgment on

the RCA, in particular on the meaning of "social welfare" within s.1, and on its application to trusts for sports.

It is submitted that as well as clarifying the law, the House of Lords has made the correct decision in its liberating interpretation of "social welfare" in s.1. This must be right if subs.(2)(b)(ii) is considered. It is then immediately obvious that the alleviation of deprivation could not have been in the minds of the legislators - a facility provided for the "social welfare" of the public at large would never seem to qualify for charitable status, since generally the public at large are not considered to be deprived.

Clearly, persons in all walks of life and all kinds of social circumstances may have their conditions of life improved by the provision of recreational facilities of suitable character. The proviso requiring public benefit will always exclude facilities of an undesirable or private nature.

The view that the House of Lords took also accords with that of the Charity Commissioners who recently announced[21], when considering the charitable status of the Birchfield Harriers (an athletics club in Birmingham):

> "We did not accept the suggestion made by Walton J at first instance in *IRC v McMullen* that the persons for whom the facilities are primarily intended must be to some extent and in some way deprived persons. We preferred the liberal approach of Bridge LJ in the Court of Appeal."

In 1976, the Goodman Committee[22] recommended that the encouragement of sport should, of itself, be a charitable object (subject to a public benefit requirement) and that legislation should be introduced to clarify the position in relation to sports and other recreational charities. Legislation has not been forthcoming. It is therefore important that RCA should be utilised in the liberal fashion displayed in *Guild* in order to assist in the achievement of this objective.

To end on a more restrictive note, the Charity Commissioners have recently announced that they have provisionally rejected applications for registration from two rifle clubs.[23] If this decision is confirmed, it would mean that over 300 existing rifle and pistol clubs with similar objects could be removed from the register. The present charitable status of such clubs rests on a 100 year old court decision[24] that such institutions promoted the defence of the realm.[25] The Commissioners now consider that this purpose remains charitable, but that it cannot, in this modern age, be carried

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21 [1989] Ch. Com Rep. para 55.

22 Goodman Committee Report on Charity Law and Voluntary Organisations at p.38.

23 Charity Commission News Release, 6th February 1992.

24 *Re Stephens, Giles v Stephens* (1982) 8 TLR 792.

25 This was in the context of experience of the Boer War which had been fought by a volunteer force whose main weapon was the rifle.

out by the provision of facilities for the instruction and practice of target shooting in such clubs. The tactical and technological environment of modern warfare has little in common with civilian rifle ranges.

It will be interesting to see whether this decision is challenged by the clubs who, thanks to the House of Lords decision in *Guild*, might be able to use the RCA line of authority, if target shooting is viewed as a sport.

BENEFITS FOR COVENANTS

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A Simple Question

Can a charity reclaim tax on its covenants if it provides any benefits for the person who makes the covenant?

This is a simple question without a simple answer.

There are three special cases where benefits are permitted; and to clear the ground for discussion, I should mention these briefly.

(1) The first special case concerns:

(a) charities for the preservation of property (e.g., the National Trust).

(b) charities for the conservation of wildlife (e.g., the London Zoo).

Such charities may offer rights of admission to their premises in return for covenants.[2]

(2) There is an exception for small benefits. This is sometimes called the *de minimis* exemption. The Revenue practice is to ignore

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2 Section 59 FA 1989.