THE COURTS AND CHARITIES: CHARITY PROCEEDINGS, JUDICIAL REVIEW AND HUMAN RIGHTS

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A. Introduction

The Charity Commission's approach, both substantively and procedurally, to granting consent for the bringing of charity proceedings under s.33 of the Charities Act 1993[2] has previously been reviewed in this journal by James Kilby.[3] Section 33 stipulates that what are defined in s.33(8) of the 1993 Act as "charity proceedings" may only be

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2 As amended by the Charities Act 2006. References in this article to the various charity law statutes use the year of enactment, e.g. the 2006 Act, etc. It is proposed that the 1993 Act together with many of the provisions of 2006 Act and the Recreational Charities Act 1958 will be repealed and replaced by consolidating legislation. The draft consolidating Bill may be accessed on the website of the Cabinet Office, Office of the Third Sector at http://www.cabinetoffice.gov.uk/media/265540/draftcharitiesbillsept2009.pdf. The relevant provisions in relation to charity proceedings which are contained in s.33 of the 1993 Act are reproduced without substantive amendment in clause 115 of the draft Charities Bill. Such proceedings do not include appeals from the decisions of the Charity Commission and applications or references to the Upper or First-tier Tribunal (Charity) (replacing what was formerly the Charity Tribunal as from 1st September 2009 – see The Transfer of Functions of the Charity Tribunal Order 2009, S.I. 2009/1834) under Schedules 1C and 1D to the 1993 Act as amended by Schedule 4 to the 2006 Act or any appeal from the Upper or First-tier Tribunal, which are outside the ambit of this article and, indeed, of s.33 itself. See also n.94 below.

3 James Kilby, "Charity Proceedings" CL&PR 9/1 [2006] 23.

taken by "other persons" (that is to say, by persons other than the Attorney General[4] or the Charity Commission)[5] in relation to a charity if those proceedings are authorized by an order of the Charity Commission or, if such an order is applied for and refused, leave to take those proceedings is obtained from a judge in the Chancery Division of the High Court;[6] the section also specifies[7] the persons who are entitled to bring such proceedings under that section, which include "any person interested in the charity".

The purpose of this article is to consider the present scope which the courts have attached to the meaning of "charity proceedings" under s.33(8) of the 1993 Act and the extent, if any, to which that scope may have to be adapted in order to encompass the role of judicial review in relation to charities and applications for judicial review under the Human Rights Act 1998.

Accordingly, three related aspects of charity case law will be considered. The first concerns the interpretation which the courts have given to the term "charity proceedings" under s.33(8) of the 1993 Act and its statutory predecessors[8] and also to the term "any person interested in the charity" under s.33(1) of the 1993 Act, together with the interrelationship between those terms. These matters are considered in section B below. The second aspect concerns the extent to which charities will potentially be subject to judicial review proceedings under Part 54 of the CPR. This aspect will be considered in Section C below and will concentrate on the question of the extent to which charities will be regarded as public bodies or authorities for these purposes. The development of the exclusivity rule established by the House of Lords in *O'Reilly v*

4 Acting *ex officio* in executing the duty of the Crown as *parens patriae* to protect charity property – see, generally, *Tudor on Charities*, 9th ed, London: Sweet & Maxwell (2003), at 10-018 *et seq*. Where legal proceedings are brought by some other person in relation to a charity, whether under s.33 of the 1993 Act or otherwise, the Attorney General should properly be joined as a defendant to represent the beneficial interest in the charity or may intervene in order to protect the charity – see *Tudor* (*supra*) at 10-019. Note that under the Law Officers Act 1997, s1(1), any function of the Attorney General may be exercised by the Solicitor General.

5 The Charity Commission itself is now empowered to exercise the same powers as are exercisable by the Attorney General acting *ex officio* with respect to the taking of legal proceedings with reference to charities or the property or affairs of charities (except for the power to present a petition for the winding up of a charity under s.63(1) of the 1993 Act) or the compromise of claims with a view to avoiding or ending such proceedings – see Charities Act 1993, s.32(1) and (2).

6 The provisions of s.33 of the 1993 Act are largely unchanged by the Charities Act 2006, save that, when para.8 of Schedule 5 to the 2006 Act comes into force, charity proceedings in relation to exempt charities will also require authorization by the Charity Commission.

7 See Charities Act 1993, s.33(1).

8 See Charitable Trusts Act 1853, s.17 and Charities Act 1960, s.28. S.33(8) of the 1993 Act re-enacts in the same terms what was formerly s.28 of the 1960 Act. The 1960 Act in turn repealed and replaced s.17 of the 1853 Act, the terms of which are considered in Section B3 below.

Mackman,[9] under which the decision of a public body or a body exercising public or governmental functions which infringes public law rights can only be challenged by judicial review proceedings,[10] renders it necessary to examine the circumstances in which charities may be considered to be public bodies for the purposes of judicial review generally.

Additionally, since challenges against public authorities alleging that their actions have violated an applicant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR") as incorporated into domestic law by the Human Rights Act 1998 ("the HRA"), may now be brought by way of a claim for judicial review, it will also be necessary to consider the circumstances in which a charity will be a "public authority" in the specific context of s.6 of the HRA and the principles which have been established by the decisions of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[11] and *YL v Birmingham City Council*[12] as well the recent decision of the Court of Appeal in *R (On the Application of Weaver) v London & Quadrant Housing Trust.*[13] As will be seen below, the approach to this last question may differ from that which has traditionally been adopted in public law.

The third aspect follows on from the second and concerns the extent to which the judicial review proceedings are likely to be considered to constitute "charity proceedings" for the purposes of s.33(8) of the 1993 Act. This aspect will be examined in Section D below.

B. Section 33 of The Charities Act 1993

B1. Introduction

The statutory definitions of "charity proceedings" and of "charity" under what is now s.33 of the 1998 Act are considered in Section B4 below. Since both of those definitions expressly incorporate references to "the court's jurisdiction with respect to charities", the inherent jurisdiction of the Court in relation to charities will be briefly summarized by way of background in Section B2 below. In order to consider the historical perspective which underlies s.33 of the 1993 Act, which itself re-enacts s.28 of the Charities Act 1960, Section B3 below will, by way of comparison, look at the

9 [1983] 2 AC 237, HL

10 The justification and reasons for this rule and the consequent substantive divide between public/private law have been extensively criticised – see for example, D. Oliver, *Common Values and the Public-Private Divide*, Butterworths: London (1999), Chapter 4 at 71-93

11 [2003] UKHL] 37, [2004] 1 AC 546

12 [2007] UKHL 27, [2008] 1 AC 95

13 [2009] EWCA Civ 587, [2009] HRLR 29, CA

development of the case law under s.17 of the Charitable Trusts Act 1853, which was the statutory predecessor to both s.33 of the 1993 Act and s.28 of the 1960 Act.

B2. The Inherent Jurisdiction of the Court in relation to Charities

There is general agreement amongst commentators that the inherent jurisdiction of the court in relation to charities derives from the jurisdiction which was originally asserted or assumed by the Court of Chancery over trusts and thus was, initially at least, limited to a jurisdiction over charitable trusts.[14] The court had no jurisdiction over a gift to charity without a trust, whether express or implied and it was the function of the Crown, as *parens patriae* and in exercise of its prerogative jurisdiction, to secure the proper application of funds which were the subject of such gifts by nominating the charitable objects by means of a scheme made under the Royal Sign Manual.[15] The Sign Manual procedure will still apply to a gift to charity generally which has been made without the intention of creating a trust and where the particular objects or purposes have not been defined or are uncertain.[16]

The court's inherent jurisdiction over charitable trusts, which is now vested in the High Court of Justice and assigned to the Chancery Division,[17] is now recognized as extending to charities other than those which have adopted a structure of a trust, including corporations,[18] companies established for charitable purposes[19] as well as

14 See generally *Tudor on Charities*, 9th ed, London: Sweet & Maxwell (2003), at 10-003 and P. Luxton, *The Law of Charities*, Oxford: Oxford University Press (2001), at 11.06 and 15.01

15 See, for example the authorities cited in *Tudor* (*supra*), at 1-018 and 10-002. The power of the Crown to dispose of charitable gifts under this procedure has now been delegated to the Attorney General - see [1989] Ch Com Rep at para 38; in practice, this function may be exercised by the Solicitor General under the Law Officers Act 1997, s1(1).

16 See, for example, *Re Smith* [1932] 1 Ch 553, CA, and *Re Slevin* [1891] 2 Ch 230, CA.

17 See the Supreme Court Act 1981, s.61 and Sched. 1

18 See *Construction Industry Training Board v A-G* [1973] Ch 173, where the Charity Commissioners had refused to register the Construction Industry Training Board, a corporation established by special Act of Parliament, as a charity on the basis that the Board was not an institution which was subject to the control of the High Court in exercise of its jurisdiction in relation to charities within the meaning of the Charities Act 1960 s.45(1), the statutory predecessor to what is now s.1(1) of the 2006 Act. The majority in the Court of Appeal (Buckley LJ and Plowman J) held that a charitable company was subject to the jurisdiction of the High Court on the basis that the High Court could restrain a charitable company from applying its property other than to its charitable objects and that the Act which established the Board did not sufficiently remove the court's jurisdiction to prevent the Board satisfying the statutory definition as a "charity" within s.45(1). Russell LJ dissented from this conclusion. As with the definition of charity in s.45 of the 1960 Act, the definition of "charity" which is contained in s.1 of the 2006 Act and which, in turn, is expressly incorporated by reference in s.96(1) of the 1993 Act similarly refers to institutions established for charitable purposes which fall "to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities."

unincorporated associations whose objects are restricted to charitable purposes and whose property is to be applied wholly and exclusively for such purposes whether on dissolution or otherwise.[20] Under its inherent jurisdiction, the court decides such matters as the validity of dispositions to charity and matters arising in the course of the administration of such trusts, including, for example, any questions of construction which may arise under any relevant trust deed relating to the charity in question. Where there is an intention to create a trust, the court will have jurisdiction to direct the purposes to which the gift shall be applied by way of a scheme settled by the court and to exercise all the equitable powers and remedies which derive from the inherent jurisdiction of the Court of Chancery, including the power, amongst other things, to establish a scheme (whether for the administration of the charity or for the alteration of the charitable purposes of the trust *cy-prés*),[21] to appoint and remove trustees, to order accounts and inquiries and to appoint a receiver.[22]

In addition, the Crown itself will also normally exercise its function as *parens patriae* to ensure the due administration of established charities and the proper application of funds devoted to charitable purposes through the instrumentality of the courts. In *Construction Industry Training Board v A-G*[23] Buckley LJ expressed the view that, where the Crown invokes the assistance of the courts for such purposes, the jurisdiction which is invoked is a branch of the Court's jurisdiction in relation to

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19 See, for example, in relation to *cy-prés* schemes to apply the property of a charitable company incorporated under the Companies Acts, *Re Dominion Student Hall Trust* [1947] Ch 183 and *Liverpool and District Hospital for Diseases of the Heart v A-G* [1981] Ch 193. The precise basis of the court's jurisdiction over charitable companies has been described by Luxton as a source of continual theoretical difficulty as it is a well-established principle under cases such as *Saloman v Saloman & Co* [1897] 2 AC 22,HL that a company incorporated under those Acts does not hold its property upon trust for its purposes; nevertheless Luxton concludes that the court's jurisdiction over such companies might be viewed as based upon the notion that the charitable corporation, though not a trustee of its assets in the strict sense, is nevertheless subject to fiduciary duties in respect of them which are enforceable by the Attorney-General in the High Court in respect of its jurisdiction over charities so that the assets of a charitable incorporation might therefore be described as subject to a quasi-trust, or as being subject to a trust in the broad sense - see P. Luxton, *op cit*, at 11.16 – 11.18 and 11.20.

20 See, for example, the Charity Commissioners, Model Constitution for a Charitable Unincorporated Associations and the Charity Law Association's Constitution for a Charitable Unincorporated Association, *Tudor* (*supra*) at 3-037 and J. Warburton, *Charities, Members, Accountability and Control*, [1997] Conv 106 at 108

21 See now Charities Act 1993 , s.13

22 See *A-G v Schonfeld* [1980] 3 All ER 1. Where the gift falls outside the inherent jurisdiction of the court, the court will strictly be limited to declaring that the property belongs to charity and protecting that property until its application through the Sign Manual procedure - see *Da Costa v De Pas* (1754) Amb 208 and *Re Bennett* [1960] Ch 18

23 [1973] Ch 173, CA

trusts.[24] It has been observed[25] that the more modern cases indicate that the judicial jurisdiction is being expanded at the expense of the prerogative jurisdiction of the Crown, even where no express trust exists[26] or, indeed, no trust may exist at all in a strict sense.[27] To this extent, the dividing line between what was traditionally regarded as the inherent jurisdiction of the court in relation to charities and the prerogative jurisdiction of the Crown may be regarded as becoming blurred. The blurring of this distinction is illustrated not only by the comments of Buckley LJ in *Construction Industry Training Board v A-G* referred to in the previous paragraph but also by the public law developments in relation to charities which are discussed in Section C below.

B3. S.17 of the Charitable Trusts Act 1853

Section 17 of the 1853 Act introduced the requirement that the authorization or direction by an order or certificate of the Charity Commissioners needed to be obtained before

> "any suit, petition or other proceeding…for obtaining any relief, order or direction concerning or relating to any charity, or the estate, funds, property, or income thereof shall be commenced, presented or taken by any person whomsoever.".

This requirement to obtain the prior authorization of the Charity Commissioners to all forms of proceedings in which relief was sought "concerning or relating to" any charity or its property was, however, expressly made subject to one proviso by the section, namely:

> "Provided always, that this enactment shall not extend to or affect any such petition or proceeding *in which any person shall claim any property or seek any relief adversely to any charity*." (emphasis added)

The underlying purpose behind the imposition of the requirement to obtain the consent of the Charity Commissioners by s.17 of the 1853 Act was described by James LJ in *Holme v Guy*[28] as follows:

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24 *Ibid*, at 186E-F

25 See P. Luxton, *op cit*, at 15.04, commenting in the context of the exercise by the court of its jurisdiction to make a scheme in relation to charities.

26 By, for example, the mechanism of a presumed trust - see *Re Vernon's Will Trusts* [1972] Ch 300n.

27 See *Re Liverpool and District Hospital for Diseases of the Heart v A-G* [1981] Ch 193, concerning a charitable company.

28 (1877) 5 Ch D 901

> "Its object was to prevent strangers from coming in as relators in suits in Chancery, or as Petitioners under [Romilly's Act 1812, (52 Geo.3, c.101)], to complain of the management of the charity, unless the Charity Commissioners are first satisfied that such proceedings ought to be taken."[29]

The commencement or joining in of proceedings by such persons had been described by Lord Cranworth LC some twenty years or so previously as having given rise to "enormous abuses which had grown up in the administration of charities in reference to proceedings which," prior to the enactment of the section, "used to be instituted to the good of no-one."[30] For some years prior to the enactment of the s.17, the Court of Chancery had expressed concern as to the impact of costs on charities and other prejudice arising from prolonged litigation in relation to matters of comparatively small value.[31] Concern in relation to the frittering away of the assets of charities on such litigation continues to the present day to be regarded by the courts as providing the underlying rationale behind s.17 and its statutory successors.[32]

Two aspects of the section are worthy of note. The first is that s.17 of the 1853 Act differed in form from its statutory successors in so far as it did not contain any definition of "charity proceedings." Instead the section applied the requirement to obtain the authorization of the Charity Commissioners to all forms of proceedings in which relief was sought "concerning or relating to" any charity or its property and merely sought to specify, by way of the exclusionary proviso referred to above, one class of proceedings which could be brought without the need to obtain the prior authorization or consent of the Charity Commissioners. As to the scope of the section, it was stated by Bowen L.J. in *Rendall v Blair* [33] that:

> "It is apparent from the initial language that actions at common law are not within the scope of the section, which applies simply to suits, petitions, or other proceedings for obtaining relief, orders, or directions concerning or relating to any charity. Those were not, at the date of this statute, 1853, apt

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29 *Ibid*, at 910

30 See *Re Lister's Hospital* (1855) 6 De GM & G 184 at 186. Lord Cranworth LC interestingly went on to suggest in the same dictum, however, that, notwithstanding the terms of the section, there may be cases in which the Court of Chancery should be able to act without waiting for proceedings to be set in motion by the sanction of the Charity Commissioners. It has been suggested that this observation may explain such cases as *Re Lister's Hospital* (*supra*) and *Re St Giles and St George Bloomsbury* (1858) 25 Beav 313, in which the court granted relief on petitions which had been brought without a certificate of the Charity Commissioners having been obtained under s.17 of the 1853 Act and/or without the Attorney-General having been made a party to the proceedings – see P. Luxton, *op cit*, at 13.24.

31 See, for example, *A-G v Shearman* (1839) 2 Beav 104 at 111-2 *per* Lord Langdale MR

32 See *Muman v Nagasena* [2001] 1 WLR 299

33 [1890] 45 Ch D 139 at 154-5

> words for dealing with or describing common law actions, and it follows, in my opinion, that no common law action, or, in other words, no action brought solely to enforce a common law right, whether such right arises out of contract or out of common law obligation, or common law duty, is within the section."

Secondly, the section did not seek to impose any restriction upon the persons who were entitled to bring proceedings "concerning or relating to" any charity or its property.[34] Accordingly the reported cases under s.17 tended to concentrate upon the question whether the claim or the relief sought against the charity or its property was in essence adverse to the charity, in contrast to the general emphasis of the case law under its statutory successors, ss.28 of the 1960 Act and 33 of the 1993 Act, which is considered in Sections B4 and B5 below.

This concentration upon the question of whether the claim or the relief sought against the charity or its property was in essence adverse to the charity in the reported cases under s.17 is exemplified by the decisions in *Holme v Guy*,[35] *Rendall v Blair*[36] and *Benthall v Earl of Kilmorey*.[37] The action in *Holme v Guy* was an action by the governors of an endowed school against the master to restrain him from presenting himself at the school or continuing to occupy the schoolhouse on the ground that the master had never been properly appointed to the mastership, was unfit to fulfil its duties and had been removed by a resolution of the governors, while the action in *Rendall v Blair* was brought by a master of a charity school against the managers of the school for an injunction to restrain them from dismissing from his office and from ejecting him from the schoolhouse. Neither action was held to require the consent of the Charity Commissioners under s.17 of the 1853 Act. In *Holme v Guy*, James LJ stated:

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34 By virtue of the definition of "charity" in s.66 of the 1853 Act, voluntary charities which had no endowment and relied entirely on membership subscription were excluded from the scope of s.17 of the 1853 Act, so that prior to the enactment of the Charities Act 1960, individual members of such voluntary charities could enforce any rights arising under the rules of association of the charity without needing recourse to a relator action (which needed the consent of the Attorney-General representing the Crown as *parens patriae*) or charity proceedings under s.17 of the 1853 Act. Accordingly, individual actions by members of voluntary charities were entertained without either the Attorney-General being made a party or the consent of the Charity Commissioners in *Howard v Hill* (1888) 59 LT (NS) 818, *Bolton v Madden* (1873) LR 9 QB 55 – see, generally, Luxton, *op cit*, at 13.17. The definition of charities was widened by s.45(1) of the Charities Act 1960 (re-enacted as s.96(1) of the Charities Act 1993 and now s.1 of the 2006 Act) and the position as to the taking of charity proceedings in relation to voluntary charities is now the same as with any other charity.

35 (1877) 5 Ch D 501

36 (1890) 45 Ch D 139

37 (1883) 25 Ch D 39

> "It is, in my judgment clear that the 17th section of the Charitable Trusts Act, 1853, was never intended to interfere with the rights or powers of the trustees of a charity in their character of owners of property, or to interfere with their rights in the character of masters who are employing servants."[38]

These comments were echoed in *Rendall v Blair*, in which the decision at first instance of Kay J holding that the consent of the Charity Commissioners was required under the section was reversed by a majority decision in the Court Appeal. As seen from the passage in his judgment which has been quoted above, Bowen LJ expressed the view that, as a matter of statutory interpretation, s.17 of the 1853 Act was not intended to deal with or touch actions which were brought solely to enforce a common law right.[39] Fry LJ also expressed the view that an action to enforce an individual equitable right not relating to the administration of the trusts of the charity would also fall outside the purview of s.17 of the 1853 Act;[40] the consent of the Charity Commissioner under the section was only to be obtained in cases where administration of a trust was sought.

The decisions in *Holme v Guy* and *Rendall v Blair* may be contrasted with that in *Benthall v Earl of Kilmorey*,[41] in which a resident medical superintendent sought an injunction restraining the committee of a hospital from ejecting him from his residence and otherwise interfering with the tenure of his office. The committee had purported o give the medical superintendent notice of removal under rules framed by the committee in exercise of their powers under the trust deed establishing the hospital. Those rules provide for the appointment of a resident medical superintendent for life subject to his removal on three months' notice from the committee on proof of neglect of duty. The committee gave notice of removal on the grounds that the funds of the hospital were insufficient to maintain a resident medical officer even though no charge of neglect of duty had been brought against the medical superintendent. At first instance, Chitty J refused the motion for an injunction on a preliminary objection holding that the certificate of the Charity Commissioners should have been obtained under the section before the issue of the writ, on the basis that the resident medical superintendent's claim was not adverse litigation but in reality a claim to be an object of the charity and a claim to part of the charity estate as beneficially belonging to the resident medical superintendent for life together with the endowments belonging to that office.[42]

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38 (1877) 5 Ch D 901 at 910

39 (1890) 45 Ch D 139 at 154-5, 157

40 *Ibid* at 160. Bowen LJ also concurred with this view but Cotton LJ dissented from the views of the majority, holding that the case raised issues relating to the administration of a trust and thus that consent was required under s.17.

41 (1883) 25 Ch D 39

42 *Ibid* at 44

Chitty J accordingly drew a distinction between (i) a claim brought by a plaintiff merely for the object of preventing the trustees from excluding the schoolmaster or resident medical officer from his office or house and (ii) one in which the plaintiff claimed to be an object of the charity and, as such, entitled to share in the benefits of the charity as a recipient of part of the charity estate.[43] The former claim would by its very nature constitute adverse litigation to the charity which would not require the consent of the Charity Commissioners under the section, while the latter would lead to what Chitty J described as "an interference with the charity estate itself" which may necessitate the taking of accounts and inquiries involving the administration of the charity estate; Chitty J described such a claim as an "internal" claim which would require the consent of the Charity Commissioners under the section.[44]

No order was made on the appeal on the grounds that the committee stated that they had no intention of disturbing the resident medical superintendent in his occupation of his house unless and until a new scheme was settled by the Charity Commissioners or until the trial of the action and, on this basis alone, Cotton LJ therefore regarded it as unnecessary and therefore improper to grant an injunction.[45] Cotton LJ would not, however, go so far as to say that an injunction would have been granted in the absence of such a statement although he did indicate that, if the action had been brought with any other object beyond preventing the committee from excluding the resident medical superintendent from his office and house, the action would clearly have required the sanction of the Charity Commissioners under s.17.[46]

Accordingly, as Robert Walker J observed much later in *Scott v National Trust*,[47] in the nineteenth century questions whether a schoolmaster or resident medical officer appointed and paid by charity trustees had lawfully been dismissed could be therefore be seen either as a matter of employment law, in which case the proceedings in which they were raised would be regarded as essentially "adverse" to the charity and thus as falling within the proviso to s.17 thereby obviating the need to obtain the prior authorization of the Charity Commissioners or, alternatively, as a matter of the proper administration of charitable trusts, in which case the authorization of the Charity

43 Citing the decision of Jessel MR in *Brittain v Overton* which is noted at (1883) 45 Ch D 41-3. Chitty J distinguished *Holme v Guy* on the basis that an action for recovery of possession of a residence or a schoolhouse being a common law action for ejectment, fell outside the ambit of the section – *ibid* at 45-6.

44 (1883) 25 Ch D 39 at 44-5

45 *Ibid* at 46-7

46 *Ibid* at 47

47 [1998] 2 All ER 706 at 713d. Robert Walker J commented (at 713b-d) that the factual context which gave rise to the dichotomy between a claim in adverse litigation to the charity and an "internal" claim involving the administration of the charity estate in *Holme v Guy*, *Benthall v Earl of Kilmourey* and *Rendall v Blair* arose at a time when education and healthcare was more generally provided through charities.

Commissioners would be required under the section.

The limits placed upon the ambit of construction of s.17 in the case law referred to above (in particular, the exclusion of common law actions from the purview of the section) therefore led to the courts, in deciding whether an action was one which was adverse in nature to the charity in question, tending largely to concentrate upon the comparatively narrow question of the form of proceedings, in the sense of whether the proceedings in question were in essence proceedings which had the purpose of enforcing common law or personal rights against a charity or were, instead, proceedings to enforce the administration of a charitable trust action. This was not an exclusive tendency, however. Thus, for example, in *Rook v Dawson*,[48] the plaintiff, who had obtained the highest mark in a examination, brought an action seeking firstly a declaration that he was entitled to the award of a scholarship under a trust deed which provided for the award of a scholarship to the pupil achieving the best performance in an examination and, secondly, an order directing the trustees to make him the award. The action was held by Chitty J to be legal proceedings "relating to" a charity within the meaning of s.17 of the 1853 Act. The action was held not to be an action to enforce any personal right as there was no contract between the plaintiff and the trustees but instead an action to enforce the administration of the charitable trusts of the trust deed, thus requiring the certificate of the Charity Commissioners under the section.[49]

As will be noted in Section B4 below, particularly in relation to the decisions in *Brooks v Richardson*[50] and *Muman v Nagasena*,[51] nowadays the courts are more likely to look at the substance of the issues raised by the proceedings in question rather than the precise form of proceedings themselves in deciding whether the proceedings constitute "charity proceedings" for the purposes of the statutory successors to s.17 and, in particular, whether those issues essentially relate to the administration of the charity.

Whatever limits which the courts may have placed on the ambit of construction of s.17, however, it is submitted that the conceptual distinction drawn by the terms of the proviso to that section between an action which is in itself adverse in nature to a charity, on the one hand, and an internal claim relating to the administration of the affairs and estate of a charity provides an inherently valid distinction which remains of use even after the repeal of s.17 of the 1853 Act. This distinction is one which has, however, subsequently either been overlooked or misapplied in some of the modern case law which is considered in Sections B4 and B5 below under what is now s.33 of the 1993 Act.

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48 [1895] 1 Ch 480

49 *Ibid* at 487

50 [1986] 1 WLR 385

51 [2001] 1 WLR 299

In contrast, the case law under its statutory successors, ss.28 of the 1960 Act and 33 of the 1993 Act has generally tended, until recently, to concentrate upon the question of whether the claimant is a "person interested" in the relevant charity for the purposes of what is now s.33(1) of 1993 Act. So framed, the question becomes one of *locus standi* to bring charity proceedings; thus a claimant will face two hurdles before bringing proceedings under s.33 of the 1993 Act. Firstly, the claimant will have to obtain the consent of the Charity Commissioners to bring the proceedings under s.33(2) and, secondly, the claimant will have to satisfy the court that he or she is a "person interested" in the relevant charity under s.33(1). This aspect is considered further in Section B5 below both in the context of proceedings which are by their nature adverse to interests of a charity and also in relation to its significance in respect of proceedings which relate to the internal affairs of a charity. It now seems that a claimant who brings proceedings which are essentially adverse in their nature to a charity will not be a "person interested" in the relevant charity under what is now s.33(1) of the 1993 Act although this distinction has not (until comparatively recently) necessarily always been fully appreciated in the relevant case law.

B4. Charity Proceedings under s.33 of the Charities Act 1993

Reference has already been made in Section B2 above to the definition of "charity" in s.1 of the 2006 Act by reference to an institution which (a) is established for charitable purposes (thus taking into account the extended definition of charitable purposes which is contained in s.2 of the 2006 Act) and (b) falls to be "subject to the control of the High Court in the exercise of its jurisdiction with respect to charities". This definition is also adopted as the definition of "charity" for the purposes of s.96(1) of the 1993 Act, with the definition of "institution" in s.97(1) of the 1993 Act extending to "any trust or undertaking". "Charity proceedings" themselves are defined in s.33(8) of the 1993 Act as:

> "proceedings in any court in England or Wales brought under the court's[52] jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes."[53]

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52 "The court" is defined in s.97(1) for these purposes as meaning the High Court and, within the limits of its jurisdiction, any other court in England and Wales having a jurisdiction in respect of charities concurrent (within any limit of area or amount) with that of the High Court.

53 The view has been expressed that the first limb of the definition of "charity proceedings" in the statutory definition refers to the jurisdiction of the court to alter or modify trusts by schemes as now enlarged by statute on the basis that this jurisdiction is not truly a question of administration and that the second limb of the definition refers to the power of the court to appoint and remove trustees, to sanction dealings with trust property, to enforce the performance of trusts and redress breaches of trust – see H.Picarda QC, *The Law and Practice relating to Charities*, 3rd ed., Lexis Nexis Butterworths: London (1999).

"Trusts" in this context are given a wide definition in s.97(1) of the 1993 Act as meaning the provisions which establish the charity as a charity and regulate its purposes and administration, whether those provisions take effect by way of trust or not, and have a corresponding meaning in relation to other institutions.

If the proceedings in question do constitute charity proceedings within the meaning of s.33(8), then s.33(2) provides that no such proceedings shall be entertained or proceeded with in any court unless the taking of proceedings is authorized by the Charity Commission. This is, however, subject to the qualification that the Commission shall not, without special reasons, authorize the taking of charity proceedings where in its opinion the case can be dealt with under the powers conferred by the 1993 Act[54] otherwise than those conferred by s.32 of the 1993 Act, which permits the Commission to exercise the same powers as are exercisable by the Attorney General acting *ex officio* with respect to (a) the taking of legal proceedings with reference to charities or the property or affairs of charities or (b) compromise of claims with the view of avoiding or ending such proceedings. If the Commission has refused to authorize the taking of charity proceedings then the leave of the court to take such proceedings may be obtained from one of the judges of the High Court attached to the Chancery Division under s.33(5) of the Act.[55]

Although s.33(4) of the 1993 Act provides that s. 33(1) does not require any order authorizing the taking of proceedings "in a pending cause or matter", it does not seem that a person who wishes to make a counterclaim in existing charity proceedings in the nature of a wholly distinct claim which does not arise out of the subject matter of the action can escape the need to seek the prior authorization of the Charity Commission under the section by relying on s.33(4). The better view appears to be that, even if there are existing charity proceedings on foot relating to a charity other than an exempt charity, a person who wishes to claim relief in those proceedings, whether as an addition to claims he is already making or by way of counterclaim, requires authorization from either the Charity Commission or, if applied for and refused, from the Court under ss.33(2) or s.33(5) unless the relief

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54 See *Seray-Wurie v Charity Commission* [2006] EWHC 3181 (Ch), [2007] 1 WLR 3242, where, after the Charity Commissioners had refused authorization under s.33(2), an application to the court for leave to continue charity proceedings under s.33(5) of the 1993 Act was refused, on the basis that the Charity Commissioners had proposed to exercise their powers under s.26(1) of the 1993 Act by sanctioning a procedure for the election of members of the committee of management of the charity in question at a newly convened general meeting as a practical solution to the dispute which had arisen in relation to the constitution of the charity and that the ambit of s.26 was sufficiently wide to give the Charity Commissioners power to sanction that procedure.

55 See, for example, *Seray-Wurie v Charity Commission* (*supra*) at 3246 *et seq.*

sought is clearly within the scope of any authorisation already given.[56]

The statutory definition of "charity proceedings", which re-enacts the definition which was formerly contained in s.28 of the Charities Act 1960 is therefore a wide one although there is a debate as to the extent to which such proceedings would include an application for judicial review pursuant to Part 54 of the Civil Procedure Rules 1998.[57] As stated in *Tudor*,[58] the definition of "charity proceedings" will encompass all cases in which the administration of charity property is sought or which necessarily involve either the whole or partial administration or execution of the trusts of the charity,[59] but not an action which is brought in respect of a charity solely to enforce a common law right, whether arising out of contract (for example a contract of service or to recover rent) or a common law duty or obligation in tort.

Examples of matters which would clearly fall within the ambit of charity proceedings as relating to the administration and/or execution of the trusts of the charity or to the administration of charity property and so require prior authorization under s.33(2) include proceedings to determine disputes which have arisen over the true construction or interpretation of a trust deed of, or relating to, a charity,[60] disputes over the constitutional validity of acts of the trustees or management committee of the charity[61]

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56 See *Dean v Burne* [2009] EWHC 1250 (Ch), *Barron v Herefordshire CC* [2008] EWHC 2465 (Ch), *Associated Nursing Services plc v Kells & ors*, (unreported)16 October 1996 and also *Amrik Singh v Virender Pal Singh Sikka & ors* (unreported) 2 December 1998, where the Court of Appeal refused permission to appeal out of time against an order staying proceedings seeking particular relief because, although that relief was claimed in charity proceedings which the Charity Commissioners had authorised, the authorisation did not expressly extend to the particular relief that was sought. In giving reasons for refusing permission to appeal Peter Gibson LJ (with whom Butler-Sloss LJ agreed) considered that the absence of authority from the Charity Commissioners to pursue the particular head of claim was fatal and stated that it was not sufficient that the relief for which authority had already been obtained included "further or other relief" Both *Dean v Burne* and *Associated Nursing Services plc v Kells & ors*, were decisions of Blackburne J., who explained in the former decision that the origins of s. 33(4) can be traced back to s17 of the 1853 Act (see Section B3 above) and lay in the fact that it was not possible to bring a counterclaim in existing proceeding prior to the Judicature Act 1873 - see *Dean v Burne* (*supra*) at [123].

57 See Section D below.

58 *Op cit*, at para 10-028

59 See also *Rendall v Blair* (1890) 45 Ch D 139 at 160, where Fry LJ stated in relation to s.17 of the 1853 Act: "In my opinion, the section relates exclusively to administration" and the statement by Bowen LJ which is cited above.

60 See, for example, *Barron v Herefordshire CC* [2008] EWHC 2465 (Ch) and *Dean v Burne* [2009] EWHC 1250 (Ch)

61 See, for example, *Seray-Wurie v Charity Commission* (*supra*) and also *Bukhari v Shah* [2006] EWHC 3373 (Ch)

and claims involving a breach of trust or fiduciary duty in relation to the charity.[62] The line between proceedings relating to the administration of the charity or its affairs and proceedings which are essentially adverse in nature to the charity may not always be an easy or straightforward one to draw, however.

In *Brooks v Richardson*,[63] proceedings brought by a subscriber to a registered charity which was an unincorporated charity and the constitution of which created a charitable trust, were held to be "charity proceedings" within the meaning of s.28 of the 1960 Act. The charity ran the Royal Masonic Hospital and, under the terms of its constitution, a subscriber became a "governor" of the charity and, as such, one of the persons who was entitled to take part in the government of the charity through the annual general meeting of the governors. The plaintiff, who objected to the decision of the board of management of the charity to sell the hospital, brought an action against members of the board of management and trustees seeking (*inter alia*) an order restraining the defendants from holding a special general meeting of the governors and/or the putting at that meeting of an extraordinary general resolution that the hospital be placed on the market for sale as a going concern and various declaratory relief.

Warner J rejected the Plaintiff's arguments that the constitution of the charity created a contract between the "governors" of the charity regulating their rights and obligations *inter se* and that the proceedings were therefore merely invoking the jurisdiction of the court to enforce that contract as opposed to the jurisdiction of the court within the meaning of the section. Instead, Warner J held that that the rights acquired by a "governor" under the constitution (which were described in the constitution as "privileges" and not "rights") were rights to take part in the government of the charity for the benefit of the charity so that the proceedings invoked the latter jurisdiction of the court within the meaning of s.28. Warner J held that the analogy of a members club was imperfect because the rights of a member of such a club were rights acquired by a member for his own benefit and not the benefit of a charity.[64]

More recently, however, the dichotomy between an action which is adverse to a charity and an "internal claim" relating to the administration of a charity claim has been re-emphasized by the Court of Appeal in *Muman v Nagasena*.[65] In that case, the claimants, who were the members of the governing council of a Buddhist charity and the charity trustees under s.33(1) of the Act, brought proceedings for possession against the defendant, who had been appointed the patron and resident monk of the charity under the constitution of the charity. The defendant occupied living quarters at

62 See, for example, *Hollis v Rolfe* [2008] EWHC 1747 (Ch), [2008] NPC 88

63 [1986] 1 W+LR 385

64 *Ibid*, at 390H

65 [2000] 1 WLR 299

premises used as temple by the charity and which were vested in the Official Custodian for Charities under s.22 of the Charities Act 1993. The claimants alleged that the defendant had been deselected as patron and his licence to occupy the residential accommodation at the temple had been terminated. The defendant resisted the claim for possession alleging in turn that he had not lawfully been deselected as the patron and that the claimants had ceased to be the governing council and trustees of the charity. He counterclaimed for a declaration that he was a statutory tenant of the residential part of the premises.

The factual issues raised in *Muman* can therefore be described as broadly similar in nature to those which were raised in *Holme v Guy*, *Benthall v Earl of Kilmourey* and *Rendall v Blair*, which are considered in section B3 in relation to s.17 of the 1853 Act and which, as has been seen, established the dichotomy between a claim in adverse litigation to the charity and an "internal" claim involving the administration of the charity estate. In *Muman* Mummery LJ, having held that the proceedings were "charity proceedings" within s.33(1) of the 1993 Act concerning the membership and thus the administration of the charity, also expressly referred to this dichotomy:

> "This ... is a trust for charitable purposes, and it is clear that there are now issues in the possession proceedings which relate to the administration of those trusts, namely (i) who are the trustees and (ii) who is the patron of the charity? There is a possible third issue as to who are the members. Those are matters of internal or domestic dispute and are not a dispute with an outsider to the charity. These are charity proceedings within s.33(8)… To allow the proceedings to continue without authorisation would be to offend the whole purpose of requiring authorisation for charity proceedings. That is to prevent charities from frittering away money subject to charitable trusts in pursuing litigation relating to internal disputes."[66]

The decision in *Muman v Nagasena* may therefore be contrasted with those in *Holme v Guy*[67] and *Rendall v Blair*.[68] Although the distinction between an adverse claim and one which relates to the administration of a charity may, on occasion, be a very fine or difficult one to draw, it is submitted that the decision in *Muman v Nagasena* is surely correct in holding that the questions raised in that action all essentially related to the administration of the charity. Academic commentary seems to support the substantive distinction between claims which are adverse in nature to a charity and those which relate to its administration.[69] The distinction was also referred to in the submissions of Counsel for the Attorney-General in a previous decision of the Court of Appeal in

66 *Ibid* at 306

67 (1877) 5 Ch D 501

68 (1890) 45 Ch D 139

69 See, for example, P.Luxton, *op cit*, at para 13.23.

Gaudia Mission v Brachmary,[70] where it was submitted that charity proceedings for the purposes of the section are concerned with internal or domestic aspects of an institution, not with issues between the institution and an outsider.[71]

As a matter of policy, there is no reason why charities, as opposed to any other organization, should enjoy a modified form of immunity or protection from the assertion of "hostile" claims (or rights) by third parties who are essentially unconnected with the charity through the imposition of a procedural "filter" requiring the prior consent of the Charity Commissioners before any action is brought. There are, however, good policy reasons why claims which relate purely to the internal administration or the governance of a charity should be made subject to the requirement of obtaining the prior consent of the Charity Commission or the Court before they are brought. Those include protection against both the unnecessary frittering away of a charity's assets on purely internal disputes without any substantial grounds and also the adverse affect of such disputes on the administration of the charity and the execution of the trusts.

Concerns that actions involving the assertion of intrinsically hostile third party rights may be frivolous or that the costs of such an action may be disproportionate to the value of the claim can, on the other hand, be met by making the appropriate application under the Civil Procedure Rules 1998. It is, however, hard to see any good reason why the Charity Commission, which is essentially charged with overseeing the good governance of charities, should have any input into the entitlement of a third party to assert a hostile claim or right against the charity in question through any requirement for its prior consent before proceedings asserting such a claim or right are brought.

As will be seen below, however, some of the case law seems to suggest that the importance of the dichotomy between hostile or adverse actions and internal claims is now being recognized not so much in relation to the meaning of "charity proceedings" but, instead, in relation to the meaning of a "person interested in a charity" for the purposes of s.33(1) of the 1993 Act.[72] This, it is submitted, is a false and misleading distinction in this context since the distinction is, and can only be, relevant to the question whether the proceedings are "charity proceedings" for the purposes of s.33(8) and not to the question of the question of whether a potential claimant is a person interested in the charity within s.33(1), which should instead turn on other considerations as outlined in Section B5 below.

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70 [1998] Ch 341

71 *Ibid* at 344. The actual decision in *Gaudia Mission v Brachmary* was, however, primarily concerned with the different question whether proceedings concerning a charity established or intended to be established under foreign legal system were "charity proceedings" for the purposes of s.33(8) of the 1993 Act.

72 See, for example, *Haslemere Estates Ltd v Baker* [1982] 1 Ch 1109, which is discussed in Section B2 below.

B5. A "person interested in a charity"

This term appears in s.33(1) of the 1993 Act, which provides:

> "Charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, *or by any person interested in the charity*, or by any two or more inhabitants of the area of the charity if it is a local charity, but not by any other person." (emphasis added)

The definition of "charity trustees" extends to persons who have the control and administration of a charitable organisation which has adopted a legal structure other than that of a trust. No definition is, however, given in the Act of "any person interested" in a charity.[73]

The leading cases under what is now s.33(1) are, in chronological order, the decision of Megarry V-C in *Haslemere Estates v Baker*[74]and the decision of the Court of Appeal in *Re Hampton Fuel Allotment Charity*, [75] which were both decided under s.28(1) of the 1960 Act, the immediate statutory predecessor to s. 33(1) of the 1993 Act. Both of these sections follow the same substantive scheme and form. In contrast, as has been seen in Section B3 above, s.17 of the 1853 Act did not, however, contain any definition of "charity proceedings" and, instead, applied the requirement to obtain the authorization of the Charity Commissioners to all forms of proceedings in which relief was sought "concerning or relating to" any charity or its property, merely specifying, by way of an exclusionary proviso, proceedings in which any person claimed any property or sought any relief adversely to a charity as proceedings which could be brought without the need to obtain the prior authorization or consent of the Charity Commissioners. Nor did the section seek to impose any restriction upon the persons who were entitled to bring proceedings "concerning or relating to" any charity or its property.

Accordingly, s.28(1) of the 1960 Act and now s.33(1) of the 1993 Act, in effect, reverse the emphasis of the scheme for obtaining the prior consent of what is now the Charity Commission by specifying that prior consent must be obtained to proceedings which fall within the definition of "charity proceedings" and, secondly, by imposing the separate requirement that such proceedings can only be brought by someone who falls within the definition of "a person interested in" the charity. Although Lord Kilmuir LC stated that s.28 consolidated what was believed to be the existing law regarding the institution of "charity proceedings",[76] it is submitted that the change of

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73 See Charities Act 1993, s.97(1)

74 [1982] Ch 1109

75 [1989] Ch 484

76 *Hansard* (*Lords*), March 1, 1960 col 570

emphasis in the statutory scheme for obtaining the prior consent of the Charity Commissioners which was introduced by s.28(1) of the 1960 amounted to an amendment of the law and not merely a consolidation of the existing law under the 1853 Act.

Haslemere Estates v Baker concerned a contract between property developers and the governors of a charity relating to the property of the charity. The property developers were held not to be a "person interested" in the charity for the purposes of s.28(1) of the 1960 Act as contractors under that contract, even though the contract related to land or other property of the charity. In considering the status of the property developers for these purposes, counsel for the property developers placed considerable emphasis on the case law under s.17 of the 1853 Act. Sir Robert Megarry V-C emphasized that the language used in s.28(1) was quite different from that used in s.17 of the 1853 Act but did acknowledge that the phrase "any person interested in the charity" is to be construed not on its own, but in relation to those who are to be permitted to take the special type of proceedings known as "charity proceedings."[77]

Even though the property developer's interest was held to be one adverse to the charity, the decision in *Haslemere Estates v Baker* proceeded upon the agreed basis that the proceedings issued by property developers, which the charity governors sought to have struck out on the basis that they disclosed no reasonable cause of action, constituted "charity proceedings" within the meaning of s.28(1) of the 1960 Act and Megarry V-C was therefore not called upon to decide this question.[78] The question in the proceedings thus became one of whether the property developers were "persons interested" in the charity for the purposes of s.28(1) because, if they were not, the proceedings would have been prohibited under that section. This may be contrasted with the approach had previously been adopted under s.17 of the 1853 Act in cases such as *Holme v Guy*, *Benthall v Earl of Kilmourey* and *Rendall v Blair*. Had *Haslemere Estates v Baker* fallen to be decided under the provisions of s.17 of the 1853 Act, it is submitted that the proceedings would not have been struck out under the section as the proviso to that section would clearly have applied and so there would have been no requirement to obtain the prior authorization of the Charity Commissioners.

Megarry V-C stated in *Haslemere Estates v Baker* that he did not aspire to define the meaning of a "person interested" under s.28(1) of the 1960; on the basis that a person may be interested in the property of a charity without, for this purpose, being interested in the charity, however, Megarry V-C did express the view that the act of entering into a contract with the trustees of a charity did not turn the contractor into a "person interested in the charity," even if the contract relates to land or other property of the charity and stated:

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77 [1982] 1 WLR 1109 at 1121G-1122A

78 This was accepted by the property developers – see [1982] Ch 1109 at 1120F-G

> "An interest which is adverse to the charity is one thing, an interest in the charity is another. Those who have some good reason for seeking to enforce the trusts of a charity or secure its due administration may readily be accepted as having an interest in the charity, whereas those who merely have some claim adverse to the charity, and seek to improve their position at the expense of the charity, will not. The phrase, I think, is contemplating those who are on the charity side of the fence, as it were, however much they may disagree with what is being done by or on behalf of the charity. The phrase does not refer to those who are on the other side of the fence, even if they are in some way affected by the internal affairs of the charity."[79]

Accordingly, Megarry V-C did emphasize that the dichotomy between third party actions, that is to say, actions between a charity and an outsider, and "internal" actions was relevant to the meaning of "any person interested" under s. 28(1), now s.33(1) of the 1993 Act. Although *Haslemere Estates v Baker* has been cited and applied without criticism in subsequent cases, including *Re Hampton Fuel Allotment Charity*,[80] it is submitted that this emphasis is misplaced and is relevant only to the question whether or not the proceedings are "charity proceedings". On the particular facts of *Haslemere*, it is submitted that Megrray V-C was correct to characterize the claims of the property developers in the proceedings as essentially adverse to the interests of the charity and thus as a claim which was hostile to the charity even though the relief sought by the developers included an order under s.29 of the 1960 Act[81] authorizing the governors of the charity to perform the contract which was the subject of the proceedings. The reasoning contained in the passage of his Lordship's judgment which is cited above is, however, open to criticism on the basis that, if the interests of the property developers were truly adverse to those of the charity, as it is submitted they were, it is hard to see why the proceedings brought by the developers should have been categorized as "charity proceedings" in the first place.

It is open to question whether the legislature intended that the imposition of a second hurdle by way of the need for a claimant to satisfy the court that he or she is a "person interested" in the charity under s.33(1) was intended to address the dichotomy between a claim in adverse litigation to the charity and an "internal" claim involving the administration of a charity. It would be more logical and appropriate for that dichotomy to be addressed in determining whether or not the proceedings are "charity proceedings" within the meaning of s.33(8) in the first place as opposed to in determining the status or *locus standi* of a claimant to bring proceedings relating to the

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79 [1982] 1 WLR 1109 at 1122B-E

80 See n.80 below

81 S.29 of the 1960 Act provided that charity land cannot be "sold, leased or otherwise disposed of" without an order of the court or the Charity Commissioners. It has now been repealed and replaced by what is now s.36 of the Charities Act 1993, the effect of which has been considered in *Bayoumi v The Women's Total Abstinence Educational Union* [2004] Ch 46, CA. See D. Dennis, "Dispositions of Charitable Land" [2006] Conv 219.

internal affairs of a charity and its due administration as a "person interested in the charity" for the purposes of s.33(1).

The other leading case under those sections is the decision of the Court of Appeal in *Re Hampton Fuel Allotment Charity*,[82] which considered the meaning of a "person interested in the charity" in a factual context which was more akin to an "internal" dispute in relation to the management or administration of the affairs of a charity. In *Re Hampton Fuel Allotment Charity*, it was held that a local authority which, under a scheme sealed by the Charity Commissioners was entitled to appoint three out of six nominative trustees of a charity which owned land within the area of the local authority, was held to be a "person interested" in that charity for the purposes of s.28(1) of the 1960 Act. The judgment of the court was given by Nicholls LJ, who noted that the Act afforded no express guidance on the meaning of that phrase and the comparative dearth of authority considering its meaning.

Nicholls LJ referred to four relevant background factors which afforded some guidance to the meaning of the words "interest" and "interested" in s.28, although the section contained no definition of those words. The first was that the context in which the section was enacted was that of standing to bring charity proceedings with reference to a particular charity so that the person needs to have some good reason for bringing the matter before the court. The second was that the net was spread widely since, in the case of local charities, any two or more inhabitants of the area of the charity are competent plaintiffs under the section, although there may be special historical reasons for this. The third was the protective filter requiring persons competent to bring charity proceedings to obtain the approval from the Charity Commissioners or the court under ss.28(2) and (5). Accordingly, any concern to avoid charities being vexed with frivolous and ill founded claims did not dictate that the words "any person interested" must be given a narrow meaning. The fourth and important factor was that the role of the Attorney-General, [83] in representing the interest which ordinary members of the public, whether or not subscribing to a charity and whether or not potential beneficiaries of a charity, have in seeing that a charity is properly administered, was preserved in relation to charity proceedings by s.28(6).[84]

All these factors suggested to Nicholls LJ that, in order to qualify as what is now a claimant in his own right, a person generally needs to have an interest materially greater than or different from that possessed by ordinary members of the public but

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82 [1989] Ch 484

83 In *Scott v National Trust* [1998] 2 All ER 705 at 714, Robert Walker J commented in relation to this factor that there may often be occasions when (on grounds of expense to public funds, or uncertainty as to outcome or otherwise) the Attorney-General may perfectly properly decide not to intervene and, by enacting s.33 of the 1993 Act and its statutory predecessors, Parliament had plainly intended not to give the Attorney-General a monopoly of proceedings for the judicial monitoring of charities.

84 [1989] Ch at 493-4

went on to state that this may be as near as one can get to identifying what is the nature of an interest which a person needs to possess to qualify under s.28(1) as a competent claimant as s.28 did not afford a definition of a "person interested under the section.[85] Lord Nicholls continued by stating:

> "But charitable trusts vary so widely that to seek a definition here is, we believe, to search for a will-o'-the-wisp. If a person has an interest in securing the administration of a trust materially greater than, or different from, that possessed by a member of the public as described above, that interest may, depending on the circumstances qualify him as a "person interested". It may do so because that may give him, to echo the words of Sir Robert Megarry V-C in [*Haslemere*][86] : 'some good reason for seeking to enforce the trusts of a charity or secure its due administration …' We appreciate that this is imprecise, even vague, but we can see no occasion or justification for the court attempting to delimit with precision a boundary which Parliament has left undefined."[87]

The wide approach has since been applied in three cases. The first was *Gunning v Buckfast Abbey Trustees Registered*,[88] where proceedings were brought by parents of pupils at a fee-paying boarding school run by Benedictine monks as part of the activities of a charitable trust. The trustees decided to close the school because of declining numbers of pupils but the parents claimed that the decision was void because it had been made without the consent of the Chapter of the Abbey or the Abbott's Council as was required by the trust deed.

On a preliminary issue as to whether the parents were "persons interested" under s.33(1), the trustees, relying on *Haslemere*, submitted that the parents were not "persons interested" because their interest in the charity arose solely out of their contractual relationship with the trustees and thus were adverse to the charity. Arden J held, however, that the charity proceedings were not being used to pursue an adverse claim to the charity and that the parents were "persons interested" in the charity as they had an interest in the charity which was materially different from that enjoyed by a member of the public through the benefit to themselves of having their children educated as they wished and because of their natural and moral concern for their children's education as well as the legal obligation to educate them.

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85 *Ibid* at 494

86 [1982] 1 WLR 1109 at 1122C

87 [1989] Ch 484 at 494

88 [1994] *The Times*, 9 June

The second decision was that of Robert Walker J in *Scott v National Trust*,[89] where it was held that members of local hunts which had hunted deer on parts of estates in Devon and Somerset owned by the National Trust and the tenant farmers of those estates were all "persons interested" in the charity to enable them to bring proceedings and hounds on its land. Again the huntsmen and farmers were held to have an interest materially greater than, or different from, a member of the public in securing the due administration of the National Trust because they could be considered to be partners with the National Trust in the management of the land in question and in the successful preservation of red deer on that land and the preservation of deer could fairly be considered to be one of the Trust's statutory purposes under s.4(1) of the National Trust Act 1907.

On this basis, Robert Walker J distinguished *Haslemere* on its facts, describing the claim of the property developers in that case as being in the nature of a wholly commercial dispute which had no real connection with the internal or functional administration of charitable trusts. Conversely, Robert Walker J commented that cases such as *Holme v Guy*, *Benthall v Earl of Kilmourey*, *Rendall v Blair* and *Gunning v Buckfast Abbey Trustees Ltd* showed that the position may be different when the complainant, although having some sort of contractual link with the charity trustees which might, on analysis, be described as adverse is really complaining about the way in which the charity is performing its essential functions.[90]

The decisions in *Re Hampton Fuel Allotment Charity* and *Scott v National Trust* were followed by Norris J in *Barron v Hereford County Council*,[91] where what was in essence held to be a claim by Mr. Barron for the grant of a new lease of the farm which was held on charitable trusts (although no claim for specific relief had strictly been included in the particulars of claim) was held to be "charitable proceedings" within the meaning of s.33(8), with Mr. Barron being held to be a "person interested" in the charity for the purposes of s.33(1). In holding that Mr. Barron was a "person interested in the charity", Norris J merely stated that he did so by reference to the elucidation of the test contained in *Re Hampton Fuel Allotment Charity* and *Scott v National Trust* and that Mr. Barron was someone with an interest materially greater than or different from that possessed by ordinary members of the public.[92] It is submitted that the conclusions that the proceedings in *Barron v Hereford County Council* were "charity proceedings" and that Mr. Barron was a "person interested" within the meaning of s.33(1) and (8) respectively of the 1993 Act were clearly correct by analogy with the reasoning in both *Re Hampton Fuel Allotment Charity* and

89 [1998] 2 All ER 705

90 [1998] 2 All ER 705 at 715a-c.

91 [2008] EWHC 2465 (Ch)

92 *Ibid* at [10]

Gunning v Buckfast Abbey Trustees Ltd , the proceedings in all three cases concerning the due administration of a charitable trust.[93]

On this basis, it is submitted that the approach which has been adopted in *Re Hampton Fuel Allotment Charity* and the subsequent case law that a "person interested" in a charity for the purposes of s.33(1) must have an interest in the securing the proper administration of a charity which is materially or significantly greater then that of an ordinary member of the public is the correct approach and enables the court to focus upon the need for the due administration of the charity in deciding whether any given claimant falls within s.33(1). This focus upon the need for the due administration of the charity is, and should be, the central issue in deciding whether any given claimant is a "person interested" in a charity within the meaning of s.33(1) and thus has the appropriate *locus standi* to bring "charity proceedings" under s.33(8), and the question whether the claimant has an interest which is adverse to the charity should only be relevant in determining whether the proceedings are "charity proceedings" for the purpose of s.33(8).

C. Judicial Review

C1. Introduction

This section considers the role which judicial review may have to play in the supervisory jurisdiction of the court over charities.[94] Two issues will be considered in this and the following Sections. Firstly, in what circumstances will charities constitute public bodies for the purposes of judicial review and, secondly, in Section D, whether judicial review proceedings will constitute "charity proceedings" for the purposes of s.33 of the 1993 Act. The first issue will also consider the question of whether a

93 See also *Hollis v Rolfe* [2008] EWHC 1747 (Ch), [2008] NPC 88, where the Roman Catholic Bishop of Portsmouth was held to have no *locus standi* to bring the proceedings in question (which concerned the sale and transfer of a property and lodge house which had originally been purchased by a Benedectine community of nuns because he was not a member of that charitable community and he was not able to represent any party or institution having a beneficial interest or potential beneficial interest in the assets which were subject to the relevant trusts in question.

94 Under Charities Act 1993, s.2(A)(4) and Sched.1C, paras.3 and 4 (as amended by Charities Act 2006, Sched. 4, para. 1 and The Transfer of Functions of the Charity Tribunal Order 2009, S.I. 2009/1834), an application may be made to the Upper or First-tier Tribunal (Charity) to review those decisions and orders of the Charity Commission which are specified in the Charities Act 1993, Sched. 1C, para.3(2) ("the reviewable matters") and in determining such an application the Tribunal is directed by Sched. 1C, para.4(4) to apply the principles which would be applied by the High Court on an application for judicial review – see, generally, Alison McLennan, "The Principles of Judicial Review in Charity Law" [2008] PCB 41. These amendments have not yet come into force and are in any event outside the ambit of this article. Similarly, applications for judicial review in relation to the Charity Commission (see, for example, *R (on the application of O'Callaghan) v Charity Commission for England and Wales* [2007] EWHC 2491(Admin), [2008] WTLR 117) itself also fall outside the ambit of this article.

charity may be a "public authority" for the purposes of s.6 of the HRA, since challenges against public authorities alleging that their actions have violated the applicant's rights under the European Convention on Human Rights and incorporated into domestic law by the HRA, may also be brought by way of a claim for judicial review.[95]

The judicial review jurisdiction of the courts under s.31 of the Senior Courts Act 1981[96] and what is now Part 54 of the Civil Procedure Rules (as amended),[97] which modifies the provisions of Part 8 of the CPR in application to judicial review, provides a means by which the court can review and control the lawfulness of (amongst other things) decisions, or the decision-making process, of any person or body exercising a public function.[98] A successful application for judicial review is generally founded[99] on the public body in question exceeding its statutory powers ('illegality') or on procedural irregularity or unfairness ('procedural impropriety'), or *Wednesbury* unreasonableness[100] (sometimes also referred to as 'irrationality"). In *Council of Civil Service Unions v Minister for the Civil Service*,[101] Lord Diplock presaged a fourth ground of judicial review, namely 'proportionality.' This concept has a particular role to play in cases under the Human Rights Act 1998,[102] under which the reviewing courts are required to consider whether the limitation of the relevant Convention right is necessary in a democratic society, in the sense of meeting a pressing social need, and is proportionate to the legitimate aim being pursued.[103] Nevertheless, the courts

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95 Para.5.3 of the Practice Direction under CPR Part 54 requires the claim form to state that such a claim is made and to give details of the Convention right relied upon and the relief sought. Such claims may also be raised in private, as opposed to public law, actions.

96 Formerly referred to as the Supreme Court Act 1981 – see Constitutional Reform Act 2005, Sched. 11, Part 1, para. 1 (1)

97 See the Civil Procedure (Amendment No. 4) Rules 2000, SI 2000/2092 and the Civil Procedure Rules 2003, SI 2003/364, replacing Order 53 of the RSC 1965, SI 1965/1776, as amended by RSC (Amendment No 3), SI 1977/1955

98 CPR Part 54, r.54.1(2)(a), which refers to "a decision, action or failure to act in relation to the exercise of a public function"

99 See *Scott v National Trust* [1998] 2 All ER 705 at 710j-711b *per* Robert Walker J and the *GCHQ* case, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-11 *per* Lord Diplock

100 See *Associated Provincial Picture Houses Ltd v Wednesbury Corp*. [1948] 1 KB 223

101 [1985] AC 374 at 410-11

102 See *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, HL and *R v Shayler* [2002] 2 WLR 754

103 See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [27] *per* Lord Steyn.

have so far generally declined to recognize proportionality as a general or independent head of judicial review.[104] In the context of judicial review the concepts of both *Wednesbury* unreasonableness and fairness have been invoked in determining whether it would be an abuse of power by a public body to deny a legitimate expectation, whether substantive or procedural.[105]

An application for judicial review must be made promptly and, in any event, not later than 3 months after the grounds to make the claim first arose.[106] No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with CPR Part 54, r.54.4[107] and the court shall not grant such leave unless it considers that the applicant has *locus standi* by way of a "sufficient interest" in the matter to which the application relates.[108] These procedural provisions, which are of peculiar application to the procedure for judicial review, provide a protective filter which is designed to protect public bodies from a multiplicity of groundless or tardy challenges to their actions.[109]

C2. Public Bodies

Bodies or persons exercising powers or performing duties derived from statute[110] or the prerogative[111] will generally be regarded as public bodies so that their acts and omissions in the exercise of their statutory will generally amenable to judicial review,

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104 See *R v Secretary of State for the Home Department Ex p Brind* [1991] 1 AC 696, *R v International Stock Exchange Ex p Else* [1992] BCC 11 and *R v Chief Constable of Kent Ex p Absalom* , (unreported), May 5, 1993. It has, however, subsequently been suggested that the distinction between the two tests of *Wednesbury* unreasonableness and proportionality may in practice be much less than suggested (see *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2AC 418, HL and, generally, Wong, "Towards the Nutcracker Principle: Reconsidering Objections to Proportionality" [2000] PL 92) and in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at [51] Lord Slynn expressed the view that proportionality should be recognized as a general head of review under domestic law.

105 See *R v North and East Devon Health Authority Ex p Coughlan* [2001] QB 213, CA and *R (on the application of Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 203, CA.

106 CPR Part 54, r.54.5(1)

107 Senior Courts Act 1981, s.31(3)

108 *Ibid*

109 See *O'Reilly v Mackman* [1983] 2 AC 237 at 284-5 *per* Lord Diplock and *Scott v NationalTrust* [1998] 2 All ER 705 at 712j-13b

110 *R v Secretary of State for Trade and Industry, Ex p Vardy* [1993] 1 CMLR 712

111 *R v Criminal Injuries Compensation Board, Ex p Lain* [1967] 2 QB 864

as will powers derived from the prerogative, provided they raise issues which are justiciable.[112]

Additionally, the exercise of powers which are not derived from statute or the prerogative may involve a sufficient public element to render their exercise subject to judicial review. Accordingly, in *R v Panel on Take-overs and Mergers, Ex p Datafin Plc*,[113] the Panel was held to be amenable to judicial review even though it was part of the self-regulatory system operated by the City and did not derive its authority from statute or the exercise of the prerogative. The Panel had, however, been established under the authority of the government. The Secretary of State had deliberately abstained from legislating in the field of take-overs and mergers and had instead decided to use the Panel as the centrepiece of his regulation with, additionally, the Governor of the Bank of England appointing both the chairman and the deputy chairman of the Panel.

The basis of the decision of the Court of Appeal in *Datafin* was that, in deciding whether or not a particular body was amenable to judicial review, regard would be had to not only the source of the body's power but also as to whether the body operated as an integral part of the system which has a public law character. Lloyd LJ stated that if the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review, but, if the source of power was contractual, as in the case of a private arbitration, then the arbitrator would not be subject to judicial review, continuing:

> "But in between these extremes there is an area in which it is helpful to look not just as the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review."

Both Lord Donaldson LJ and Nicholls LJ also laid emphasis upon the fact that the Panel exercised a public function in prescribing and operating the Code on Take-overs and Mergers.

This emphasis upon public functions led Robert Walker J to express the view in *Scott v National Trust* that the National Trust, which was originally incorporated as a company limited by guarantee but was re-incorporated in 1907 by a private Act of Parliament and was regulated not only by a series of private Acts but also by the National Trust Act 1971, a public Act which amended its constitution, was a public body amenable to judicial review, stating that it was:

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112 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

113 [1987] QB 815, CA

> "… a charity of exceptional importance to the nation, regulated by its own special Acts of Parliament. Its purposes and functions are of high public importance, as is reflected by the special statutory provisions (in the fields of taxation and compulsory acquisition) to which I have already referred, It seems to me that to have all the characteristics of a public body which is, prima facie, amenable to judicial review, and to have been exercising its statutory public functions in making the decision which is challenged."[114]

Robert Walker J, however, expressly refrained from considering the broad question of principle whether any charity, even one especially established by statute, was subject to judicial review on the ground that charities are many and various in nature.[115]

Although a charity which takes the form of a trust has been described by Mummery LJ in *Gaudia Mission v Brachmary*[116] as a public trust for the promotion of purposes for the beneficial to the community and not a trust for private individuals, it seems that a charity will not generally be regarded as a public body for the purposes of judicial review, at least in a context outside that of the HRA, unless the charity exercises public or governmental functions, as in *Scott*.

The contrary view has been expressed by Lightman J in *RSPCA v Att-Gen*, [117] in stating:

> "The fact that a charity is by definition a public, as opposed to a private, trust, means that the trustees are subject to public law duties and judicial review is in general available to enforce performance of such duties"[118]

Stanley Burnton J, however, at first instance in *R (on the application of Heather and ors) v The Leonard Cheshire Foundation*,[119] expressly disagreed with this proposition, stating:

> "In his judgment in *Stanway v Att-Gen*[120] Richard Scott V-C said charities operate within a framework of public law, not private law. However, in the context of charities the word public bears its ordinary meaning, and has no

114 [1998] 2 All ER 706 at 716f-h

115 *Ibid*

116 [1998] Ch 341 at 350

117 [2002] 1 WLR 448

118 *Ibid*, at 460

119 [2001] EWHC Admin 429 at [94]-[95].

120 (Unreported), 5 April 2000

> governmental connotation. The Vice Chancellor did not mean that charities are governed by the same law as governs governmental authorities. The law of charities is a different area of public law. The old judicial review remedies of certiorari, mandamus and prohibition were never applied to charities as such. The public law that applies to charities is of equitable origin; that applied to public authorities is of common law origin. Charities are not necessarily public authorities."[121]

The decision in *Leonard Cheshire* in fact concerned an application for judicial review on the grounds that the decision of the charity in question was made in contravention of Article 8 of the EHCR. On this basis Stanley Burnton J went on to express the view that it did not follow from his statement that a charity cannot be a public authority within the meaning of the HRA and Part 54 of the CPR, only that a charity is not necessarily a public authority for those purposes. The meaning of a public authority for the purposes of the HRA is considered in Section C3 below but it is submitted that the comments of Stanley Burnton J are of general application in the context of judicial review in general.[122] It should also be noted that, notwithstanding his statement in *RSPCA v Att-Gen*, Lightman J went on to hold in that case that the RSPCA had, in contrast to the National Trust, no statutory or public law role and, although theoretically and in a proper case an application for judicial review may lie against the RSPCA, such an application was not open to disappointed applicants for membership because of the availability of the alternative avenue of charity proceedings under s.33 of the 1993 Act. This aspect is further considered in Section D below.

It is submitted that the suggestion that it must follow from the fact that a charity is by definition a public trust for the promotion of purposes beneficial to the community as opposed to a private trust that trustees of charitable trusts will in turn *ex hypothesi* be subject to public law duties and judicial review is a non-sequitur. This suggestion would seem to arise in the context of, and in tandem with, a trend by the courts to introduce into the area of trust law concerning the judicial control of the exercise of discretionary powers by charity trustees, an area which had hitherto essentially been regarded as being governed by principles of private trust law,[123] new principles which are very closely akin to public law principles, such as the doctrine of unreasonableness in the sense used in *Associated Picture House v Wednesbury Corp*.[124] and the

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121 [2001] EWHC Admin 429 at [94-5]

122 An appeal from the decision of Stanley Burnton J was dismissed by the Court of Appeal, on the basis that the role which the charity in question was performing manifestly did not involve the performance of public functions - see [2002] EWCA Civ 366, [2002] 2 All ER 936 at {38]-[39] *per* Lord Woolf CJ. The decision of the Court of Appeal is considered in the Section 3C below.

123 See, for example, *Re Beloved Wilkes Charity* (1851) 3 Mac & G 440

124 [1948] 1 KB 223

recognition of a legitimate expectation, as seen in such decisions as *Edge v. Pensions Ombudsman*[125] and *Scott v. National Trust*.[126]

This trend is also accompanied by two separate but parallel debates. The first of these debates concerns the application of the rule or principle in *Re Hastings-Bass*,[127] which specifies the circumstances in which the exercise of a discretion will be overturned where the trustees have failed to take account of relevant considerations or have taken into account irrelevant considerations. The second debate has arisen in the wider context of whether the principles which govern the basis on which the courts will intervene in the exercise by trustees of charitable trusts of their discretionary powers should diverge from those which are applied by the courts in relation to traditional private or family trusts. The premise on which this contention is based is that charitable trusts are public trusts in nature and operate in a sufficiently different legal, fiscal and social environment with such differences in internal law from trusts for the benefit of private individuals that they should now be considered to be a unique form of trust in their own right.[128].

In a previous issue, the author has argued [129] that such questions are essentially all capable of being resolved within the sphere of ordinary or private trust law principles, without the need to develop separate principles of judicial intervention in the spheres of charitable and non-charitable trusts, through, firstly, the proper application of the fiduciary duty to consider which was adumbrated by Lord Wilberforce in *McPhail v Doulton*[130] in relation to the exercise by trustees of their discretionary powers and, secondly, the overriding principle that the court has a discretionary power to intervene in disputes which will be exercised only where it is necessary to do so in order to secure the primary and overriding object of the due execution and administration of the trust, as described by Lord Walker in the context of the disclosure of trust

125 [1998] Ch. 512, affd [2000] Ch 602, CA

126 [1998] 2 All ER 705

127 [1975] Ch 25, CA

128 J. Warburton, "Charitable Trusts – Unique?", [1999] 63 Conv 20 and also A. Hudson, *Equity and Trusts*, 6th ed., London: Cavendish Publishing Limited (2009) at 1004, where it is argued that charitable trusts are not properly trusts at all, but rather a form of quasi-public body in which the officers have fiduciary duties which are overseen by a regulatory structure made up of the Attorney-General and the Charity Commissioners. Similarly, it has been argued that pension trusts should now be recognized as a *sui generis* species of trust on the basis that pension trusts principles have diverged, and ought to diverge further, from traditional trust principles – see D.J. Hayton, "Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts", [2005] Conv 229.

129 See D. Dennis, "The Judicial Control of the Exercise of Discretionary Powers by Charitable Trustees" CL&PR 9/3 [2007] 1

130 [1971] AC 424, HL

documents in the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd.*[131] Equally, it is submitted that the underlying reason for the purported importation of public law principles into this area may be attributed to the clear parallels between the supervisory jurisdiction which the courts exercise in both judicial review and private trust law over the making of discretionary decisions, in one case by public bodies and in the other by trustees. These parallels arise from the requirements which have been imposed by the courts in relation to the making of discretionary decisions by trustees in private trust law on the one hand and, in the public law context, the need for legality and the *Wednesbury* reasonableness to be observed in the decision–making process of public bodies on the other. In the contexts of both public law and private trust law the principal concern of the courts in exercising its supervisory jurisdiction in each case will be to ensure that public bodies and trustees follow a sound decision-making process in the exercise of their discretionary powers while preserving, so far as is practicable, the autonomy of those public bodies and trustees to make their decisions. It is submitted that it is not therefore wholly surprising that the duties imposed on trustees and public bodies by the courts in reaching their decisions will be very similar.[132]

While the internal law of many charities which will continue to govern at least "internal" disputes in relation to the control and management of the charity[133] will primarily remain private trust law, [134] it does not, however, by any means follow that the public law supervisory jurisdiction of the courts has no role to play in relation to charities.[135] For the reasons which are given above, it is submitted that what will be relevant in determining whether a charity will a public body for the purposes traditional public law proceedings will not be the public nature of charitable trusts but, instead, and in accordance with the criteria set out decision in *Datafin* referred to above, whether, in taking the particular decision which is being challenged in the

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131 [2003] 2 AC 709, PC

132 See D. Dennis, (*supra*) at 48-9 and see also D. Oliver, *Common Values and the Public-Private Divide*, Butterworths: London (1999) at 187-92, who notes that Lord Greene MR, who gave the leading judgment in *Wednesbury* was a distinguished equity and trusts lawyer and may well have been drawing deliberately on equitable principles in formulating the grounds for review in the *Wednesbury* context

133 Such disputes will usually concern decisions taken by those who are "charity trustees" for the purposes of the Charities Act 1993, s.97(1), that is to say the persons having the general control and administration of the charity in question. In the case of a charitable trust, this will usually be the trustees themselves in exercise of their discretionary powers but the definition of charity trustee may also extend to other officers of the charity if they participate in the control and administration of the charity.

134 See J. Warburton, "Trusts: Still Going Strong 400 Years after The Statute of Charitable Uses, *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, D Hayton (ed), Kluwer Law International (2002) 163

135 See Jonathan Garton, "The judicial review of the decisions of charity trustees", [2006] 20(3) Tru LI 160

proceedings, the charity in question was exercising a public function. This is likely to be of particular relevance where public bodies delegate, whether formally or otherwise, the exercise of what may be regarded as some of their public functions to charitable bodies or charitable bodies provide services which assist public bodies in the performance of those functions without any such delegation. Disputes which arise in relation to the exercise of such functions by charitable bodies may arise in a context which is entirely different from that of "internal" disputes in relation to the control and management of the charity in relation to which private trust law principles will apply and, in the former instance, disputes may well be subject to public law supervisory jurisdiction of the courts.[136] Whether charities will also be public authorities for the purposes of the HRA in such circumstances is an issue which has been the subject of much judicial controversy and is considered in Section C3 below.

C3. Public Authorities and the HRA 1998

The circumstance in which a charity may be held to be a public authority for the purposes of the 1998 Act ("the HRA") will require an examination of the provisions of s.6 of that Act and of the principles which have been established by the decisions in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[137] *YL v Birmingham City Council*,[138] and *R (on the Application of Weaver) v London & Quadrant Housing Trust*.[139] The decisions in *Aston Cantlow* and *YL* established a difference in approach towards the question of whether a body is a public authority for the purposes of s.6 of the HRA from that which had traditionally been adopted in public law in determining whether a body was a public body for the purposes of judicial review. The earlier authorities will also be considered in order to illustrate how a confusion of approach had developed prior to the decisions in *Aston Cantlow* and *YL*. That confusion of approach may to some extent still be reflected in the controversy which surrounds the recent Court of Appeal decision in *Weaver*.

Under and by virtue of s.6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. No definition of "public authority" is contained in the HRA other than a partial definition in s.6(3)(b) of the Act which is referred to below. Lord Nicholls in *Aston Cantlow* described the broad purpose behind s.6(1) as being to make those bodies for whose acts the state is answerable before the European Court of Human Rights subject to a domestic law obligation not to act incompatibly with convention rights and, if they do so, to enable victims to obtain redress from the domestic courts. In conformity with this purpose, Lord Nicholls stated that the phrase a "public authority" in s.6(1) of the HRA:

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136 See, for example, *R (on the application of Brent LBC) v Fed 2000* [2005] EWHC 2771

137 [2003] UKHL 37, [2004] 1 AC 546

138 [2007] UKHL 27, [2008] 1 AC 95

139 [2009] EWCA Civ 587, [2010] 1 WLR 363, CA

> "is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organizations of this nature that the government is answerable under the convention … The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organizations as bodies whose nature is governmental lie factors[140] such as the possession of special powers, democratic liability, public funding in whole or in part, an obligation to act only in the public interest and a statutory constitution."[141]

Such governmental bodies will therefore be public authorities which fall within s.6(1) without reference to s.6(3) and will not themselves enjoy convention rights.[142] They are now conventionally referred to as "core" or "standard" public authorities. Accordingly, charities will not be "core" public authorities but they may fall within the definition of a "public authority" under s.6(3)(b) of the HRA, which provides that a public authority will include "any person certain of whose functions are functions of a public nature ...", while s.6(5) provides that " in relation to a particular act, a person is not a public authority by virtue only of s.6(3)(b) if the nature of the act is private." Such a public authority is conventionally referred to as a "hybrid" public authority in contrast to a "core" public authority. A "hybrid" public authority under s.6(3)(b) will therefore exercise both public and non-public functions and will not be a public authority in respect of an act of a private nature, in which case they will not be disabled from having convention rights. Again, the HRA does not define either "public" or "private."

Prior to the decision of the House of Lords in *Aston Cantlow*, cases under the HRA tended to follow a traditional public law approach in determining whether a charity was a "hybrid" public authority within the meaning of s.6(3)(b) of the HRA. Reference has already been made in Section C2 above to the decision at first instance in *R (Heather and ors.) v The Leonard Cheshire Foundation,*[143] which concerned an application for judicial review of a decision by the trustees of a charity which was the leading voluntary sector provider of care and support services for the disabled, to close for redevelopment a residential home at which the places of the residents were funded either by the social services of their local authority or the health authority in exercise in each case of the statutory powers of the local authority or health authority. The grounds upon which judicial review of the trustees' decision was sought were that the charity was a public authority within the meaning of s.6 of the HRA and that the decision to close the home was made in contravention of the rights of the residents under Article 8 of the EHCR.

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140 See D. Oliver, *The Frontiers of the State: Public Authorities under the Human Rights Act*, [2000] PL 476

141 [2004] 1 AC 546 at [7]

142 ECHCR, Article 34

143 [2001] EWHC Admin 429.

At first instance Stanley Burnton J reviewed the pre-HRA authorities. Although the learned judge disagreed with Lightman J's statement in *RSPCA v Att-Gen* that the fact that a charity is by definition a public trust means that the trustees are subject to public law duties, Stanley Burnton J did accept that a charity could be a public authority within the meaning of the Human Rights Act and Part 54 of the CPR if it exercised public (ie. governmental) functions.[144] In making this statement, Stanley Burnton J approved the pre-HRA decision of Moses J in *R v Servite Housing Association and Wandsworth LBC, Ex p Goldsmith v Chatting*,[145] in which judicial review had again been sought of a decision by a charitable housing association, which provided residential accommodation to disabled persons in need of residential care pursuant to arrangements made by a local authority, to close its home. It was held that the charitable housing association was not amenable to judicial review. Stanley Burnton J held that the facts of *Servite* were indistinguishable from those in *Leonard Cheshire* but distinguished the decision of the Court of Appeal in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,[146] which again concerned an application for judicial review of a decision by a charitable housing association which was registered with Housing Corporation as a social landlord providing accommodation under arrangements with a local authority by which the latter fulfilled its statutory duties. The charity in question in *Donoghue* was held on the facts to be a public authority for the purposes of s.6 of the HRA, on the basis that the functions of the charity were closely integrated and enmeshed with those of the local authority and depended on the close assimilation of the charity's role to that of the local authority.

The decision of Stanley Burnton J at first instance in *Leonard Cheshire* that the charity was neither a public body for the purposes of judicial review apart from the HRA nor a public authority under s.6 of the HRA itself was upheld by the Court of Appeal[147] on the basis that the charity was performing a private function and manifestly not any public function. In giving the judgment of the Court of Appeal, however, Lord Woolf CJ was anxious to dispel any impression that, even if a charity had no public functions, it was not necessarily wrong to commence judicial review proceedings and emphasized that the provisions of Part 54 of the CPR are intended to avoid what he described as the "wholly unproductive" demarcation disputes between public law and private law which had arisen in determining whether judicial review was appropriate under the former provisions of RSC Order 53.[148] This aspect is considered further in Section D below in relation to the separate question as to whether judicial review

144 See [2001] EWHC Admin 429 at [94]-[95] and Section C2 above.

145 [2001] LGR 55

146 [2002] QB 48, CA

147 [2002] EWCA Civ 366, [2002] 2 All ER 936 at [38]-[39]

148 *Ibid* at [38]-[39], referring to comments made by Stanley Burnton J in his judgment at first instance at [104]-[107]

proceedings will constitute "charity proceedings" for the purposes of s.33 of the 1993 Act.

Although *Leonard Cheshire* and *Donoghue* produced contrasting decisions on their respective facts as to whether or not the charity was a public authority for the purposes of s.6 of the HRA (under which it is unlawful for a public authority to act in a way which is incompatible with a Convention right), both decisions followed a traditional public law approach as to the question whether the charity was a "hybrid" public authority within the meaning of s.6(3)(b) of the HRA. That traditional public law approach classified a body as a public body if the body carried out public or governmental functions and was reflected in the statement by Lord Woolf MR in *Donoghue*[149] that:

> "While HRA section 6 requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public function reflects the approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal in [*Datafin*]"[150]

and also in his further statements of general principle in *Poplar* that the fact that "a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such a performance is necessarily a public function" or that "the acts are supervised by a regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of a body may be categorized private."[151]

This approach was the subject of adverse comment by the Joint Committee on Human Rights of the House of Lords and House of Commons,[152] which criticized the decisions in *Leonard Cheshire* and *Donoghue* for adopting as their starting point to the question of whether a body will be a hybrid public authority for the purposes of s.6(3)(b) the amenability to judicial review of a body discharging a function. This, in the view of the Joint Committee led to a narrow approach to the question which essentially looks to the identity of the body and its links with the state, as well as to the nature of the function performed, particularly in relation to private or charitable sector

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149 [2002] QB 48

150 *Ibid*, at [65(i)]

151 *Ibid*, at [65(v)].

152 House of Lords and House of Commons Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act,* Seventh Report of Session 2003-4, HL Paper 39, HC 382

providers of public services under contract from local authorities.[153] The Joint Committee described the test for a "public authority" adopted in *Donoghue* and *Leonard Cheshire* as being problematic in human rights terms since those tests would result in many instances of an organization "standing in the shoes of the state" and yet not having responsibilities under the HRA. The Joint Committee considered that the continued adoption of such a test would lead to the protection of human rights becoming dependent in such cases not on the type of power being exercised or its capacity to interfere with human rights but on what it describes instead as the relatively arbitrary criterion of the body's administrative links with institutions of the State , whereas the ECHR provides no basis for such a limitation.

A departure from the traditional narrow public law approach became evident in the decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[154] in which the distinction which between "core" or "standard" public authorities on the one hand and "hybrid" public authorities on the other for the purposes of s.6 of the HRA was fully considered. In *Aston Cantlow* it was held that a parochial church council was neither a core public authority nor a hybrid public authority under s.6(3) (b) when enforcing a statutory obligation to repair the chancel of a parish church, but was instead essentially acting as a private party enforcing a civil liability. Reference has previously been made in this Section to the description which was given by Lord Nicholls in *Aston Cantlow* of "core" public authorities and of the broad purpose behind s.6(1) as being to make those bodies for whose acts the state is answerable before the European Court of Human Rights subject to a domestic law obligation not to act incompatibly with convention rights so as to enable victims to obtain redress from the domestic courts if they do so. A "hybrid" public authority under s.6(3)(b) will exercise both public and non-public functions but will not, under s.6(5) be a public authority in respect of an act of a private nature. Although the HRA does not define either "public" or "private" for these purposes, Lord Nicholls expressed the view that a useful guide which may be drawn from the context of the statute is the contrast which is drawn between functions of a governmental nature and functions, or acts, which are not of that nature, continuing:

> "What then is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."[155]

153 *Ibid*, at 26

154 [2004] 1 AC 546

155 [2004] 1 AC 546 at [12]

On this basis, the House of Lords held that the Church of England could not be said to be part of the Government, while the general function of a parochial church council was to carry out the religious mission of the Church in the parish (rather than to exercise any governmental power) nor was it in any sense under the supervision of the state. The enforcement of the liability for chancel repairs was a private rather than a public act since the nature of the obligation was a civil debt and the function which the parochial church council was seeking to perform thereby had nothing to do with the responsibilities owed by the state to the public. Accordingly the parochial church council was held by the majority in the House of Lords not to be a hybrid public authority within s.6(3).

Lord Scott, while concurring in the dismissal of the appeal on the basis that there had been no infringement of any convention right on the facts, dissented from the conclusion that the parochial church council was not a hybrid public authority within s.6(3)(b), stating that a parochial church council is corporate, its functions are charitable with its members having the status of charity trustees, and charitable trusts are public trusts not private trusts; indeed, Lord Scott expressed the view that a decision to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole, not in pursuit of any private interest; and that if such a decision was taken in pursuit of any private interest, it would be impeachable by judicial review.[156] It is, however, submitted that the reasoning of Lord Scott on this aspect is subject to the same criticism as that made by Stanley Burnton J of the reasoning of Lightman J in *RSPCA v Att-Gen*.[157]

The Joint Committee on Human Rights of the House of Lords and House of Commons expressed the view[158] that the decision of the House of Lords in *Aston Cantlow*, while favouring a relatively narrow test for "core"[159] public authority status, had balanced this with a correspondingly wide and flexible category of "hybrid"[160] status. The decision in *Aston Cantlow* was followed by a further decision of the House of Lords in *YL v Birmingham City Council*, [161] in which it was again emphasized that a broad or generous application of s.6(3)(b) should be given.[162] In *YL*, the particular issue which arose was whether a private company which operated a care home for profit was a

156 *Ibid* at [130]-[132]

157 See Section C2 above

158 House of Lords and House of Commons Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, Seventh Report of Session 2003-4, HL Paper 39, HC 382

159 Described in the Report as "pure"

160 Described in the Report as "functional"

161 [2007] UKHL 27, [2008] 1 AC 95

162 Ibid at para [4] *per* Lord Bingham and at [91] *per* Lord Mance

hybrid public authority for the purposes of s.6(3)(b) of the HRA. The claimant, who was 84 years old and suffered from Alzheimer's disease, had been placed in the care home by her local authority which had a statutory duty to arrange for her care under s.21 of the National assistance act 1948. The company operating the care home sought to terminate the contract with the local authority for the care of the claimant and remove her from the home and it was alleged that if the company were to remove the claimant from the home then this would be in breach of her rights under the Convention for the protection for Human Rights and Fundamental Freedoms. By a bare majority, the House of Lord s held that, in taking its decision, the company was not a hybrid authority for the purposes of s.6(3)(b). It may be noted that, although the actual decision in the case has now been reversed by statute,[163] the nature of the reasoning of the majority decision in *YL* remains binding on the courts in deciding whether or not any particular body is a hybrid authority for the purposes of s.6(3)(b).

The principles which were established by the decisions in *Aston Cantlow* and *YL* were described by Elias LJ in the subsequent decision of the Court of Appeal in *R (on the application of Weaver) v London & Quadrant Housing Trust*[164] as being relatively clear with the real issue lying not in identifying those principles but in determining the result of their application to the particular circumstance in each case.[165] For these purposes, in determining whether a body is a hybrid public authority, those principles were that there was no single test of universal application,[166] and the court should adopt a "factor-based" approach[167] in which a number of factors may be relevant, although none were likely to be determinative on its own and the weight of different factors will vary from case to case.[168] Those factors include the extent to which the body in question is (a) publicly funded in carrying out the relevant function, (b) exercising statutory powers, (c) taking the place of central government or local authorities and (d) providing a public service.[169]

However, in relation to public funding a distinction fell to be drawn between the injection of capital or subsidy into a body in return for undertaking a non-commercial role or activity of general public interest, on the one hand and payment for services under a contractual arrangement with a company aiming to profit commercially[170] with Lord Neuberger stating in *YL*:

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163 See Health and Social Care Act 2008, s.145(1)

164 [2009] EWCA Civ 587, [2010] 1 WLR 363, CA

165 *Ibid* at [34]

166 *Aston Cantlow* (*supra*) at [12] *per* Lord Nicholls,

167 *YL* (*supra*) at [91] *per* Lord Mance

168 *YL* (*supra*) at [5] *per* Lord Bingham

169 *Aston Cantlow* (*supra*) at [12] *per* Lord Nicholls

170 *YL* (*supra*) at [105]

> "It seems to me much easier to invoke public funding to support the notion that that a service is a function of 'a public nature' where the funding effectively subsidises, in whole or in part, the cost of the service as a whole, rather than consisting of paying for the provision of that service to a specific person." [171]

In *Weaver*, Elias LJ stated[172] that factor (c) above, namely the taking of the place of central government or a local authority, "chimes" with the observation of Lord Nicholls in *Aston Cantlow* that generally a public function will be governmental in nature and which Lord Neuberger described in *YL*[173] as a theme running through the speeches in *Aston Cantlow*.

The relevance of the exercise of statutory powers or the conferment of special powers as a factor supporting the conclusion that a body is exercising public functions may depend on the reason why those powers have been conferred. In *YL* Lord Mance took the view that if that reason is for private, religious or purely commercial purposes, then it will not support the conclusion that the functions are of a public nature, [174] while Lord Neuberger expressed the view that the existence of a wideranging and intrusive set of statutory powers would be a very powerful and often determinative factor in favour of the function being a public function.[175] Lord Mance stated that the factor that a body is providing a public service should not, however, be confused with the performance of functions which are in the public interest or for the public benefit since the self-interested endeavour of individuals generally works to the benefit of society. [176] In reinforcing this point, Lord Neuberger stated that many private bodies, such as private schools, hospitals, landlords and retailers provide goods or services which it is in the public interest to provide.

It by no means follows from the fact that a function is one which is carried out by a public body that that function will be a public function when carried out by a potentially hybrid authority.[177] Another factor which was identified in *YL* as generally having little, if any, weight or relevance in determining whether or not a body is a public authority for these purposes is that the function in question is subject to detailed statutory regulation. The mere fact that a service is one which is, in the public interest,

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171 *Ibid* at para [165]

172 [2009] EWCA Civ 587, [2010] 1 WLR 363 at [35]

173 [2007] UKHL 27, [2008] 1AC 95 at [159]

174 *Ibid* at [101]

175 *Ibid* at [167]

176 *Ibid* at [105]

177 *YL* (*supra*) at [30]-[31] *per* Lord Scott

required to be closely regulated and supervised pursuant to statutory regulation does not mean that the provision of the service as opposed to its regulation and supervision[178] is a function of a public nature. Similarly the fact that the function is one which will be subject to judicial review would certainly not seem to be determinative of the question whether the body in question is a public authority for the purposes of s.6(3)(b) of the HRA.

That substantial difficulty may lie in determining the result when applying all these various factors in any particular instance or case is, perhaps, cogently illustrated by the fact that each of the decisions in *Aston Cantlow*, *YL* and the subsequent decision of the Court of Appeal in *Weaver* were majority decisions in each case. In *Weaver* it was held that the Trust, which was a registered social landlord[179] and also a charity, was acting as a hybrid public authority for the purposes of s.6(3)(b) of the HRA in serving the claimant, who was an assured tenant of the Trust, with an order for possession for rent arrears. The act of termination of the tenancy was held not to be a private act under the provisions of s.6(5). In reaching this decision, the Court of Appeal by a majority[180] dismissed an appeal by the Trust from the Divisional Court[181] which had made a declaration that the Trust was a public authority under s.6(3)(b) of the HRA as the management and allocation by the Trust of housing stock (including decisions concerning the termination of the tenancy) was a function of a public nature and thus that the Trust was accordingly amenable to judicial review on conventional public law grounds.[182]

That declaration was made despite the fact that the claim that the decision of the Trusts to seek act of termination of the tenancy on the mandatory ground 8 of Schedule 2 to the Housing Act was in breach of a legitimate expectation that the Trust first pursue all other reasonable alternatives to recover the debt before resorting to ground 8 and thus in breach of her rights under article 8 of the Convention was dismissed by the Divisional Court on the grounds that the legitimate expectation claimed was held by the Divisional Court to be too tenuous and general in character to be enforceable in public law and that there was in any event no breach of Article 8. Furthermore the Court of Appeal criticized the reasoning behind the judgment given by the Divisional Court the basis that, although the declaration did state that acts of

178 *Ibid* at [134] *per* Lord Neuberger

179 Now a non-profit registered provider under Housing and Regeneration Act 2008, s.115

180 The dissenting judgment was given by Rix LJ.

181 [2008] EWHC 1377 (Admin)

182 An application by the Trust for permission to appeal from the Court of Appeal to the Supreme Court was refused by Lord Hope, Lady Hale and Lord Brown on the 5th Nov 2009 on the grounds that although the case raised an arguable point of law of general importance, the case was not a suitable case on its facts to be heard by the Supreme Court – see Andrew Arden "Weaver and Pinnock" [2010] JHL 17.

termination were public functions, the Divisional Court had wrongly focussed on the issue whether the act of management and allocation of housing by the Trust was a public function (which had been the subject of a limited and partial concession during the course of the hearing before the Divisional Court) and had failed to address the key question , namely, whether the act of termination was a private act within the meaning of.s.6(5) of the HRA, the scrutiny which the Divisional Court gave to the housing functions of the Trust being relevant not so much to the question whether the Trust was a hybrid public authority but instead to the question whether the act of termination was a private act or not.[183]

Nevertheless the majority of the Court of Appeal in *Weaver* went on to held that the act of termination was so bound up with the management and allocation of social housing, which was a public function, so as to constitute a public act and not a private act, the grant of a tenancy and its subsequent determination being part and parcel of determining who should be allowed to take advantage of the public benefit which was afforded by social housing.[184] In his dissenting judgment, Rix LJ after a very detailed and close examination of the authorities referred to above, contended that the term "management" in this context had such a wide meaning covering such a vast and undifferentiated area that it was most unlikely to be a single integrated function of a public nature as it would include functions and acts such as the commercial acquisition and development of property and their financing which were most unlikely to fall within that description even on the basis that public subsidy may have a role to play in this.[185] Rix LJ then went on to express doubt, on the basis of the decision in *YL* as to whether the provision and allocation of housing, including social housing, should be regarded as being of an inherently governmental and public nature and concluded that, once an allocation had been made under arrangements made between a social registered landlord and a local authority and a prospective tenant has been accepted by the landlord as its tenant, the tenant then enters into a contractual tenancy with the landlord which is thenceforward governed by private law just like any tenant's relationship with his or her landlord.[186] This is very much an echo of the view expressed by Lord Scott in *YL*, to which Rix LJ had previously referred in his judgment, that the termination of a tenancy in circumstances such as those found in *YL* pursuant to a contractual provision in private law agreement must be a private act, affecting, as it does, no one but the parties to the agreement.

The decision in *Weaver* has been the subject of much comment, adverse and

183 [2009] EWCA Civ 587, [2010] 1 WLR 363 at [42]-[57]

184 *Ibid* at [73]-[82]

185 *Ibid* at [151]

186 *Ibid* at {152]

otherwise,[187] as was the decision in *YL* itself. Such controversy vividly illustrates how difficult it may be to apply principles of general application to individual cases in this context as well as demonstrating what can only be described as the extremely fact-sensitive nature of the individual cases. It is, however, submitted that Rix LJ was correct to conclude in his dissenting judgment in *Weaver* that, while it is inevitable that core public authorities who enter into contractual tenancies are subject to the Convention, special circumstances are required to impose Convention solutions on top of the working out of private law contracts of private bodies, including, for these purposes, charities, in this area even if such bodies may also be hybrid public authorities in some respect of their functions. In treating the termination of the tenancy as being part or parcel of what was described as the management and allocation of housing stock by the Trust the majority judgment in *Weaver* may have conflated the many and diverse functions which are carried out by the Trust in its overall role in the provision of housing and impressed the act of termination with a public nature which that act should not bear in its correct and proper context.

In its written evidence to the Joint Committee,[188] the Charity Commission recognized that the current case law gave rise to a great deal of uncertainty for charities as to whether and in what circumstances some or all of their functions would be regarded as "public functions" for the purposes of s.6(3) but expressed the view that, while the charitable sector is made up of an extremely broad range of organizations undertaking a wide variety of different functions in a variety of ways, most of those functions would not be functions of a public nature. It is submitted this uncertainty still remains, even after the decisions in *YL* and *Weaver* and that the question is likely to require further consideration by the Supreme Court once a suitable case on its facts has been found.

The Charity Commission emphasized, however, the essential need for independence of charities and their trustees, who must act within the scope and objects of the charity, take their own decisions and exercise their discretions solely in the interests of the charity and, subject to the requirements of the general law, must not be controlled or directed in the exercise of those discretions by anyone outside the charity. The Charity Commission would therefore expect charity trustees, when entering contracts with public authorities which may seek to include specific clauses requiring the charity to act as if it were a public authority under the HRA, to ensure that the contract retains

187 See in relation to *Weaver*, for example, N. Billingham "Private or Public Function? Weaver sows confusion in the Court of Appeal" [2009] JHL 83, /Robert Brown, "Weaver: A step too far?" [2009] JHL 83 and C. Handy and J. Alder, "Housing associations: 'sufficient public flavour'" [2009] JHL 101 and, in relation to *YL*, Stephanie Palmer, "Public functions and private services; a gap in human rights protection" [2008] IJCL 585 and Alexander Williams, "YL v Birmingham City Council: contracting out and 'functions of a public nature'" [2008] EHRLR 524

188 House of Lords and House of Commons Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act,* Seventh Report of Session 2003-4, HL Paper 39, HC 382, List of Written Evidence, Ev 17

enough discretion for the trustees over the delivery of the service to sustain independence and to ensure that they would not be acting outside the charity's purposes.

Where the charity provides particular services similar to those provided by a local authority but not under contract (such as almshouse accommodation or other charitable housing accommodation, which is provided at the discretion of the trustees)[189], the discretion of the trustees must be exercised for the benefit of, and in the interests, of the charity and within its scope and objects. The provision of such housing, which will only be charitable if it is provided to meet the needs of proper charitable beneficiaries, will not normally be a public function. The Charity Commission therefore considered the law would need to be amended to bring such almshouse or other charitable housing provision within the scope of the HRA.

To the extent that the HRA applies or might apply in the future to certain functions applied by charities, the Charity Commission also considered that it would be necessary (a) to extend either the discretion of charity trustees to include consideration of convention rights or (b) to extend very substantially the impact of the current legal obligations which the law imposes on trustees when exercising their discretions. Any such extension would need to be subsumed into the law relating to the exercise of trustees' discretions, to be applied on a proportionate basis to the size and responsibilities of the charity. The Charity Commission went on to express the view, however, that, since charity trustees would be required only to take a proportionate approach to the consideration of convention rights, such an extension would not in practice present charity trustees with too many difficulties.

Many of the factors listed by the Charity Commission in its evidence to the Joint Committee may easily be overlooked in seeking to determine whether or not a charity can or should be categorized as a public authority for the purposes of s.6(3)(b) of the HRA and, it is submitted, clearly demonstrate that the use of a traditional function-based adopted in public law may not be either suitable or appropriate for these purposes. While the Charity Commission itself has clearly recognized that there are circumstances in which a charity may constitute or become a hybrid public authority under the HRA for some purposes, it is submitted that those circumstances should be regarded as the exception rather than the rule. The correct approach to adopt in determining whether or not a charity is or has become such a public authority in any individual case should be the broad-based approach which has been adopted in *Aston Cantlow* and *YL* and which gives full recognition to the context in which the determination falls to be made.

D. Are Judicial Review Proceedings Charity Proceedings?

Conflicting views have been expressed in the case law as to whether an application for

189 See, for example, *Gray v Taylor* [1998] 1 WLR 1093

judicial review under Part 54 of the CPR would constitute charity proceedings within the meaning of s.33(8) of the 1993 Act.

In *R v National Trust, Ex p Scott*,[190] in which members of two hunts and the chairman of the Tenant Farmers' Group applied for leave to move for judicial review of the decision of the Council of the National Trust to end deer hunting with hounds on land owned by the National Trust, Tucker J dismissed the application, notwithstanding that he considered that the applicants had an arguable case for judicial review. The grounds on which the application was dismissed were that the court had no jurisdiction to entertain the application as (a) the application and the relief claimed were "charity proceedings " within the meaning of s.33(8) and (b) no order had been obtained from the Charity Commissioners authorizing the taking of proceedings under s.33(2).

Tucker J considered that, as (i) the National Trust was a charity[191] (ii) the members of the Council were charity trustees under s.97(1) of the 1993 Act and (iii) one of the purposes for which the National Trust was created was to manage lands open spaces or places of public resort, the application for judicial review of the decision of the Council to end hunting on the land in question constituted an attempt to impugn a decision which had been made by charity trustees in the exercise of their discretionary powers in the management of trust property and thus related to the conduct and administration of the National Trust's affairs as a charity..

Subsequently the applicants sought the authorization of the Charity Commissioners to commence proceedings against the National Trust under s.33(2) by way of judicial review but the Charity Commissioners refused such authorization on the ground that judicial review proceedings did not constitute "charity proceedings" within the meaning of s.33(8). The applicants then applied by originating summons for the leave of the court to bring such proceedings under s.33(5). That application, together with other interlocutory applications in two sets of existing proceedings, was heard by Robert Walker J, whose decision was reported in *Scott v National Trust.*[192] The aspect of that judgment in which it was held that the applicants had a sufficient interest to bring charity proceedings under s.33(2) has been considered in Section B5 above.

Robert Walker J indicated that the opinion of Tucker J was to be preferred over that of the Charity Commissioners but expressed no concluded view on that issue. Although he considered that the National Trust was *prima facie* amenable to judicial review, Robert Walker J held that no leave should be granted for the proposed judicial review proceedings as an alternative remedy was available by way of the existing proceedings which themselves constituted charity proceedings within the meaning of s.33(8) and

190 [1998] JPL 465

191 *Re Verrall* [1916] 1 Ch 100

192 [1998] 2 All ER 705.

that parallel judicial review proceedings would simply be wasteful duplication, stating:

> "It is well established that judicial review will not normally be granted where an alternative remedy is available, whether by way of appeal or otherwise…There are exceptions to the general rule…But it seems to me that Parliament has laid down a special procedure - charity proceedings in the Chancery Division – for judicial monitoring of charities, and that in all but the most exceptional cases that is the procedure which should be followed."[193]

In refusing leave for judicial review on these grounds, Robert Walker J stated that it would in his view be less convenient, not more, if the applicants were to have go through the double filter of s.33 of the Charities Act and s.31 of the Supreme Court Act 1981, which imposed the requirements of leave to apply for judicial review and to have a sufficient interest, although he emphasized that the protective filter and the need for an applicant to show sufficient interest were not merely matters of technicality but sensible and necessary requirements in the public law field, including the law of public (or charitable) trusts.[194]

The decision in *Scott v National Trust* left the question of whether judicial review proceedings would constitute "charity proceedings" unresolved since Robert Walker J's indication that he preferred the view of Tucker J over that of the Charity Commissioners was strictly *obiter*. In *RSPCA v Att-Gen*,[195] Lightman J stated that it was well established that judicial review proceedings are inappropriate where the issue can be the subject of charity proceedings and that an application for judicial review would not lie in any ordinary case at the instance of an applicant who had an insufficient interest to take charity proceedings under s.33(1) of the 1993 Act, since the statutory standard for the institution of proceedings under that section was laid down as a form of protection of charity trustees and the Administrative Court would rarely (if ever) be justified in allowing that protection to be circumvented by the expedience of commencing judicial review proceedings in place of charity proceedings However, Lightman J also added that an application for judicial review may lie theoretically and in a proper case.[196] These statements implicitly suggest that judicial review proceedings would constitute charity proceedings where the applicant would qualify as a "person interested" under s.33(1) of the 1993 Act.

The question whether judicial review proceedings would also be charity proceedings was considered afresh by Stanley Burnton J at first instance in *Leonard Cheshire*,

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193 *Ibid* at 716j-717a

194 *Ibid* at 717b-d

195 [2002] 1 WLR 448

196 *Ibid* at [22]

although not by the Court of Appeal on appeal from that decision as the applicants did in fact obtain the necessary authority under s.33(2) from the Charity Commissioners to continue the proceedings during the course of the hearing before Stanley Burnton J and permission to appeal the issue was not granted.[197] Notwithstanding this, Stanley Burnton J did consider the issue (which had been argued before him as a preliminary jurisdictional issue) fully in his judgment at first instance because of its general importance and concluded that he would have held that proceedings for judicial review, whether raising issues under the HRA or not, did constitute charity proceedings for the purposes of s.33(2).

The grounds upon which Stanley Burnton J reached this conclusion were that (a) in *Construction Training Board v Att-Gen,*[198] Pennycuick V-C at first instance considered that the reference to the jurisdiction of the court in respect of charities in what is now s.33(8) of the 1993 Act would include proceedings over allegations that the charity had acted *ultra vires* while Buckley LJ and Plowman J in the Court of Appeal considered that proceedings concerning the misapplication of charitable funds or an abuse of trust by those having management of the charity would also be included, (b) that acts by trustees of a charity in the exercise of its public functions that infringe convention rights may constitute breaches of trust and (c) the decisions in *R v National Trust Ex p Scott, Scott v National Trust* and *RSPCA v Att-Gen.*

Stanley Burnton J, however, questioned the suggestion made in *Scott v National Trust* and *RSPCA v Att-Gen.* that charity proceedings would be a suitable alternative remedy for the purposes of enabling the court to refuse leave to apply for judicial review in its discretion. Leave to apply for judicial review may be refused or withheld if there is a suitable alternative remedy, but Stanley Burnton J stated that this principle only applies where there is an alternative statutory or other administrative remedy,[199] not where the alternative is proceeding in another Division of the High Court in order to avoid a duality of jurisdiction. In such cases, one Division of the High Court will normally consider all the causes of action relevant to the facts before it. Both judicial review proceedings and charity proceedings may, in an appropriate case, be combined and heard together by transfer of proceedings either by the transfer of proceedings to the Administrative Court under CPR Part 30; furthermore, a judge of the Administrative Court may act as an additional judge of the Chancery Division or the combined proceedings may be heard by a Chancery Division judge who is also a nominated judge of the Administrative Court.

In upholding the judgment of Stanley Burnton J in the Court of Appeal, however, it will be recalled[200] that Lord Woolf CJ emphasized that the provisions of Part 54 of the

197 See [2001] EWHC Admin 429 at [9] and [2002] 2 All ER 936, CA, at [2] and [38]-[39]

198 [1971] 1 WLR 1309, [1973] Ch 173, CA

199 See *R v Chief Constable of the Merseyside Police, Ex p Calveley* [1986] QB 424

200 See Section C3 above

CPR could be put to flexible use in order to avoid the demarcation disputes between public law and private law which had previously arisen under the former provisions of RSC Order 53 by stating that where the proceedings involved a *bona fide* (but incorrect) contention that the charity was performing a public function, and no public law rights arose, then any remaining issue as to private law rights could be dealt with by using the powers of transfer under Part 54 (subject to any procedural requirements under s.33 of the Charities Act 1993) as opposed to merely dismissing the proceedings.[201]

The question whether judicial review proceedings fell within the definition of charity proceedings was subsequently considered again in *R (on the application of Brent LBC) v FED 2000*,[202] in which Lloyd Jones J held that judicial review proceedings brought by a local authority against a charity in which the local authority sought to enforce certain statutory obligations under the School Standards and Framework Act 1998. Lloyd Jones J held that the proceedings were not charity proceedings within the meaning of s.33(8) on the basis that the proceedings were not brought to challenge the administration of a trust but rather to raise a public law challenge to an alleged refusal on the part of the charity to perform public law duties arising under the 1998 Act. The only authorities referred to in the judgment were *Rendall v Blair*,[203] *Braund v Earl of Devon*[204]and the decision of Tucker J in *R v National Trust, Ex p Scott*, which Lloyd Jones J reconciled with the preceding two decisions on the basis that the judicial review in the *National Trust* case was essentially concerned with the allegation that that the Council of the National Trust had acted *ultra vires* and in breach of its trust powers so that it had failed properly to administer the affairs of the National Trust in order to give effect to its trust purposes; accordingly, the applicants in that case were not seeking relief which was adverse to the charity but only in relation to the administration of the charity.[205] The proceedings by the local authority in *FED 2000* were, on the other hand, brought not in order to challenge the administration of a trust but to bring a public law challenge to the alleged refusal by the charity to perform its public law duties arising under the 1998 Act.

Accordingly in *Fed 2000*, Lloyd Jones J resurrected the dichotomy between proceedings which are adverse or hostile in nature to a charity and those which relate to its administration and used this dichotomy to indicate when judicial proceedings would fall within the definition of "charity proceedings" with judicial review proceedings which are akin to proceedings which are hostile in nature to a charity and

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201 *Ibid* at paras 38-9, referring to comments made by Stanley Burnton J in his judgment at first instance at [104]-[107]

202 [2005] EWHC 2771 (Admin)

203 (1890) LR 45 Ch D 139

204 (1867-68) Ch LR 3 Ch App 800, CA in Chancery

205 [2005] EWHC 2771 (Admin) at [8]-[13]

do not relate to the administration of the charity falling outside that definition. Such an argument reflects Luxton's suggestion[206] that the better view is that judicial review proceedings against a charity, whether raising HRA issues or otherwise, are not charity proceedings within the meaning of s.33(8) as claims for judicial review (such as that advanced in *R v National Trust Ex p Scott* and *Scott v National Trust* regarding the right to hunt on the charity's land) are in nature and substance adverse to the charity.

It is, however, submitted that this distinction cannot be used as a universal or complete yardstick in deciding when judicial review proceedings will fall within the definition of charity proceedings under s,33(8) of the 1993 Act. The nature of claims for judicial review under CPR Part 54 may be many and various and not all applications for judicial review may be adverse in nature (as where, for example, a claim is made for judicial review on the basis that a decision by charity trustees is *ultra vires* raising public law issues). It is suggested that the question whether or not, a claim for judicial review is in substance adverse to the charity may afford a useful indicator as to when judicial proceedings may fall outside the ambit of s.33(8) of the 1993 Act but, in instances where other instances where the claim for judicial review is more akin to claim relating to the administration of the charity, it is submitted that the decision whether to proceed by way of judicial review on the one hand or by way of charity proceedings on the other is a matter which would be more appropriately decided on an individual case to case basis. The balance of the authorities at present therefore favours the inclusion of judicial review proceedings within the meaning of charity proceedings for the purposes of s.33(8).

206 *Op cit*, at 13.45 and 13.52