

SMALL CHARITIES: A NEW MINIATURE CODE

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Introduction

Small charities have always presented their own particular problems. Some of these were identified by the House of Lords Select Committee which reported in 1984². This Committee recognised that the purposes of many small charities were no longer useful or practicable and also that many small charities were ineffective as a result of the size of their funds.

The Charities Act 1985 attempted to address these problems without complete success and they have again been addressed, this time by ss.43 and 44 of the Charities Act 1992.

After a brief review of the development of this area, this article will consider the provisions of the new Act which came into force on 1st September 1992: see Charities Act 1992 (Commencement No 1 and Transitional Provisions) Order, SI 1992 No 1900 made on 28th July 1992.

Historical Background

The nineteenth century saw considerable activity in the field of charities with unworkable or outdated purposes.

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² House of Lords Select Committee on The Parochial Charities (Neighbourhood Trusts) Bill and the Small Charities Bill - see HMSO 1984 HL 293.I

Professor David Owen, in his magisterial book *English Philanthropy 1660-1960*³, published in 1964, charts the remodelling of certain City of London charities. During the course of this he refers to charities with such imaginative purposes as "the killing of ladybirds on Cornhill" and "the ransoming of Christian captives from Barbary pirates".

The established equitable means of dealing with the problem of unworkable or outdated purposes was the doctrine of *cy-près*. However, prior to its reform in the Charities Act 1960 the application of the doctrine of *cy-près* was limited to circumstances where a charitable gift had become impossible to perform or where it had become impracticable to give effect to its charitable purposes. It was not sufficient that a charity's purposes were no longer expedient or were partially impossible. It was also necessary, in cases of initial or partial impossibility or impracticability, to show a paramount or general intention on the part of the donor to benefit charity.

Early inroads, albeit of a limited nature, were made into the doctrine in the field of education. Both the Grammar Schools Act 1840 and more substantially the Endowed Schools Act 1869 sought to adapt ancient trusts to reflect modern educational purposes. The latter Act established an independent commission to effect changes to educational trusts in order that they should be "most conducive to the advancement of education of boys and girls or either of them"⁴.

It was, however, in the field of parochial charities that the greatest steps towards reform were made. The City of London Parochial Charities Act 1883 had the effect of giving the Charity Commissioners the power to apply the funds of parochial trusts except those of five large and populous city parishes for charitable purposes throughout metropolitan London. Property, which had previously been held on trust for diverse purposes, became available for schemes promoting education, libraries, open spaces, hospitals and "physical, moral, and social improvement of the poorer inhabitants" of the Metropolis⁵.

The effect of the City of London Parochial Charities Act was to lead to a wholesale reorganisation by the Charity Commission of the City of London charities.

³ The Belknap Press of Harvard University and Oxford University Press. David Owen was at the time Gurney Professor of History and Political Science, Harvard University.

⁴ Endowed Schools Act 1869 s.9.

⁵ City of London Parochial Charities Act 1883 s.13. The five large parishes were to continue to handle their own charities under new schemes framed by the Commissioners: see Owen *op cit* 283-284.

The powers of the Commissioners were to a very considerable degree statutorily enhanced to restructure over thirteen hundred existing trusts. This meant state intervention (cast within the ideological principles of utilitarianism) on a level unseen previously. Furthermore it resulted in a disregarding of the founder's wishes and the exclusion of the doctrine of *cy-près*.

The Charities Act 1960 modified the law relating to the *cy-près* doctrine by adding a number of *cy-près* occasions while also confirming the *cy-près* occasions developed by the law of Equity.

For the application of the *cy-près* doctrine under the 1960 Act there must be:

- (1) a designated charitable object;
- (2) a *cy-près* occasion; and
- (3) in the case of initial impossibility (but in no other case) a paramount or general charitable intent.

S.13 of the 1960 Act sets out 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*. S.14 of the Act deals with the application *cy-près* of gifts of unknown or disclaiming donors.

Charities Act 1985

The 1985 Act had its origins in two private member's bills which were introduced into the Lords and the Commons during the 1982/3 parliamentary session⁶. The House of Lords Select Committee appointed to consider the bills and to make recommendations concluded that neither bill should proceed and instead recommended that an alternative Charities Bill, prepared by the Committee, should be introduced. It was this Bill, with some minor amendments, that received Royal Assent on 23rd May 1985 and came into force on 1st January 1986.

S.2 of the 1985 Act contained provisions to allow the trustees of older local charities for the relief of poverty to alter the objects of the charity in certain circumstances provided that the revised objects were, in the trustees' opinion, "not so far dissimilar in character to those of the original charitable gift that this modification of the charity's trusts would constitute an unjustifiable departure from the intentions of the founder of the charity, or violate the spirit of the gift"⁷.

The trustees were required to be unanimous in resolving to take advantage of s.2.

S.3 of the 1985 Act empowered trustees of charities with a gross income of less than £200 per annum to transfer the whole of the property of the charity to another charity. Again, a unanimous resolution of the trustees was required.

⁶ See footnote 2 above. For further background see Michael Sladen *The Charities Act 1985* [1986] Conv 78-84 particularly at 78-80.

⁷ CA 1985 s.2(3).

S.4 of the Act, for the first time, attempted to deal with another common problem for small charities by allowing very small endowed charities, with no interest in land, to spend capital as income.

The 1992 Act

In 1987 the Home Office commissioned Sir Philip Woodfield to carry out "An Efficiency Scrutiny of the Supervision of Charities".

The Woodfield Report identified the fact that the provisions of the 1985 Act were of limited application and recommended that the Act should be amended to increase its use by extending its application to all small charities, increasing the monetary limits of charities to be treated as "small charities" and by simplifying its procedure⁸.

In fact the 1985 Act has not been amended but has been repealed in its entirety and replaced by ss.43 and 44 of the 1992 Act.

Application

Neither s.43 nor s.44 applies to exempt charities or charitable companies.

S.43, which replaces and extends the provisions of ss.2 and 3 of the 1985 Act (by allowing small charities, in certain circumstances, to transfer all their property to one or more other charities and/or to modify their objects or administrative provisions) applies to a charity only if:

- "(a) its gross income in the last financial year did not exceed £5,000, and
- (b) it does not hold any land on trust which stipulates that the land is to be used for the purposes, or any particular purpose, of the charity;"⁹

S.44 (which replaces and extends the provisions of s.4 of the 1985 Act) applies to a charity only if:

- "(a) it has a permanent endowment which does not consist of or comprise any land, and
- (b) its gross income in the last financial year did not exceed £1,000"¹⁰.

Both sections contain provisions allowing the Home Secretary, by order, to vary the

⁸ Woodfield Report paras 93-94.

⁹ CA 1992 s.43(1).

¹⁰ CA 1992 s.44(1).

financial limits for the application of the sections.¹¹

Power to Transfer Property to One or More Other Charities

The trustees of a qualifying charity may resolve:

- "(a) that all the property of the charity should be transferred to such other charity as is specified in the resolution, being either a registered charity or a charity which is not required to be registered;
- (b) that all the property of the charity should be divided, in such manner as is specified in the resolution, between such two or more other charities as are so specified, being in each case either a registered charity or a charity which is not required to be registered;"¹²

¹¹ CA 1992 s.43(11) and s.44(9).

¹² CA 1992 s.43(2).

Pre-conditions to passing a resolution

Before making such a resolution the trustees must:

- (1) be satisfied
 - "(a) that the existing purposes of the transferor charity have ceased to be conducive to a suitable and effective application of the charity's resources; and
 - (b) that the purposes of the charity or charities specified in the resolution are as similar in character to the purposes of the transferor charity as is reasonably practicable;"¹³ and
- (2) have received from "the charity trustees of the charity or, as the case may be, of each of the charities, specified in the resolution written confirmation that those trustees are willing to accept a transfer of property".¹⁴

The trustees' resolution must be passed by a majority of not less than two-thirds of such trustees as vote on the resolution.¹⁵

Procedure after a resolution

Having passed the necessary resolution to transfer the property of the charity to one or more other charities, the trustees must then follow the procedure set out in s.43¹⁶ which includes giving public notice of the resolution (in such manner as they think fit) and sending a copy of the resolution to the Charity Commissioners with a statement of their reasons for passing it.

It then falls to the Charity Commissioners to consider the resolution and in this connection they may require the trustees to provide any additional information or

¹³ CA 1992 s.43(4).

¹⁴ CA 1992 s.43(4).

¹⁵ CA 1992 s.43(3).

¹⁶ CA 1992 s.43(6).

explanation. The Commissioners are also bound, for a period of six weeks from the date on which they receive the resolution, to take into account any representations made to them by interested parties.¹⁷

If they receive a resolution from charity trustees which appears to them to comply with the provisions of s.43, the Charity Commissioners must, within three months of receipt, indicate to the charity trustees whether or not they can concur with the resolution.¹⁸ If they do concur, the charity trustees should transfer the property in accordance with the resolution and "on terms that any property so transferred -

- (i) shall be held and applied by the charity to which it is transferred ("the transferee charity") for the purposes of that charity, but
- (ii) shall, as property of the transferee charity, nevertheless be subject to any restrictions on expenditure to which it is subject as the property of the transferor charity."¹⁹

The transfer may be made to the trustees of the transferee charity, to any trustee for the charity or to any person nominated by the charity trustees to hold it on trust for the charity.²⁰

Power to Modify Objects and/or Administrative Provisions

The provisions allowing trustees of qualifying charities to modify the objects or administrative provisions of the charity are also contained in s.43 of the 1992 Act. The procedures to be followed by the trustees are basically the same as those outlined above in relation to the transfer of charity property.

S.43 allows the trustees to resolve:

¹⁷ CA 1992 s.43(7).

¹⁸ CA 1992 s.43(8).

¹⁹ CA 1992 s.43(9)(a).

²⁰ CA 1992 s.43(12)(b).

- "(c) that the trusts of the charity should be modified by replacing all or any of the purposes of the charity with such other purposes, being in law charitable, as are specified in the resolution;
- (d) that any provision of the trusts of the charity -
 - (i) relating to any of the powers exercisable by the charity trustees in the administration of the charity, or
 - (ii) regulating the procedure to be followed in any respect in connection with its administration,should be modified in such manner as is specified in the resolution".²¹

Pre-conditions to passing the resolution

Before passing such a resolution the charity trustees must be satisfied:

- "(a) that the existing purposes of the charity (or as the case may be, such of them as it is proposed to replace) have ceased to be conducive to a suitable and effective application of the charity's resources; and
- (b) that the purposes specified in the resolution are as similar in character to those existing purposes as is practical in the circumstances".²²

Again the resolution must be passed by a majority of not less than two-thirds of the charity trustees voting on the resolution.²³

Procedure after resolution

Having passed the resolution the charity trustees submit it to the Charity Commission, as before, with a statement of their reasons for the resolution.

If the Charity Commission concur with the resolution the trusts of the charity are deemed "as from such date as may be specified in the notification, to have been modified in accordance with the terms of the resolution"²⁴.

²¹ CA 1992 s.43(2).

²² CA 1992 s.43(5)..

²³ CA 1992 s.43(3).

²⁴ CA 1992 s.43(9)(b).

Power to Spend Capital

S.44(2) Charities Act 1992 provides that where trustees of a qualifying charity are of the opinion "that the property of the charity is too small, in relation to its purposes, for any useful purpose to be achieved by the expenditure of income alone" they may resolve that the charity ought to be freed from the restrictions with respect to expenditure of capital to which the charity's permanent endowment is subject.

Pre-conditions to passing a resolution

However, before passing such a resolution the charity trustees "must consider whether any reasonable possibility exists of effecting a transfer or division of all the charity's property under s.43 (disregarding any such transfer or division as would, in their opinion, impose on the charity an unacceptable burden of costs)."²⁵

As with s.43 of the Act, a resolution under s.44 requires a majority of not less than two-thirds of the charity trustees voting.²⁶

Procedure after a resolution

The procedure for dealing with a resolution passed under s.44 is again similar to that outlined above in relation to transfers of charity property.²⁷

Where the Charity Commissioners notify charity trustees that they concur with a resolution the trustees have power to spend capital from the date specified in the notification.²⁸

²⁵ CA 1992 s.44(4).

²⁶ CA 1992 s.44(3).

²⁷ See above and s.44(5)-(7).

²⁸ CA 1992 s.44(8).

Conclusion

The Charities Act 1992 repeals the Charities Act 1985 and, by ss.43 and 44, introduces a new miniature code for small charities.

It seems likely that, for at least three reasons, the new code will be considerably more useful to small charities than the provisions of the 1985 Act. First, the financial limits set out in the new Act will allow a greater number of charities to take advantage of the provisions. Secondly, the ability for a resolution, under either section, to be passed by a two-thirds majority of the trustees, will enable steps to be taken by trustees despite the presence of a dissenter amongst them. Finally, in relation to the power to amend a charity's objects, the new provisions in s.43 allow the revised purposes to "be as similar in character to the existing purposes as is practical in the circumstances"²⁹ which is significantly less onerous than the previous provision.

Neither s.43 nor s.44 deals with the position which obtains where the Charity Commissioners do not concur with the resolution. It is assumed that in such circumstances the trustees' resolution will be ineffective and/or invalid. Similarly, neither section contains a mechanism for the advance clearance of a resolution by the Commissioners. However, trustees wishing to avoid finding themselves in the position of having a resolution rejected might choose to consult the Charity Commissioners (either informally or invoking the provisions of s.24 Charities Act 1960) prior to passing a resolution.

²⁹ CA 1992 s.43(5).