A THREE-PART INVENTION: PUBLIC BENEFIT UNDER THE CHARITY COMMISSION

Peter Luxton[1]

From the Charity Commission's *General Guidance on Public Benefit*[2], its draft supplementary guidance that has appeared to date, and its legal analyses of the underpinning law, it is clear that the Commission is now drastically changing its view of how public benefit is to be applied in the law of charities. It is not the aim of this paper to analyse every detail of the Commission's already voluminous and still growing guidance and draft guidance[3]; rather its aim is to ascertain whether the Commission's basic approach to public benefit is sound in law. This is separate from the issue of whether the Commission's approach is morally or socially desirable or otherwise.

The Commission's new approach seems to be dependent on three crucial propositions: first, that the Charities Act 2006 has reversed the presumption of public benefit in the first three heads of charity in *Pemsel's* case[4] so that public

---

1 Peter Luxton, Professor of Law, Cardiff University. E-mail: LuxtonP@Cardiff.ac.uk

2 Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008)

3 e.g. the charitable status of the so-called 'poor-relations' and 'poor-employee' cases, or the soundness of the Commission's assertion that the class to benefit must not be unreasonably restricted (including an alleged principle that there must be no irrational link between the purposes and the class to benefit): *Analysis of the law underpinning Charities and Public Benefit* (January 2008), para 3-10-3.21 (pp17-19). The Commission's requirement of a rational link is its attempt to rationalise the class-within-a-class restriction that Lord Simonds in *IRC v Baddeley* [1955] AC 572 held applicable to cases within the fourth head of *Pemsel's case* [1891] AC 531, 583. This involves a degree of creativity on the part of the Commission, as neither *Baddeley* nor any of the other cases refers to reasonableness in respect of any restriction on the class to benefit.

4 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten)

benefit now has to be proved under every category of charity[5]; secondly, that the presence and degree of public benefit is to be assessed by looking at an institution's activities, not merely at its purposes[6]; and, thirdly, that an institution cannot be a charity if the poor are excluded from the opportunity to benefit[7] – which is likely to have the greatest impact on charities that charge fees. The Commission indicates that the new Act 'highlights' the public-benefit requirement 'by explicitly including public benefit in the definition of a charitable purpose'[8]; but the second and third of these propositions would appear not to be based on any change brought about by the new Act, but rather on a re-interpretation of the case law.

The Commission is set to apply these propositions in sequence with an apparently remorseless logic. This can be illustrated with regard to the position of the charitable fee-paying independent schools. Although the purposes of such schools are indisputably for the advancement of education, the Commission no longer regards this as sufficient to establish that their purposes are for the public benefit; rather such schools will have to show that their purposes are for the public benefit (the first proposition); proof will be made by the trustees' reporting to the Commission on how the charity is providing public benefit in its activities (the second proposition); and, unless the schools make adequate provision for those who cannot afford their fees, they risk being treated as excluding the poor (the third proposition), and so will not be charitable. In order to determine whether these propositions are legally sound, each will be considered in turn.

Proposition one: that the Charities Act 2006, section 3(2), has reversed the presumption of public benefit in the first three heads of *Pemsel's* case so that it can no longer be presumed that such purposes are for the public benefit

According to the Commission, before the new provisions came into force, a purpose had to be shown to be for the public benefit only if it was within the fourth head of *Pemsel's* case (other purposes beneficial to the community). The Commission claims that the effect of the reversal of the presumption in the Charities Act 2006, s 3(2), is that every description of charitable purposes (*i.e*. the thirteen 'descriptions of charitable purposes' set out in section 2(2)) must now be shown to be for the public

5 *Analysis of the law underpinning Charities and Public Benefit* (January 2008), para 2.20 (p 12)

6 Ibid, Part 4 (pp 38-47)

7 Ibid, paras 3.53-3.76 (pp 26-31); see also Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008), F11 (pp 26-27).

8 Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008), section D1 (p 8); and see Foreword (p 3)

benefit. This key point comes out very clearly in the foreward to the draft guidance on public benefit and the advancement of education:[9]

> '*In the past, advancing education was viewed as something so inherently beneficial that the courts had previously presumed that the aims of any organisation advancing education were for the public benefit, unless there was evidence to the contrary. Following the implementation of the Charities Act 2006, that presumption no longer applies …*'

On this footing, the Commission's view is that, just as before the Act the court would weigh benefits and detriments in determining whether a purpose was charitable under the fourth head (as laid down in *National Anti-Vivisection Society v IRC*[10]), so the Commission is now entitled to take these factors into account under all heads of charity.[11] According to the Commission, it is not sufficient that an institution has purposes that fall within one of the 'descriptions of charitable purposes' in the statutory list; the Commission will also require evidence that its particular purposes (what the Commission calls 'aims'[12]) are for the public benefit, and the evidence must satisfy what might, for convenience, be called the '*NAVS* test'.

It is far from clear, however, that section 3(2) has the effect that the Commission claims for it. The sub-section provides that, in determining whether the public benefit requirement is satisfied, 'it is not to be presumed that a purpose of a particular description is for the public benefit.' This appears to be intended to reverse Lord Wright's statement in the *National Anti-Vivisection Society* case[13] that 'The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though, as regards the first three heads, it may be prima facie assumed unless the contrary appears.'

It is necessary to consider, however, the context of Lord Wright's dictum, as there are two different ways in which it might be argued that a description of a purpose set out in a will, trust, or other governing instrument, amounts to a charitable purpose.

---

9 Charity Commission, Public Benefit and the Advancement of Education: Draft supplementary *guidance for consultation* (March 2008), Foreword, section A, p 3

10 [1948] AC 31 (HL)

11 *Analysis of the law underpinning Charities and Public Benefit* (January 2008), para 2.31 (p 14)

12 For the Commission's definition of its use of the word 'aims', see Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008), section B4 (p 4)

13 [1948] AC 31, 42

First, it might be argued that, even though the specified purpose has not previously arisen for consideration as a charitable purpose, it ought nevertheless to be recognised as charitable as falling within what used to be the fourth head (and would now be category (m) of section 2(2)). In this type of case, the purpose had to be shown to be for the public benefit because, before the Act, a purpose would not fall within the residual category (the fourth head) unless it was 'beneficial to the community.' In the *National Anti-Vivisection Society* case, the House of Lords was called upon to determine whether anti-vivisection was a charitable purpose under the fourth head,[14] and it was therefore necessary to show that anti-vivisection was beneficial to the community. Having weighed in the scales both the perceived benefits of anti-vivisection (which were essentially moral) and its perceived detriments (mostly involving the loss to medical science), their Lordships concluded that anti-vivisection was not beneficial to the community and so was not charitable.

Secondly, it might be argued that the words used in the governing instrument indicate a purpose that can be fitted into one of the recognised categories of charitable purpose. By recognised categories of charitable purposes is meant not merely the first three heads of *Pemsel*, but also all purposes that have been held charitable within the fourth head. The fourth head was not equivalent to the first three: unlike them, it was not itself a charitable purpose – rather it merely indicated a quality (that of being beneficial to the community) that any purpose would need to possess in order to enter the ranks of charitable purposes. Lord Upjohn once likened the fourth head to a portmanteau into which are placed purposes that are beneficial to the community.[15] There are of course numerous examples of purposes that have been held to be charitable within the fourth head; the list is too long to set out in full, but it includes: the promotion of public works[16], agriculture[17], public health[18], and the defence of the realm[19]; the relief of unemployment[20]; faith-healing in a secular context[21]; and the welfare of animals.[22] If the court were satisfied that a particular governing instrument contained a charitable purpose which fell within one of those

14 In a first-instance judgment some fifty years earlier, Chitty J had held that it was: *Re Foveaux* [1895] 2 Ch 501

15 *Scottish Burial Reform and Cremation Society Ltd v IRC* [1968] AC 138, 150

16 *A-G v Heelis* (1824) 2 Sim & St 67

17 *IRC v Yorkshire Agricultural Society* [1928] 1 KB 611

18 *Re Resch* [1969] 1 AC 514 (PC)

19 *Re Driffill* [1950] Ch 92

20 *IRC v Oldham TEC* [1996] STC 1218

21 *Re Le Cren Clarke* [1996] 1 All ER 715

22 *Re Wedgwood* [1915] 1 Ch 113

established under the fourth head, it was self-evident that there would be no room to apply additionally the *NAVS* test, because, as that purpose had already been held to fall within the fourth head, the requirement of public benefit had already been satisfied.

This might appear to leave open the possibility, with section 3(2) in force, of applying the *NAVS* test to what used to be the first three heads of *Pemsel*; and this is, course, what the Commission intends to do. This approach, however, is flawed, because it can be demonstrated that all purposes that have been held to be charitable are for the public benefit, including those comprised in the first three heads. Although the courts rarely referred to public benefit as a separate ingredient until the late nineteenth century, it has been inherent in the concept of a charitable purpose since the enactment of the Statute of Elizabeth 1601.[23] The first three heads of *Pemsel's* case were merely an enumeration of purposes whose public benefit was beyond dispute; this is evident from Lord Macnaghten's description of the fourth head as '*other* purposes beneficial to the community'[24], the inference being that the first three heads have already satisfied this requirement. It therefore makes no sense to require trusts in the first three heads (or, after the Charities Act 2006, any purposes listed in paragraphs (a) to (l)) to show that their purposes are for the public benefit – they must necessarily be so.

This view is supported in the case law. Several cases illustrate that it is implicit in the holding of a particular gift to be for the advancement of education that its purpose is for the public benefit. In *Re Pinion* [25], the court held that an attempt to foist a 'mass of junk' on the public as a museum was not charitable for the advancement of education because it was not for the public benefit. Similarly, making lists of Derby winners[26], the training of poodles to dance[27], and a school for pickpockets[28], all fail to qualify as the advancement of education because they are not for the public benefit.[29] These decisions show that a purpose is not for the advancement of education merely because the settlor believes it to be so; there is, in other words, no presumption that the purpose of a particular gift is for the public

---

23 See Gareth Jones, *History of the Law of Charity*, Cambridge University Press, Cambridge, 1969, at p 27, who states that public benefit 'was the key to the statute [of 1601]'.

24 [1891] AC 531, 583; italics supplied

25 *Re Pinion* [1965] Ch 85

26 Brunyate, 'The legal definition of charity',(1945) 61 LQR 268, 273

27 *Re Hummeltenberg* [1923] 1 Ch 237, 242

28 One of Harman LJ's illustrations in *Re Pinion* [1965] Ch 85, 105; a similar example had been used by Rigby LJ in *Re Macduff* [1896] 2 Ch 451, 474

29 See also, to similar effect, *Re Shaw* [1957] 1 WLR 729

benefit, a point made by Russell J in *Re Hummeltenberg*[30], who observed that 'no matter under which of the four classes a gift may prima facie fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show … that the gift will or may be operative for the public benefit.' Therefore, unless public benefit is self-evident[31], evidence may need to be adduced.[32]

At first blush, it might not appear self-evident that, as a purpose, the advancement of religion is for the public benefit. If the doctrines of a particular religion are particularly unpalatable, might it be not argued that, whilst a gift for the purposes of that religion is for the advancement of religion, it should nevertheless be denied charitable status as not being for the public benefit? The Commission's view, expressed in its draft guidance, is that a religion one of whose tenets required members to refuse blood transfusions for themselves and their families might, under what it sees as a reversal of the presumption of public benefit, no longer be for the public benefit.[33] This is, however, a dangerous road to take, as the Commission would be trying to assess the merits of different religions, which is something the courts have long declined to do, and for good reason: the court is hardly a competent forum to determine matters of religious doctrine.[34] If section 3(2) were to have the effect that the Commission believes it does, there could be challenges under the European Convention on Human Rights by religions denied charitable status on this basis.[35] The better view, however, is that the advancement of religion is intrinsically for the public benefit; and as this does not depend on any presumption, it is not affected by section 3(2).[36] Only faiths whose tenets are immoral or against all religion are treated as not being religions for this purpose.[37]

---

30 [1923] 1 Ch 237

31 e.g. *Re Delius* [1957] Ch 299; *Re Shaw's Will Trusts* [1952] Ch 163, 170

32 e.g. the evidence of a schoolmaster in *Re Dupree's Deed Trusts* [1945] Ch 16

33 Charity Commission, *Public Benefit and the advancement of religion: Draft supplementary guidance for consultation* (February 2008), pp 26-27

34 Cf. *Varsani v Jesani* [1999] Ch 219 (CA), *Craigdallie v Aikman* (1813) 1 Dow 1, and *General Assembly of Free Church of Scotland v Lord Overtoun* [1904] AC 515; see also Robert Atkinson, 'Problems with Presbyterians', chap 6 in Mitchell, C and Moody, S, *Foundations of Charity*, 2000, Oxford: Hart Publishing

35 See Anne Sanders, 'The Mystery of Public Benefit', (2007) 10 CL&PR (issue 2) 33, 37, referring to Articles 9 and 14 of the European Convention on Human Rights, and Human Rights Act 1998, s 13; see also Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit, (2008) 71 MLR 159, 177-182; Francesca Quint and Peter Hodkin, 'The Development of Tolerance and Diversity in the Treatment of Religion in Charity Law', (2007) 10 CL&PR (issue 2), 1, at p 15

36 Cf. the unwarranted refusal of the Commission to accept the dicta to this effect in *Re Watson* [1973] 1 Ch 1472

37 *Thornton v Howe* (1862) 31 Beav 14

The foregoing analysis is entirely consistent with the true meaning of Lord Wright's dictum: namely, although a purpose within the first three heads is necessarily for the public benefit, there is still the possibility that a particular gift, trust, or institution with such a purpose might not be charitable because it lacks public benefit in some other way. The presumption therefore related, not to the purpose itself, but to the section of the community to benefit.

Whilst, therefore, section 3(2) reverses Lord Wright's dictum in the *National Anti-Vivisection Society* case, it does not have the effect that the Commission maintains. As the established charitable purposes necessarily contain public benefit, they are unaffected by the reversal of the presumption. What is reversed is only the presumption that, once it is shown that a trust is for an established charitable purpose, it is for the public benefit in the sense that it benefits a sufficient section of the community. The presumption had hardly any impact in the case law, however, because whether there is a sufficient section of the community to benefit is in virtually every instance determined either as a matter of evidence or (where the specified class is described by reference by a personal[38] or contractual[39] nexus) as a matter of law. Indeed, there was so little need to rely on the presumption, it seems that, at a practical level, it hardly existed.[40] Consider, for instance, *Neville Estates Ltd v Madden*[41], which concerned a trust for the advancement of religion amongst the members for the time being of the Catford Synagogue. Cross J observed that the case was in some ways similar to *Gilmour v Coats*, in that the persons immediately benefited by the trust were not a section of the public but the members of a private body. He nevertheless held the trust charitable for the advancement of religion because he considered that[42]

> *the court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens.*

38 *Re Compton* [1945] Ch 123 (CA)

39 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL)

40 See Anne Sanders, 'The Mystery of Public Benefit', (2007) 10 CL&PR (issue 2) 33. In *Re Hetherington* [1990] Ch 1, Browne-Wilkinson J explained *Gilmour v Coats* as a case where, although the trust was for the advancement of religion, the presumption that the class to benefit was a sufficient section of the community was rebutted by evidence that, the nuns being cloistered, the court was unable to find any recognizable benefit to the community at large from intercessory prayer or spiritual edification. This is a rare instance of the court's referring to a presumption that a gift was for the benefit of a sufficient section of the community if its purpose fell under one of the first three heads.

41 [1962] Ch 832

42 Ibid, 853

He therefore decided the case, not by falling back on any presumption, but by drawing an inference of public benefit from the circumstances. This technique could be used today to provide evidence of public benefit, thereby minimizing the effect of section 3(2).

Proposition two: that the Commission is entitled to require a charity to show that it is providing public benefit in carrying out its activities

Much of the Commission's guidance, particularly that relating to fee-paying charities, is therefore taken up with detailing what activities the Commission is going to regard as providing public benefit, and the degree of public benefit that such activities will have to show is being provided. The Commission appears to regard each individual activity of a charity as capable of being placed on a sliding scale from a high degree of public benefit to considerable public detriment. For example, whilst it seems that independent schools will provide some public benefit if they award scholarships (which are awarded on merit), the Commission indicates that more public benefit will be provided by the award of bursaries (which are based on financial need), and yet still more public benefit will be provided if the schools offer bursaries to children from disadvantaged families irrespective of their academic ability.[43] Furthermore, if the activities do not satisfy the Commission that enough public benefit is shown, and the trustees do not take steps to remedy this, the Commission might exercise various powers, which could include the removal and replacement of the trustees.[44]

One problem with proposition two is that, by virtue of section 3(3), public benefit has the same meaning under Part I of the Act as it had before; yet the Commission cannot state precisely either what public benefit charities must carry out in their activities, or how much of it there must be.[45] For charities, this uncertainty is, of course, giving rise to serious concern.

Another problem with proposition two is that even the Commission's enthusiasm for it cannot hide the slight drawback that it is without legal foundation. The case law establishes beyond doubt that public benefit relates to an institution's purposes, not to its activities; an institution's purposes must be for the public benefit, otherwise it will not qualify as a charity. There are, of course, instances in which it may be necessary to examine an institution's activities in order to establish what its purposes

43 Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008), p 30

44 Ibid, section D4 (p 9)

45 See the comment of Professor Albert Weale at the Bircham Dyson Bell forum on public benefit in March 2008, reported in *Third Sector*, 2 April 2008, pp 28-29: 'The Commission will have to take sides on what is beneficial, which, in a sense, nobody can do.'

are: where the institution does not have any (or any comprehensive) written statement of purposes, where the expressed purposes are unclear or ambiguous,[46] or where such purposes are shown to be a sham.[47] There are clearly instances where the ostensible charitable purposes of a governing instrument merely conceal the institution's true, non-charitable purposes, and it is legitimate to ascertain what those true purposes are – political propaganda, for instance, should not be allowed to masquerade as education.[48]

There is, however, a world of difference between using an 'activities' test in appropriate cases to determine what an institution's true purposes are, and applying it to an institution that is indubitably a charity. Interestingly, in its underpinning legal analysis, the Commission recognises that the test for public benefit under the Charities Act 2006 is a 'purposes' test[49], but makes reference to a number of dicta that indicate that charitable status may be lost by changes in the law, with the result that the Commission is entitled to look at activities on a continuing basis to determine whether the institution's purposes remain charitable.[50] Two comments can be made on this. First, the cases on which the Commission relies for its 'activities' test, are all decisions on whether the purposes of a gift or of an institution were charitable in the first place; they were not cases where the courts were considering whether an existing charity should lose its charitable status because of its subsequent activities.[51] Secondly, the courts have made it abundantly plain that whether an institution has exclusively charitable purposes depends on the purposes as laid down by the settlor, not on the activities of its trustees. Thus, if the purposes of a trust allow its property to be applied to non-charitable, as well as to charitable, purposes, the trust is not charitable, and the willingness of the trustees to apply the

---

46 *Southwood v A-G* (2000) 28 June (CA)

47 Cf the court's approach to shams in *Snook v London and West Riding Investments* [1967] 2 QB 786 (CA)

48 *Re Hopkinson* [1949] 1 All ER 346, 350

49 *Analysis of the Law underpinning Charities and Public Benefit*, January 2008, Introduction, para. 15 (p 4), and para 4.1 (p 38)

50 See *Southwood v A-G* (2000) The Times 18 July 2000 (CA); *McGovern v A-G* [1982] Ch 321; *National Anti-Vivisection Society v IRC* [1948] AC 31; *Re Coats' Trusts* [1948] 1 Ch 340

51 If an institution applies for registration as a charity at a date after its formation, evidence of its *intra vires* activities since the date of formation may be admissible (according to the criteria described in the text) to determine if its purposes are charitable: *A-G v Ross* [1986] 1 WLR 252, 263. This case is referred to by the Commission: *Analysis of the Law underpinning Charities and Public Benefit*, January 2008, para 4.13 (p 42). It does not, however, support an on-going activities test because Scott J was referring to activities prior to the decision's being made on charitable status, not to activities after the institution had already been held to be, or registered as, a charity.

property to exclusively charitable purposes cannot save it.[52] The corollary is that if property is given for exclusively charitable purposes, the fact that the trustees apply it to non-charitable purposes in breach of trust does not cause the gift to cease to be charitable. Were it otherwise, charitable status would depend, not on the purposes laid down by the settlor, but on the actions of the particular trustees for the time being. This is not to deny that activities after registration might be relevant in determining whether such registration was a mistake in the first place;[53] but proposition two is not restricted to the very narrow instance of mistake. The case law therefore provides no support for an on-going activities' test.

Proposition three: that an institution cannot be a charity if the poor are excluded from the opportunity to benefit

The Charity Commission has decided that a trust cannot be charitable if the poor are excluded from the opportunity to benefit.[54] The Commission relies for this proposition on various judicial statements. In the eighteenth century, Lord Camden described charity is 'a gift to a general public use, which extends to the poor as well as to the rich'[55]; in the nineteenth, Lindley LJ said that he doubted 'very much whether a trust would be declared to be charitable which excluded the poor'[56]; and in the twentieth, Harman J hypothesized that a home of rest for millionaires could not be a charity.[57] The main authority upon which the Commission relies, however, is the advice of the Privy Council in *Re Resch*[58]), where Lord Wilberforce opined that 'to limit admission to a nursing home to the rich would not be charitable'.[59]

Whilst Lord Camden's and Lindley LJ's dicta appear to be of general application, those of Harman J and Lord Wilberforce both concerned the healing of the sick, one of the purposes identified in the first group of purposes listed in the Preamble to the

52 *Morice v Bishop of Durham* (1805) 10 Ves 522

53 Removal from the register on this ground occurs only rarely: see *Re Scott Bader Commonwealth Ltd* [1967] Ch Com Rep 48, App D, Pt II. If removal were to occur, it is unlikely that the assets would go cy-près, as it seems that the Charities Act 1993, s 4, could not be applied where the Commission had acted ultra vires in registering a non-charitable institution as a charity.

54 Charity Commission, *Charities and Public Benefit: The Charity Commission's general guidance on public benefit* (January 2008), F11 (pp 26-27).

55 *Jones v Williams* (1767) Amb 651, 652 (supply of water)

56 *Re Macduff* [1896] 2 Ch 451, 464 (charitable or philanthropic purposes)

57 *Re White's Will Trusts* [1951] 1 All ER 528, 530 (home of rest for nurses)

58 [1969] 1 AC 514 (PC) (for general purposes of a hospital that charged fees)

59 Ibid, 544

Statute of Elizabeth 1601, namely, 'the relief of aged, impotent and poor people'. Although it has been held that the words in this group are to be read disjunctively[60], the healing of the sick has been historically closely connected with the relief of the poor.[61] Lord Simonds, who had previously cautioned against the danger of attempting to reason by analogy from one head of charity to another[62], made the following observation in the *Oppenheim* case[63]:

> '*I am concerned only to say that the law of charity, so far as it relates to 'the relief of aged, impotent and poor people' … and to poverty in general, has followed its own line, and that it is not useful to try to harmonise decisions on that branch of the law with the broad proposition on which the determination of this case must rest.*'

It would appear that in the middle of the eighteenth century, during the time of Lord Camden, all the instances in which individuals benefited directly from charity involved the relief of poverty; otherwise charitable purposes connoted either the advancement of religion or purposes of a more general public character, such as public works and the setting out of soldiers. It was only in the latter part of the eighteenth century that the advancement of education emerged as a charitable purpose distinct from the relief of poverty, a development reflected by Samuel Romilly in his four-fold classification in *Morice v Bishop of Durham.*[64] It therefore seems that it is only where the purpose is within the first group in the Preamble that an exclusion of the poor will preclude charitable status; and even this needs qualification, since the provision of an annual allowance for widows and spinsters was held charitable despite the express exclusion of persons with an annual income of less than £8.[65] In any event, the notion that the poor cannot be excluded has no application to the fee-paying independent schools.

Furthermore, it seems that, by an exclusion of the poor, the courts were referring to an express exclusion in the governing instrument, and this was the view of Griffith

---

60 *Re Glyn's Will Trusts* [1950] 2 All ER 1150n, *Re Robinson* [1951] Ch 198, *Re Lewis* [1955] Ch 104, *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G* [1983] Ch 159

61 This clash between the wording of the Preamble and Lord Macnaghten's formulation has therefore led to unease in some of the cases mentioned in the preceding footnote as to whether the relief of the sick or the elderly falls under the first head of *Pemsel* or the fourth.

62 *Gilmour v Coats* [1949] AC 426, 449

63 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 308

64 (1805) 10 Ves Jun 522, 532. Romilly's first head was the relief of the indigent in various ways, including education and medical assistance; his second head was the advancement of learning.

65 *Re De Carteret* [1933] Ch 103

CJ in *Taylor v Taylor*.[66] The express purposes of providing 'homes of rest for millionaires'[67] and 'a nursing home [for] the rich'[68] do expressly exclude the poor. In the absence of such express exclusion, however, the charging of fees (which merely has the effect of reducing the extent to which the poor may in fact use the facilities) is outside the dicta: poor persons might, after all, be able to benefit if they can obtain financial support from relatives or friends, or from charitable or philanthropic sources.

Even if, contrary to what has been argued in the previous paragraph, it is relevant to take into account the effect that the charging of fees has on the extent to which it in fact reduces the use of the facilities by poor persons, there is still little support in the case law for proposition three. The Commission, however, appears to find sufficient in *Re Resch*[69], a decision of the Privy Council that, although some forty years old, the Commission is now using to support its new interpretation of the law.

The case concerned a gift of income for the general purposes of a private voluntary hospital. The hospital, which was conducted by the Sisters of Charity, charged the usual range of fees for a hospital of that type, although from time to time some patients had been treated free of charge; members of a hospital benefits scheme had their charges paid. The Sisters of Charity also ran a public hospital, which was adjacent to the private hospital. There was evidence that the close proximity of the hospitals was to the medical benefit of each.

Lord Wilberforce said that it would be wrong to state

> *that a trust for the provision of medical facilities would necessarily fail to be charitable merely because by reason of expense they could only be made use of by persons of some means. To provide, in response to public need, medical treatment otherwise inaccessible but in its nature expensive, without any profit motive, might well be charitable: on the other hand to limit admission to a nursing home to the rich would not be so. The test is essentially one of public benefit, and indirect as well as direct benefit enters into the account.*

In the case, his Lordship found the element of public benefit strongly present: the private hospital satisfied the need for greater privacy and relaxation than was possible in a general hospital, and it did so at approximately cost price. He added that 'So far as its nature permits it is open to all: the charges are not low, but the

66 (1910) 10 CLR 218, 226-7; see also Barton J, ibid, 232

67 *Re White's Will Trusts* [1951] 1 All ER 528, 530

68 [1969] 1 AC 514, 544

69 [1969] 1 AC 514 (PC)

evidence shows that it cannot be said that the poor are excluded', and he pointed out that the fees excluded only some of the poor (i.e. those who were not members of a medical benefit scheme, or whose benefits were insufficient). His Lordship found that a general benefit to the community resulted from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplemented that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arose from the juxtaposition of the two institutions.

In *Re Resch*, therefore, even though the effect of the charging of fees was to restrict admission to 'persons of some means' the gift was still charitable. On this basis, fees that could be afforded only by millionaires would be repugnant to charitable status, but not charges that were at approximately cost price, even though such charges could be afforded only by persons of some means, at least where there also sufficient indirect benefit, which includes relieving the state sector.

The Charity Commission treats Lord Wilberforce's words as authority for admitting indirect benefit only where there is also direct benefit: otherwise, it comments, the public benefit test would be ineffectual 'because in the case of most, if not all purposes some element of indirect benefit to society could be shown.'[70] The Commission reasons from this that, where fees are charged which have the effect of excluding the poor from direct benefit, any indirect benefit is inadmissible. The Commission's view, in purported reliance on *Oppenheim v Tobacco Securities Trust Co Ltd*[71], is that the poor are excluded unless they benefit directly.

This, however, is to misunderstand *Oppenheim* and to distort *Re Resch*. In the former, those to benefit directly were defined by a contractual nexus, and so were not a sufficient section of the community; whereas, in the latter, the class that benefited directly – the patients of the private hospital - were not so defined. In these circumstances, it was appropriate in *Re Resch* to take account of 'indirect as well as direct benefit' in determining whether the poor could be said to be excluded, and to read Lord Wilberforce's words as excluding indirect benefit in the absence of direct benefit is both contrived and illogical. Although the private hospital in *Re Resch* did from time to time treat patients free of charge or at a reduced fee, Lord Wilberforce proceeded on the basis that the direct benefit was to those who could afford the charges or who had them paid under a medical benefit scheme. The poor were therefore not treated as excluded merely because they did not benefit directly.

---

70 *Analysis of the law underpinning Charities and Public Benefit* (March 2008), para 3.67 (pp 29-30) The Commission appears to be adopting a different stance from in the past, when it had previously effectively recognised pure indirect benefit as sufficient. It had treated the advancement of education as charitable even if carried out only overseas ((1993) 1 Decisions 16); yet if (as is usually accepted) the class to benefit must be the public in the United Kingdom (*McGovern v A-G* [1982] Ch 321) the only benefit from such a purpose can be indirect.

71 [1951] AC 297 (HL)

The Commission's view that the benefit to the poor must be direct, and which it applied recently in *Odstock Private Care Ltd*,[72] is therefore incompatible with *Re Resch*.

Even if, contrary to the argument in this paper, Lord Wilberforce's reasoning in *Re Resch* were to be applied to the advancement of education, the result would be that fee-paying schools that could be afforded only by 'persons of some means' would not be treated as excluding the poor if the fees were at approximately cost price; the benefit to the poor in such instances could include the indirect benefit of relieving pressure on the state-school sector. The vast majority of such independent schools would no doubt pass this test.[73]

Conclusion

Until the legality of the Commission's guidance is tested in the Charity Tribunal and (which is surely inevitable) in the courts, many charities, particularly the fee-paying independent schools, are (understandably) fearful of not satisfying in due course the Commission's public-benefit scrutiny, and are already changing the way they carry on their activities.[74] Thus, even if the Commission's current guidance is shown to be wrong in law, it is having an impact on the charity sector.

In the light of the analysis in this paper, it must be concluded that none of the three propositions which run through the Commission's guidance, is legally sound. Doubts about the ability of the Charities Bill to deliver what the government intended on public benefit have been present from the outset[75] – even the Charity Commission initially took the view that the charitable status of the independent

72 25 September 2007

73 On the independent schools, see Peter Luxton, 'Public Benefit and Charities: the impact of the Charities Act 2006 on independent schools and private hospitals', chapter 10 (pp 181-202) in *Contemporary Perspectives on Property, Equity and Trusts Law*, (eds Martin Dixon and Gerwyn Griffiths), Oxford University Press, Oxford (2007)

74 The value of scholarships has been declining rapidly, and more funds are being put into means-tested bursaries for children from deprived backgrounds: see Paton, *The Daily Telegraph*, 6 September 2008, p 8. Some schools are considering a needs-blind policy on admissions: see *The Times*, 21 October 2006, pp 1, 38-39.

75 See the separate Written Evidence to the Joint Committee on the Draft Charities Bill 2004 (HL Papers 167-2; HC 660-2), of Hubert Picarda QC (DCH 297) and Peter Luxton, DCH270; see also the comments in the debates on the Charities Bill of Lord Phillips of Sudbury: House of Lords Debates, Charities Bill 2005, Second Reading, Hansard, 20 January 2005, col 907, that in removing the presumption of public benefit, the government 'want the appearance of change without the substance and that they want to satisfy critics of the status quo without arousing the middle classes. In short, they want the credit without any opprobrium.'

schools would be unaffected[76]; and a number of other commentators have since called the Commission's present view into question.[77] At the moment, however, the Commission does not even admit that, at the very least, the law might be susceptible to other interpretations. That what is now often called the charity 'regulator' should be basing its guidance on propositions that are fundamentally flawed should be a matter of general concern.

76 *Briefing Paper for the Joint Committee on the Charities Bill, Charity Commission*, DCH 301, para 13.1. The Joint Committee Report bluntly said that, if this view were correct, it would have 'left the draft Bill in the ludicrous position of promising to bite on the public benefit bullet without having any teeth to do so'. It is hard to believe that the Commission's later retraction of this view, in the so-called concordat with the Home Office, was not made under pressure from the latter.

77 Jeffrey Hackney, 'Charities and public benefit', (2008) 124 LQR 347; Anne Sanders, 'The Mystery of Public Benefit', (2007) 10 CL&PR (issue 2) 33 (especially p 35)