THORNTON v HOWE: A SOUND PRINCIPLE OR A SEMINAL CASE PAST ITS BEST BUY DATE?

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Introduction

The claims of Thornton v Howe[2] to be a leading case in the law of charities are not hard to sustain. Austin Wakeman Scott included the case in his casebook.[3] The doyen of Canadian charity lawyers, Professor Donovan Waters QC, made no bones about classifying it as a leading case.[4] Dal Pont refers to it as a classic,[5] a point demonstrated by its being followed in numerous cases as detailed below.

Most students of trusts, including charitable trusts, who come across it will remember it as one involving a judicial decision upholding a trust set out in the will of a testatrix (one Ann Essam), made in 1844, for publishing the religious writings of Joanna Southcott (or Southcote as it is occasionally recorded), a female prophetess who had died in 1814. Text books sometimes (or more often than not) give terse and derogatory details of the surrounding circumstances. The case is a worthy choice for the application of the case law study technique[6] sometimes

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2 (1862) 31 Beav 14, 19; 5

3 Austin Wakeman Scott, *Select cases and other authorities on the law of trusts* (Law School Casebook Series, 5th edn, Little, Brown and Company 1966) 682.

4 Donovan Waters QC, *Law of Trusts in Canada* (3rd edn, Thomson Carswell 2005) 716. See also discussion at 715-717 (limits of scope of religion) and 717 -720 (public benefit in religion).

5 Gino Dan Pont, *Law of Charity* (LexisNexis Butterworths 2010) p 242.

6 Within the last decade or so the genre of classic-case law studies has been flourishing in the USA, a development first alluded to by a distinguished Cornell Professor, Kevin M Clermont, when he was at the University of St Louis.

known as legal archaeology.[7] Indeed the case has already been comprehensively subjected to one such archaeological study; an admirable one by Professor Pauline Ridge, a Professor from the Australian National University College of Law. Her article[8] represents an erudite, impressively well documented and readable study whose editorial compression of the materials is exemplary. To it the present contributor can add but little, save some modest glosses in the form of additional biographical and bibliographic references to Southcott and Southcottiana and some other interesting and hopefully diverting detail.[9]

The choice of a seminal case such as *Thornton v Howe* in the sphere of religious trusts as a case suitable for renewed discussion by the present writer has been predicated by several contributing factors. First are the recollections of the curiosity, fascination and delighted attention engendered in the author in his student days when studying for the Bar Finals in the sixties of the last century, and for the Oxford BCL paper on Equity guided by Professor HG Hanbury's book Modern Equity[10] and the learned monograph by his pupil CE Crowther on Religious Trusts.[11] Edward Crowther, as he was usually known, interestingly went on to take holy orders and, after a stormy episcopal time in South Africa, became Bishop of Los Angeles before retiring to rural South West France. More serious claims can be made for studying the case of *Thornton v Howe* and those cases which have endorsed its liberal line because of its continuing relevance in an era where a new claimed secularist orthodoxy is abroad. The interface between religion and secularism, particularly militant proselytising atheism, is the subject of much debate. There is an impressive line-up of contestants. Most conspicuously (and in some cases vociferously) on the one hand are the geneticist Richard Dawkins, Oxford's Professor for the Public Understanding of Science;[12] the polemical essayist the late Christopher Hitchens; the prolific philosopher AC Grayling; and Daniel C Dennett. On the other hand are the former Chief Rabbi of the United Hebrew Congregation, Lord Sacks, and Professor Alvin Plantinga.

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7 Examining the facts and social and legal context of a case is a case law technique in relation to legal History, currently in fashion in the USA and dignified there with the appellation 'legal archaeology'.

8 Pauline Ridge 'Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of Thornton v Howe' (2010) 31(2) Journal of Legal History 177.

9 These are to be found in and have been culled from the Oxford Dictionary of British History, Columbia Encyclopaedia and Encyclopaedia of Occultism and Parapsychology. See also John Fletcher Clews (JFC) Harrison, *The Second Coming: Popular Millenarianism 1760-1850* (Routledge & Kegan Paul 1979); Sylvia Bowerbank, 'Southcott, Joanna (1750–1814)', *Oxford Dictionary of National Biography* (OUP 2004).

10 HG Hanbury, *Modern Equity* (8th edn, Stevens & Sons 1962).

11 C E Crowther, *Religious Trusts* (George Reynold 1954).

12 See e.g. Richard Dawkins, *The God Delusion* (Black Swan 2007).

Trailing behind these considerations comes the nice and happy coincidence that in the eighties or very early nineties of the last century the contributor had the occasion to give advice to the Panacea Society, a registered charity (now the Panacea Charitable Trust).[13] Its website relates that it came into existence in 1919 and flourished in Bedford as a religious organisation. When, in 2000, it came to the attention of the Commission, its objects were identified as being too narrow. In 2007, with Charity Commission approval, and with (it would seem) a due nod in the direction of its history, it adopted the following charitable objects:

a) to advance the Christian Religion (and in doing so the Council may have regard to the teaching of Joanna Southcott and her successors);

b) in furtherance of Christian principles to relieve both poverty and sickness and to advance education generally and in the production publication and dissemination of religious works.

The original context is important. But it also needs to be revisited and analysed in the light of modern conditions and of the new provisions of 21st century legislation on charities. That is the object of this article which will refer not merely to the terms of the legislation but to the claims of the Charity Commission to possess a law making role.[14] That arrogated role enables the Commission (so it alleges) to overrule as it deems fit previous decisions of the courts in the light of changes in conditions. The predecessor body of the Charity Commission namely the Charity Commissioners evidenced a reluctance to make judgments as to the balance between beneficial and detrimental impact of religions whose charities are already registered. Yet the transmogrified Charity Commission for its part considers itself charged with a prescribed function to carry out such a balancing exercise. For some reason, though schools trustees are now left to be judges of the public benefit elements,[15] it would appear the trustees of a Brethren meeting house or gospel hall have no such function. The continuing relevance and applicability of *Thornton v Howe* and the authorities that have followed it are at the centre of the Preston Down Trust case involving the Exclusive Brethren, presently before the First-tier Tribunal.

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13 Registered Charity No 227530. See http://panaceatrust.org/

14 PW Edge and JN Loughrey, 'Religious charities and the juridification of the Charity Commission' (2001) 21(1) Legal Studies 36, especially at 48-49 (reluctance to make judgments as to the balance between beneficial and detrimental impact of religions whose charities are already registered), and 50-51. See also Charles Mitchell, 'Reviewing the Register' in C Mitchell and S Moody (eds), *Foundations of Charity* (Hart Publishing 2000) 183-187.

15 See *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] Ch 214.

Thornton v Howe: terms of will of Ann Essam

Ann Essam was a widow who lived in Hampton Middlesex and died there in 1844. She had as a young woman become an acolyte of Joanna Southcott. She was described in a census two years before her death as a poulterer. The terms of her will made in 1843 are in fact more fully summarised in the Law Times report.[16] They benefited various people in respect of her personal estate from which legacies and bequest were to be paid or made and testamentary expenses deducted. The latter were such that little remained for the legatees. The residue consisted of realty which was directed to be applied for propagating the sacred writing of Joanna Southcott.

The course of the extended working out of the will of Ann Essam and the constitution of the law suit which it engendered took a long time and there was in the event little really at stake in terms of money. There were considerable delays between the deaths of Joanna Southcott and her adherent acolyte Ann Essam in 1844 and the eventual hearing in the early 1860s. By then the claims of the heirs at law were sufficiently researched, analysed and formulated. One of those heirs at law was the plaintiff in the lawsuit, Ann Essam's Thornton niece.

Brief life of Joanna Southcott (1750-1814)

The strange life of Joanna Southcott has attracted a considerable biographical literature and her reputation still attracts attention, with growing modern feminist interest in her career and example. The epithets heaped on her are choice: fanatic blasphemer patently demented, a candidate for an asylum. To many she gave every impression of being possessed. Joanna Southcott was born on 25 April 1750 in Taleford and raised in Gittisham, East Devon some 16 miles from Exeter. Her parents were tenant farmers and devout daily bible readers. Every day Joanna had to read out to them scriptural passages for an hour, after which she would discuss them with her parents. She is variously described as an early adherent to the Church of England - her parents' faith - but gradually inclined to Methodism. Had she be born later, she might have become a woman minister like the lady preachers who preached in the 1820s at the Methodist Chapel in Castle Street, Saffron Walden. But her gifts were to lie in prophecy of a millenarianist nature rather than in preaching, and she struck out on her own. At all events she came, at a time around 1792 when revolution, upheaval and turmoil were rampant (which coincided with an earlyish menopause consequent on her hard life on the land in service and other menial and caring tasks and duties), to be visited by voices. These caused her to make prophecies that were strangely on target. She attracted followers both simple and educated and her persistence in canvassing and bearding

16 (1862) 6 LT 525.

various Anglican clerics identified further supporters, some of whom became - like the luckless Rev Joseph Pomeroy - victims. Her ministry prospered despite recurrent torturing doubts which she periodically confessed to having and which at the very end resulted in a totally disillusioned recantation of her message as she took to her deathbed.

The writings of Joanna Southcote or Southcott

Southcott was nothing if not prolific. The Joanna Southcott collection at Princeton University consists of 12 notebooks and 63 pamphlets or loose writings containing copies of Southcott's divine communications, letters, poems, and prayers.[17] Chief among these are the following: *Strange Effects of Faith* (1801–1802), *Free Exposition of the Bible* (1804), *The Book of Wonders* (1813–1814), and *Prophecies announcing the Birth of the Prince of Peace* (1814). Her followers in their turn and in their various groups added a veritable flood of additional communications.
The nature of her single-minded and at times solipsistic outpourings has not escaped criticism. There is no lack of uncomplimentary, even scathing, comments on the style and content of her writing. One biographer writing in the year of her death described her writings as delusive prophecies; the witless efflorescences of a distracted old woman,[18] though E Palmer Thompson in his 1963 left wing classic[19] counts her as a heroine prophetess without peer, and others admire her as an apostle of feminism.

Social, Economic or Political Background; Legal Background

The gradual emancipation of religions outside the established Church in the run up to the decision in *Thornton v Howe* need only be touched on lightly. The history is conveniently set out elsewhere. Following the Toleration Act 1688 there was a gradual acceptance of dissenting denominations and successive legislative interventions improved the charitable lot of Jews, Roman Catholics, and Unitarians.

In the eighteenth century, in the well known case of *Da Costa v De Pas*,[20] a Jewish testator left money to be applied towards establishing a Jesuba or assembly for reading the Jewish law and instructing the people in the Jewish religion. That

17 http://findingaids.princeton.edu/collections/C0755

18 Jonathan Wordsworth, 'Introduction' in Joanna Southcott, *A Dispute Between The Woman & The Powers of Darkness* (Woodstock Books 1995) 2; JFC Harrison, *The Second Coming – Popular Millenarianism 1780-1850* (Routledge & Kegan Paul 1979) 92.

19 E P Thompson, *The Making of the English Working Class* (Penguin Books, 1991).

20 (1754) 1 Dick 258; Amb 228.

was held to be illegal, but under the doctrine of *cy-près* the Crown might apply the fund to other charitable purposes.

The phenomenon of millenarianism

Millenarianism was rife from the time of the French revolution onwards and has been the subject of much study evidenced by numerous materials and bibliographies.[21]

Her followers

A description of the range and calibre of her supporters gives an idea of her devotees. Many came from what in those days were regarded as the lower orders; males and females in domestic, agricultural or other lowly manual service. At least two thirds of her supporters were women, but some came from the commercial classes and some were men of the cloth. Many were recruited to her cause by her practice of binding scattered followers into a community of believers by issuing then with sealings. These were pieces of paper folded in two, signed by Joanna Southcott, and sealed to enable the adherent to join the 144,000 heirs of the New Jerusalem. At first the sealings were fairly indiscriminate but soon the seal was only sold to those who had read two of her booklets that told them what was required of them.

Mortmain

We are reminded of the important part played in legal history by the concept of mortmain, worked out in consecutive statutes. Earlier case law in the field of charities often needs to be considered against this background. *Thornton v Howe* is often held up as setting the bar extremely low in determining whether a charity is for the advancement of religion. But if one considers that, at the time the statutes against mortmain were in force, and that the effect of the decision was to render the trust void rather than to imbue it with special privileges in relation to taxation and the troublesome rule against perpetuities, it puts (according to some) perhaps a very different complexion on the ratio decidendi. Sympathy for the heirs at law overrode, they suggest, the claims of charity. Yet the learned Sir John Romilly was concerned to analyse the facts supporting charity conscientiously, as he did, and his finding is in no way devalued by that.

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21 See eg JFC Harrison, *The Second Coming: Popular Millenarianism 1760-1850* (Routledge & Kegan Paul 1979).

Argument

The judge in *Thornton v Howe*, Sir John Romilly MR, produced a judgment that is an affirmation of religious toleration; treating trusts of religious minorities in the same neutral way as major religions so far as charitable status is concerned. The implication is that they are assumed to be beneficial for the public for the purposes of any required public benefit element. Though the great grandson of a Huguenot refugee from Navarre, he does not appear to have been particularly religious though, as pointed out by Pauline Ridge,[22] he can be discerned as having a track record even prior to *Thornton v Howe* of sympathy with minority religious groups. Two years earlier he had in *Re Michel's Trust*[23] upheld as charitable a gift for the recital of the Cawdish (Kaddish).

Moreover, in going beyond the purpose of testing the sincerity of the decision of Sir John Romilly (an avowed main purpose of the article by Pauline Ridge), one is intrigued to see that the Whig background and Lockian liberal tolerant attitude of Sir John Romilly became justifiably embedded in the courts' stance of neutrality in relation, not merely to minority religions, but also, as part of the common law apart from the Mortmain Acts, regarding the mainstream religions.

Topicality of Thornton v Howe and relevance to the postponed hearing of the Exclusive Brethren case

The topicality of *Thornton v Howe* is still much in point. This is because no less a luminary than the Chief Legal Adviser and Head of Legal Services at the Charity Commission effectively rejected the claims of an Exclusive Brethren meeting house, previously exempt from registration (as an exempt charity), to be registered as a charity.[24] The charitable status of the Brethren was established in Ireland by a distinguished Master of the Rolls Sir Arthur Porter in the case of *Re Brown*[25] (where the Brethren are described alternately as Christian Brethren or Plymouth

22 See Ridge (n 8) 195.

23 *Re Michel's Trust* (1863) 28 Beav 39.

24 See his letter of 7 June 2012 concerning 'Preston Down Trust - application for registration as a charity'at: http://www.parliament.uk/documents/commons-committees/public-administration/LetterfromKennethDibble.pdf

25 *Re Brown* [1898] 1 IR 423. Although the Exclusive Brethren predominated in Dublin it is not clear whether the Brethren intended by the testator were the Open or Exclusive Brethren. The latter predominated in Ireland under the name 'Brethren' and are more likely than not to have been the intended body.

Brethren[26]), and by Walton J in *Holmes v AG*[27] as Exclusive Brethren. In Australia under the same nomenclature, in no uncertain terms, the New South Wales Court of Appeal upheld their charitable status in *Joyce v Ashfield Municipal Council*[28] where private ceremonies were held still to be of public benefit. There the New South Wales Court of Appeal had this to say:

> Even if the ceremonies of the Exclusive Brethren in the hall can be regarded as a temporary withdrawal from the world, those ceremonies are a preparation for the assumption of their place in the world in which they will battle according to their religious views to raise the standards of the world by precept and example. From the fact that they prepare themselves in private nothing can be deduced to deny the conclusion that these religious ceremonies have the same public value in improving the standards of the believer in the world as any public worship. I am therefore of the opinion that … from the fact that their ceremonies cannot be classed as public worship, it cannot be deduced that they are not for the public benefit.

Yet the position the Chief Legal Adviser adopted on behalf of the Commission (and this may have been formally decided or confirmed at a higher level) in a sophisticated formulation of double negatives, was that he was not satisfied that (and doubted whether) the law had not been changed by the reversal of the presumption of public benefit alleged to be a consequence of the Charities Act 2006 (now 2011). In consequence, the burden of proof of public benefit was one that rested or sat (he claimed) on the appellants and which they had not so far discharged. Argument based inter alia on the continuing applicability of *Thornton v Howe* in these allegedly changed circumstances needed (it was said) to be considered by the Tribunal. The case of the Preston Down Trust, which was to have been heard by the First-tier Tribunal in March 2013, was put on hold for three months[29] for negotiations to take place between the Commission and the appellants, so this present analysis of the law remains very topical and, subject to the outcome of the appeal and progress to higher courts, may or will remain so. Arguments based on evidence (the final details of which are as yet unseen) of public policy detriments are threatened. Certainly no harmful behaviour, which was raised but disregarded by Walton J in the *Holmes* case,[30] has, so far as is

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26 The name Plymouth Brethren derived from an early association with, and visit by JN Darby to, Plymouth and has been used by outsiders as a generic name for many years.

27 (1981) Times 12 February; [1981] Ch Com Rep paras 26-30 (Kingston Meeting Rooms Trust of Exclusive Brethren).

28 [1975] 1 NSWLR 744, 751.

29 The stay has since been extended until 6 January 2014.

30 *Holmes* (n 27).

presently known, surfaced in the *Preston Down* case. Perhaps the view will be taken that it is anachronistic and has little contemporary value. New evidence of a very cogent type, unless well authenticated and plainly outweighing to a very obvious and compelling extent other good done by the practice of adherents within the Church, would (one might think) need to be provided to displace the previous acceptance of the courts of the beneficial nature of the long standing Brethren institution that was popularly referred to as Exclusive Brethren even though now rebranded as Church of Plymouth Brethren.

The distinguished and highly respected All Souls Reader in Sociology, Bryan Wilson,[31] who was one of the world's leading sociologists of religion renowned for his studies of sectarianism and rationality, advocated the view that long term processes of modernisation and rationalisation had eroded the capacity of religion to shape human society. But all the while he championed and defended the freedoms of religious underdogs and unpopular religious minorities, whether long-established like the Christadelphians, Elim Pentecostals, Christian Scientists, Jehovahs' Witnesses or Exclusive Brethren, or more recent new religions such as the Church of Unification (the Moonies).Bryan Wilson writes perceptively of the misunderstandings that arise through ignorance or prejudices of journalistic and other critics who fail to study with sufficient attention or to appreciate the environment of a particular faith or indeed faith in general.

The retrospective application of newly contrived twentieth and twenty-first century theories or notions to established norms of legal thought and community endeavour is fraught with possibilities of error and misunderstanding. Such norms have been based on long accepted experience of what goes to make a settled society. Radical retrospection from a standpoint of militant secularism (especially in relation to religion) has ironic connotations and will struggle intellectually to control the incoming tide of Islamic fundamentalism. The adjacent theme of the interface between religion in its charitable manifestation and the critical approach of secularism, whether militant or otherwise, raises important issues.[32]

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31 See obituary in *Telegraph* (London, 19 October 2004). See also Bryan R Wilson, *Patterns of Sectarianism: Organisation and Ideology in Social and Religious Movements* (Heinemann Educational Books 1967). To be especially noted are three chapters which afford important doctrinal and liturgical insights: Peter L Embley, 'The Early Development of the Plymouth Brethren', ch 7; Gordon Willis and Bryan R Wilson, 'The Churches of God: Pattern and Practice', ch 8; and Bryan R Wilson, 'The Exclusive Brethren: A Case Study in the Evolution of a Sectarian Ideology', ch 9.

32 See review of Russell Blackford's book *Freedom of Religions & The Secular Society* (Wiley-Blackwell 2012), at http://skepticlawyer.com.au/2012/02/09/review-of-freedom-of-religion-the-secular-state/. See also endorsements of Blackford's book by Richard Dawkins Foundation and by AC Grayling.

Around the world, since the enactment of the Charities Act 2006 there have been numerous studies devoted to Religion and the Law of Charities which inevitably mention *Thornton v Howe*. In Canada, there have been significant contributions to the debate from two consecutive articles by Donovan Waters QC,[33] while Terrance S Carter has also, for his part, produced two articles,[34] including a riposte to the second of Donovan Waters' articles. In Australia, in addition to Pauline Ridge's original article referred to above,[35] which stands as the most extensive appreciation of the archaeology of *Thornton v Howe*, one should also refer to Matthew Harding's work[36] and an additional piece by Ridge.[37] Both these latter Australian contributions were written before the case made by Luxton,[38] Synge,[39] and others came to be formulated, and have to be read accordingly. Moreover there is interesting material from a Unitarian perspective in the successful doctoral thesis of Ian Ellis-Jones of the University of Technology, Sydney, *Beyond the Scientology Case*,[40] who, after citing *Thornton v Howe* and *Re Watson*, reminds us of Burton's quotation in the Anatomy of Melancholy, 'One religion is as true as another'.[41]

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33 Donovan Waters, 'The Advancement of Religion in A Pluralist Society Part I: distinguishing religion from giving to charity' (2011) 17(7) Trust & Trustees 652 and Donovan Waters, 'The Advancement of Religion in A Pluralist Society Part II: abolishing the public benefit element' (2011) 17(8) Trust & Trustees 729.

34 Terrance S Carter, 'Advancing Religion as a Head of Charity: What Are the Boundaries?' (2006) 20 The Philanthropist 257 and Jennifer M Leddy and Terrance S Carter, 'Advancement of religion discussion rekindled' (November 30 2011) Church Law Bulletin No 39.

35 Ridge (n 8).

36 M Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 MLR 159.

37 Pauline Ridge, 'Religious Charitable Status and Public Benefit in Australia' [2011] 35 Melb ULR 1071.

38 Peter Luxton, 'Opening Pandora's Box: The Upper Tribunal's Decision on Public Benefit and Independent Schools' (2012-13) 15(3) CL&PR 27-53.

39 Mary Synge, '*Independent Schools Council v Charity Commission for England and Wales [2011] UKUT 421 (TCC)* [2012] MLR 2012, 75(4), 624 (note) - a very critical analysis of its legal justification in which the writers suggests the Upper Tribunal has introduced a third sense of public benefit and that this relies upon a circular rationale which is informed by policy rather than law.

40 Ian Ellis-Jones, 'Beyond the Scientology Case: towards a better understanding of what constitutes a religion for legal purposes in Australia (2007) available at http://epress.lib.uts.edu.au/research/bitstream/handle/10453/20166/02whole.pdf?sequence=2

41 Robert Burton, *Anatomy of Melancholy* (Longman, Rees, and Co, 1832) pt iii, sect 4, memb 2, subsect 1.

There is also extensive and useful discussion of public benefit in religion in Gino Dal Pont's, Law of Charity.[42] This focuses inter alia on decisions of the High Court of Australia such as *Church of the New Faith v Commissioners of Pay-roll Tax*,[43] which suggest that public acceptance may not be an essential hallmark of a religion and that there is no need for proof of comprehensiveness or conclusiveness of a set of ideas or doctrines which may be varied or adapted. If, as Isaacs J opined in *Nelan v Downes*,[44] the law should not be seen to make the value judgement that one religion confers greater public benefit than another, it should be chary of making value judgments or otherwise weighing up benefit and detriment.

In England, Professor Peter Luxton[45] has alluded to the dicta in the *Independent Schools Council* case as subversive to the position of the advancement of religion and he has updated that work with his written evidence[46] to the Public Administration Select Committee. It would be natural for the Exclusive Brethren to draw on and explicitly refer to both these studies for arguments in response to those of the Charity Commission when they emerge. The non citation of learned articles or apposite authorities in the *Independent Schools Council* case was a major hindrance to the secure emergence of an intellectually respectable decision in a case expected to be an authoritative important and defining case.

Acceptance and Acceptability

The assertion of a neutrality position in *Thornton v Howe* has gained judicial currency in a bevy of later cases summarised compendiously in Picarda,[47] rehearsing extracts from judgments in various English cases[48] and reciting approving passages in three Commonwealth cases.[49]The survey carried out by

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42 Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths 2010) 234-245, especially at 214-215; and see 546-547, especially n 142.

43 (1983) 154 CLR 120.

44 (1917) 23 CLR 546.

45 Luxton (n 38).

46 Public Administration Select Committee, *The role of the Charity Commission and 'public benefit': Post-legislative scrutiny of the Charities Act 2006* (HC 2012-13, 76) vol 2: Report, Written Evidence, Ev w89.

47 See Hubert Picarda, *Law and Practice Relating to Charities* (4th edn Bloomsbury Professional 2010) 132-134.

48 eg *Bowman v Secular Society* [1917] AC 406*; Re Pinion* [1965] Ch 85.

49 Canada: *Re Orr* (1917) 40 OLR 567; *Re Knight* [1937] OR 462. Australia: *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 373.

Gino Dal Pont[50] points to other cases illustrating the same theme and is no less attentive to English, Irish and Australian statements to the effect that courts do not favour one religion over another; observations which likewise follow, whether consciously or not, in the footsteps of *Thornton v Howe*.[51] Philip Pettit in his text book *Equity and the Law of Trust*[52] notes:

> The courts are understandably reluctant to judge the relative worth of different religions or the truth of competing religious doctrines, all of which may have a place in a tolerant and culturally diverse society…So far as the various Christian denominations are concerned: there is no doubt as to the charitable character of religious trusts not only for the established church but also for nonconformist bodies.

He mentions the (Exclusive) Brethren here,[53] and adds:[54]

> More controversially, two trusts associated with the Unification Church have been registered as charitable.

An editorial in the New Law Journal described this outcome in the following way:[55]

> After three years he [the Attorney-General] had been unable to amass sufficient evidence against the Moonies to rebut the presumption of charitable status [sic] that the English law gives to any religion.

The courts are hardly well positioned to make determination as to the truth or falsity of religions or to audit public benefit in the spirituality of the doctrines and teachings of a religion in which faith and belief are juxtaposed. The position of the Charity Commission is even more questionable, having regard to its constitution and track record.

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50 Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths 2010) 215 and 544-547.

51 *Varsani v Jesani* [1999] Ch 219, 236 (Morritt LJ); *Nelan v Downes* (1917) 23 CLR 546, 550 and 568; *O'Hanlon v Logue* [1906] 1 IR 247; *Gilmour v Coats* [1949] AC 426, 458-459 (Lord Reid).

52 Phillip Pettti, *Equity and the Law of Trusts* (11th edn OUP 2009) 263.

53 viz *Holmes* (n 27); *Broxtowe Borough Council v Birch* [1981] RA 215.

54 Phillip Pettit, *Equity and the Law of Trusts* (11th edn OUP 2009) 264. A footnote in relation to the Unification Church adds: 'Popularly known as the Moonies. The Attorney-General appealed against the refusal of the Charity Commissioners to accede to his request to remove the trusts from the register, but the appeal was eventually discontinued: see the statement of the Attorney-General in Hansard, 3 February 1988, p 977 *et seq* and the debate in the Lords, 10 February p 247 *et seq*.'

55 Editorial, 'An Excess of Charity' (12 February 1988) 138 New Law Journal 87.

There were murmurs against *Thornton v Howe* in some academic quarters, reflected in the coverage given to the subject of public benefit in religion prior to the enactment of the Charities Act 2006, consolidated into the Charities Act 2011.[56] The view eventually taken by the Commission was that the effect of what the Commission insists is the reversal of what has been called the presumption of public benefit so far as religion is concerned was that it had now become mandatory on a new application to go on the register to prove public benefit in accordance with the guidance issued by the Commission on demonstrating public benefit. Contrary to the view of Professor Luxton and of this contributor, neither *Thornton v Howe* nor *Holmes v AG* was any longer a relevant authority upon which an applicant could rely. This in itself appears to be a point of law

Changes in social and economic circumstances are recited by the Commission as justification. But this is severely criticised by both Luxton and in the only presently up-to-date text book.[57] The robust application of a strong public benefit test, for which there is absolutely no case law statutory warrant, is another heresy; as is the bold suggestion that the *Independent Schools Council* case still enables an argument that the presumption has been 'reversed' so as to render *Thornton v Howe* and other cases upholding as charitable unpopular Christian bodies no longer applicable. This is despite the fact that they are part of the case law specifically preserved by the Act.[58]

Criticisms

The decision does not square with the agenda of dedicated secularist ideologues. The British Humanist Association has criticised the decision and the same criticisms are to be found among the Anti-God Botherers who poignantly lack the poetry of Lucretius in *De Rerum Natura*, which is by turns mordant, relevant and beautiful.[59] They appear to think that they can get comfort from what was said in the *Independent Schools Council* case, so far as it purports to deal in advance with the head of religion. Energetic secularists are deploying arguments asserted to be grounded on serious philosophical reasoning but traditionally classified in law as political. Neophile secularist interpretations of the law also risk veering to idiosyncratic hobby horse conceptions claiming - perhaps rather ambitiously -

56 See Jeffrey Hackney (1973) ASCL 464, 469 and Jeffrey Hackney 'Charities and Public Benefit' [2008] LQR 347 (note).

57 Hubert Picarda, *Law and Practice Relating to Charities* (4th edn Bloomsbury Professional 2010) 39E-39F.

58 Charities Act 2011, s 4(3).

59 See on the latter, Ferdinand Mount, *Full Circle: How the Classical World Came Back to Us* (Simon & Schuster 2010) ch VI.

serious philosophical basis and meriting submissive attention. No doubt some will be disinclined to give much room to these thoughts.

Subsequent Developments

In Canada there has been one case concerning the issue of Charter rights in relation to freedom of religion that is of considerable importance and significance. This is the case of *Syndicat Northcrest v Amselem*[60] (the *Amselem* decision). Despite the principles that the courts endorsed in this case and the resulting implications it has for expanding what it means to advance religion as a head of charity, it is likely to provide some boundaries within which the definition of advancement of religion should operate.

Amselem Decision

In the *Amselem* case, the Supreme Court of Canada adopted a broad interpretation of the Charter right to religious freedom. The two appellants in the case were Orthodox Jews who co-owned residential units in a condominium complex. A by-law in their declaration of co-ownership restricted them from building structures on their balconies. At issue was the appellants' ability to erect a 'succah' (a small enclosed temporary hut or booth made of wood or other material and open to the heavens) on their individual balconies during the nine-day Jewish festival of Succot. When the appellants refused to remove the 'succahs', the respondent Syndicate applied for and was granted an injunction on the basis that the by-law did not violate the Quebec Charter.

In the Supreme Court's decision, Iacobucci J rejected the 'unduly restrictive' view of freedom of religion taken by the Court of Appeal. In finding that the declaration of co-ownership infringed the appellants' religious rights under the Quebec Charter, Iacobucci J, for the majority, concluded that freedom of religion includes:[61]

> Freedom to undertake practices, and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such a claimant need not show some of religion. It is the

60 [2004] 2 SCR 551.

61 ibid [42-48].

> religious or spiritual essence of the action, not any mandatory or perceived-as-mandatory nature of its observance that attracts protection.

Iacobucci J further asserted:[62]

> an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

In addition, he stated, echoing a rooted common law approach enshrined in case law, that 'it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine'.[63]

Two main points would seem to emerge from the Supreme Court decision in *Amselem*. First, and perhaps foremost, it establishes that it is the spiritual essence of an action that is sincerely held, and not the mandatory nature of its observance, that attracts protection. Further, it reinforces the established principle that it is inappropriate for courts to resolve contentious matters of religious law. Together, these principles expand the scope of protected freedom of religion to practitioners and not just to believers of a faith.

This decision is also important to potential applicants for charitable status because it makes clear that the state and judges must not inquire into the validity of an individual's religious beliefs or practices. In Canada, at any rate, this may impact on the extent to which the Canadian Revenue Authority will consider what constitutes advancing religion when reviewing applications for charitable status by organisations whose activities are believed by their members to be advancing religion but which are not necessarily mandated by the doctrine, teaching or practice of that particular faith. In the result, the Supreme Court decision could - it is hoped - provide this useful and significant guidance.

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62 ibid [56].

63 ibid [67] In any case the court does not, and should not be aspiring to (and is not statutorily armed to) carry out an audit of religious doctrines and posited social benefits and disbenefits and detriments. Such matters are traditionally treated as not justiciable by the courts as the Court of Appeal recently opined in *Shergill and others v Khaira and others* [2012] EWCA Civ 983; [2012] WLR (D) 214, CA.

Concluding Analysis

The present position is that the proceedings relating to the Preston Down Trust has been adjourned to enable the parties to negotiate some outcome other than through an expensive tribunal procedure. There is dubious value in making anything other than general points about what lines of argument may be judged appropriate. Evidence is being assembled, as is legal argument. The doubts affecting the mind of the Charity Commission have been articulated up to a point in carefully nuanced language and are now in the public domain,[64] but not the legal argument and citations of authority that underpin them. For all that, any attempt in this essay (1) to anticipate in detail what may be said in the forthcoming Exclusive Brethren case and (2) to consider how strong a case that the doctrines and practices of their religion are contrary to public policy needs to be equiparated to the restrictions laid down by Plowman J in *Re Watson*[65] would be inappropriate and might seem impertinent in the sense of not being pertinent.

The Chief Legal Adviser at the Charity Commission itemised[66] various Christian and Jewish 'closed or exclusive religious organisations or groups whose adherents have limited interaction with the public that were felt not to meet the public benefit requirement'. This, it should be observed, goes beyond the question of accessibility of religious entities to: religion shoppers;[67] or, in the case of mosques, infidels or people of the book; or indeed synagogues for listed members only, as in the case of the Catford Synagogue (see *Neville Estates Ltd v Madden*[68]). The Chief Legal Executive asked the Attorney General to make a reference to the tribunal, commenting that it would be difficult to estimate the number of other groups that might not meet public benefit requirements. The suggestion was that they might include the Plymouth Brethren Christian Church, as well as Amish, Bruderhof and Mennonite Christian groups, Hasidic and Messianic Jews and, for good measure, it added as a *digestif* (so to speak) 'possibly some Buddhist organisations'. This illuminating'little list'of potential'victims' reminiscent of another little list, that of the Lord High Executioner Ko-Ko in the

64 Letter of 7 June 2012 (n 24).

65 *Re Watson* [1973] 3 All ER 678; [1973] 1 WLR 1472.

66 In a leaked letter to the Attorney General, now in the public domain, as quoted in 'Charity Commission asked Attorney General to refer "closed religious organisations" to charity tribunal' *Third Sector* 28 January 2013.

67 See Rebecca French, 'Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law' (2003) 51 Buff L Rev 127.

68 [1962] Ch 832; and see *Re Banfield* [[1968] 2 All ER 278; [1968] 1 WLR 846 (Goff J) (Pilsdon Community retreat and access to outside world).

Mikado,[69]perhaps tells us something of the earlier zeal and focus of the deviser or devisers of the 'little list', though it now looks as if it has been put aside for the time being, even if not overtly disowned. On its publication there was a strong reaction published by the Rosh Pina Project (an online meeting place for Messianic Jews),[70] and liberal-minded people are likely to feel sympathy for the pious Amish and Mennonites, who are at least law-abiding, and in living out their faith may also be perceived, if it be relevant, as contributing to the improvement of agriculture for the general community benefit as well as exhibiting their commitment to scripture.[71] In the event, no reference from the Attorney General emerged.

More recent announcements from the Charity Commission suggest that the Plymouth Brethren Christian Church case is now to be treated as a case turning on its particular facts; a one-off, a hapax legomenon as it were. So perhaps it does not, after all, have to be viewed as a stalking horse for assailing other religious groupings, such as those reeled off by the Chief Legal Adviser, newly conceived to be - in the light of modern conditions - possibly contrary to public policy. The appeal to a principle that each case is to be determined on its own facts raises problems. If the trust deeds are all common form and the decision in relation to the Preston Down Trust is to govern all other meeting houses, to what extent must relevant detriments need to be tied to a particular congregation? If many a mickle makes a muckle, which mickle goes to what muckle? And what is the weight of the detriment and how does that outweigh the weight of any identifiable and identified general benefit, tangible or intangible? Moreover, the invocation of modern conditions as a reason for revisiting established religions has met with predictable opposition because of the risks of subjectivity and surrender to modish political correctness[72] or even (heaven forfend) political objectives.

The suggestion that even conventional main stream religions may be at risk, as suggested in the *Independent Schools Council* case, obiter, is itself startling. The Upper Tribunal had stated earlier in its judgment that its comments on the

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69 See The Lord High Executioner Ko Ko in The Mikado (1885): 'As some day it may happen that a victim must be found, I've got a little list - I've got a little list; Of society offenders who might well be underground, And who never would be missed - who never would be missed!'

70 http://roshpinaproject.com/2013/02/06/hasidic-jews-and-messianic-jews-may-loose-charitable-status-in-uk/

71 As in the early Church; see on this point *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744, NSWCA (Exclusive Brethren).

72 See eg response of the Christian Institute to the 2007 Charity Commission Consultation on Draft public benefit guidance, available at: http://www.christian.org.uk/issues/2007/charities_bill/consult_response.pdf

public benefit aspect of the case before them was 'confined to the context of educational charities'.[73] Yet it unnecessarily went on to give hostages to fortune, as Luxton observes,[74] by saying that in the context of advancement of religion, not only is there no presumption that religion generally is for the public benefit, but also there is no presumption at any more specific level 'that for instance Christianity or Islam or the Church of England is for the public benefit'.[75] Nevertheless the Upper Tribunal concluded that there is similarly no presumption that any particular type of education is for the public benefit.[76] A further remarkable feature needs to be noted, and this, like the immediately preceding observations, is rightly emphasised by Professor Luxton. This is that the Upper Tribunal had determined that there had not previously been any presumption of public benefit so that the Charities Act 2006 section 3(2) (now section 4(2) of the Charities Act 2011) had nothing to reverse or any identifiable target to hit.

A big query must surround the ability of the presently constituted Charity Commission to handle registration work without legal strengthening. Moreover, the suitability of the tribunal system, as presently constituted and procedurally embrangled, to adjudge major controversial public benefit disputes (as opposed to minor disputes of a humdrum nature not engaging any difficult points of law) is by no means obvious in comparison with the well tried High Court. The procedures of the High Court may be more aptly suited than the cumbersome procedural maelstrom evident in the tribunal system at both levels. Interestingly, the latest pronouncement of the Public Administration Select Committee (PASC) is that, while the Act has been broadly welcomed by the charitable sector, the PASC considers that it is 'critically flawed' on the issue of public benefit.[77] The provisions should be repealed and it should be the job of Parliament, not the Charity Commission or the courts, to define what public benefit means and determine the criteria for charitable status. Yet that was the very fudge that Parliament enacted to its own cost and that of the sector. The PASC, it should be added, was not disposed to make any judgement on the public benefit issue in the case of the Preston Down Trust, which remained as a task of the tribunal system.

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73 *Independent Schools Council* (n 15) [15].

74 Luxton (n 38).

75 *Independent Schools Council* (n 15) [84g].

76 ibid [85]. But, of course, conventional schooling needs no supporting presumption. Nor does a strict Christian or Jewish denomination.

77 Public Administration Select Committee (n 46) [92].

The case foreshadowed by the Commission regarding the Preston Down Trust was set out in a letter of 7 June 2012, now in the public domain, as mentioned in the PASC evidence. It will be interesting to see how this will be expanded and refined and, on performing its duty to the court, how far the Commission will deal with, and draw attention to, learned articles, authorities and arguments - particularly those in the Response of the Christian Institute contrary to its case. Whether social perceptions have changed will be for the Commission to show. But one guide may be the judicial attitudes evinced in Australia.[78]

How far the language of the trust deed can be alleged to be uncertain and whether it fails to fall within section 3(1)(c) of the Charities Act 2011 as for the advancement of religion may be a bone of contention. The failure to follow a whole clutch of binding High Court authorities of the standing of *Holmes v AG*,[79] *Re Watson*,[80] *Neville Estates Ltd v Madden*,[81] *Re Banfield*,[82] and *AG v Fowler*[83] is another area for argument, as is of course the application of the liberal decision in *Thornton v Howe* which has been given consistent judicial support.

78 See *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744, NSWCA (Exclusive Brethren).

79 *Holmes* (n 27) (Walton J); and see a much earlier decision in Ireland: *Re Brown* [1898] 1 IR 423.

80 *Watson* (n 65) (Plowman J).

81 *Neville* (n 68) (Cross J).

82 *Banfield* (n 68) (Goff J).

83 (1808) 15 Ves 85; 33 ER 687 (Eldon LC) holding a congregation of dissenters a sufficient section of the public.