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CHARITABLE TRUSTS IN THE CAYMAN ISLANDS: GOODBYE TO THE STATUTE OF ELIZABETH

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Lord Eldon cautioned in the seminal decision of *Morice v The Bishop of Durham*[2] that the English courts have "taken strong liberties upon the subject of charities"[3], by which his Lordship was referring to the vast array of purposes found by the judges even by 1805 to be charitable in law. It nevertheless remains a fundamental truth that the boundary of legal charity has been greatly restricted by falling back upon the *fons et origo* of all legal charity - the preamble to The Statute of Charitable Uses 1601.[4] Whilst it is beyond dispute that the legal definition of charity in English law has far exceeded the purposes enumerated therein, the preamble's enduring influence[5] is seen in the proliferation of technicality which

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2 (1805) 10 Ves 522.

3 Echoed by Lindley and Lopes LJJ in *Re Macduff* [1896] 2 Ch 451 at 463 and 467-468 respectively. See also per Russell LJ in *Re Grove-Grady* [1929] 1 Ch 557 at 582. Most recently, Lord Upjohn in *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation* [1968] AC 138 at 153 lamented that, "the 'spirit and intendment' of the preamble to the Statute of Elizabeth have been stretched almost to breaking point".

4 Per Lindley LJ [1896] 2 Ch 451 at 467.

5 The Statute of Elizabeth was repealed by the Mortmain and Charitable Uses Act 1888. It is generally thought, however, that s.13(2) of the 1888 Act preserved the preamble and that it consequently survived until 1960 when s.13(2) was itself repealed by the Charities Act of that year.

has produced an inherently limited term of legal art[6]. The privileges of being accorded charitable status in English law[7] have therefore come at a high price with the law reports overflowing with examples of meritorious purpose trusts whose failure to satisfy the technical definition of charity has led not only to non-charitable status but to invalidity.[8]

The recent decision of the Grand Court of the Cayman Islands[9] in *Bridge Trust Company Ltd and another v The Attorney-General of The Cayman Islands and others*,[10] which has prompted this discussion, has embraced a refreshingly liberal concept of charity for this small English dependency. In effect eschewing both technicality and the preamble to the Charitable Uses Act (hereafter "the preamble"), Harre CJ's ruling is to be welcomed in promoting a broad and inherently workable definition of legal charity. It is timely at this point to note that charitable designation in the Cayman Islands does not carry with it the fiscal advantages which necessarily accompany such a conclusion under English law.

Charitable Designation in English Law - Entering the Wilderness

Rules of substance in this area will rarely be applied by the court without it first having undertaken a preliminary examination of what the donor's words mean. This exercise in construction increases in importance as the definition of legal charity narrows. Accordingly, where a legal system has developed a narrow and

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6 In the leading decision of the House of Lords in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 at 581 Lord Macnaghten described the word "charity" as being "of all the words in the English language ...one which more unmistakably has a technical meaning in the strictest sense of the term...peculiar to law".

7 See infra p 136 fn 92.

8 See, for example *Re Astor's Settlement Trusts* [1952] Ch 534; *IRC v Baddeley* [1955] AC 572; *Re Shaw* [1957] 1 WLR 729; *Re Bushnell* [1975] 1 WLR 1596. Lord Reid's observation in the *Scottish Burial Reform* case [1968] AC 138 at 147 that the modern attitude of the courts to legal charity is one of benignancy is seen in many of the more recent cases: *Re Hetherington Dec'd* [1990] Ch 1; *Re Koeppler's Will Trusts* [1984] Ch 243; *Guild v IRC* [1992] 2 AC 310. But cf *Attorney-General of the Bahamas v Royal Trust Co* [1986] 1 WLR 1001. The chances of validity as a private trust have improved with the developments in *Re Denley* [1969] 1 Ch 373 and *McPhail v Doulton* [1971] AC 424: see infra at fn.80.

9 The Grand Court possesses similar jurisdiction to that of the English High Court.

10 Cause 269/94, unreported decision of Harre CJ, 10th April 1996. An appeal is currently pending to the Cayman Islands Court of Appeal. It is understood that the matter has been set down for the early summer of 1997.

technical definition of legal charity pure questions of substance will arise rarely, being possible only where the donor has achieved absolute precision in his use of language. However, the converse cannot be assumed. Even a broad definition of charity cannot obviate the need for construction, although such a definition may be expected to direct the inquiry towards matters of substance. These propositions are borne out by the *Bridge Trust* case in which the court was occupied by matters of both construction and substance, although the pivotal matter (of substance) was whether admittedly wide language was nevertheless capable of giving rise to a conclusion of charity under Cayman law.

In order to place the decision in legal context, the substantive English rules must be visited. This journey may well be undertaken with a measure of trepidation by anyone who has already traversed the "wilderness of legal charity", as one writer[11] has aptly described a subject increasingly being recognised as a hybrid occupying the middle ground between trusts and taxation law. In this last statement, the central privilege of charitable status in English law is laid bare; and whilst it is true that charitable status will also lead to certain trusts law advantages,[12] it is the mainstay of this article that the primary reason for the inherently technical and limited definition of charity in English law is to be found in the fiscal and rating advantages thereby necessarily acquired.[13] In support of this thesis may be cited the increasing emphasis over the last fifty years on the public benefit requirement[14] as a necessary prelude to a conclusion of charitable status. It is no coincidence that during this same period the Inland Revenue have been the repository of record levels of taxation income.

It was the Radcliffe Commission, reporting in 1955, which first signalled a departure from the entrenched English practice of tying tax advantages to charitable status by the iconoclastic notion of creating a narrow range of fiscally

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11 Bentwich (1936) 49 LQR 520.

12 The following advantages apply equally following charitable designation under Cayman law: relaxation of the rules of perpetuity, uncertainty and enforceability which apply to purpose trusts. See infra text at p 138 et seq. It is worthy of note that charitable trusts are equally subject to the requirements that there must exist certainty of intention to create a trust (as opposed to a gift or a power) and there must be certainty of subject matter.

13 See infra at fn.92.

14 See, for example, *Re Compton* [1945] Ch 123 and *Oppenheim v Tobacco Securities Trust Ltd* [1951] AC 297 (education); *Gilmore v Coats* [1949] 1 All ER 848 (religion) and *Williams Trustees v IRC* [1947] 1 All ER 513 (fourth head); Geoffrey (later Lord) Cross QC observed extra-judicially (1956) 72 LQR 187: "A charitable trust is essentially a public trust. If a trust confers only private benefits as opposed to benefits to the community, it is not charitable."

privileged purposes.[15] The natural corollary of this recommendation would be the welcome development of a wide sweep of charity for non-fiscal purposes, bringing to an end the "unnatural union"[16] of general and revenue law definitions established in the landmark decision of their Lordships in *Pemsel's Case*.[17] It will be suggested below that it is the absence of any fiscal dimension to an outcome of legal charity in the Cayman Islands which allowed the Grand Court in *Bridge Trust* to apply a progressive interpretation of charity to the purposes before it.[18] The prospect heralded by the decision, of a greatly simplified definition of charity conducive to upholding general philanthropic wishes, is something which most legal practitioners in the UK would consider remarkable. The same could doubtless be said of the timorous approach displayed by successive British governments in denying efficacy to the recommendations of the Radcliffe Commission whose implementation would have long since ensured an end to charity's wilderness years for the Mother jurisdiction.

A Common Law Classification: The Divisions of Charity

It is well known that there has never been a general statutory definition of charity in English law[19]and that all proposals for introducing such a definition[20] have been resisted on the grounds that a comprehensive definition is unattainable.[21]

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15 The Royal Commission on the Taxation of Profits and Income (the Radcliffe Commission) 1955 (Cmnd 9474). At Chapter 7, the Commission propose that fiscal privilege should be extended to trusts for the following purposes only: "the relief of poverty, the prevention or relief of distress, the advancement of education, learning and research, and the advancement of religion."

16 Per Geoffrey (later Lord) Cross 72 LQR 187 at 205.

17 [1891] AC 531 at 581.

18 Although both the relevance of policy and the suggestion that "any bold or even timorous innovation in the law of charity" was heralded by the *Bridge Trust* decision were firmly denied by the learned Chief Justice. (Transcript at pages 10 and 42.)

19 Although a limited definition in relation to recreational charities is contained within s.1 Recreational Charities Act 1958.

20 Such as those of the Nathan Committee in their Report on the Law and Practice Relating to Charitable Trusts (1952) (Cmnd 8710). Significantly, this proposal was omitted from the legislation which implemented most of the Report's recommendations, the Charities Act 1960.

21 "There is no limit to the number and diversity of the ways in which man will seek to benefit his fellow men." Per Viscount Simonds in *IRC v Baddeley* [1955] AC 572 at 583.

Even the bold reforms of the Charities Act 1960 stopped short of attempting a statutory definition.[22] The common law has therefore for long predominated, augmented by the occasional and limited legislative incursion.[23] It is consequently in the arguments of Mr Samuel Romilly to their Lordships in *Morice v Bishop of Durham*,[24] basing himself upon the preamble, that we find the first coherent synthesis of legal charity. Some eighty-six years later, Lord Macnaghten, in the celebrated decision of their Lordships in *Pemsel's Case*,[25] reduced Romilly's categories to a more compendious form in suggesting the following four well-known divisions of charity, which continue to underpin contemporary English law: trusts for the relief of poverty, for the advancement of education and religion and for other purposes generally beneficial to the community.

It is evident that with the sole exception of poverty trusts, the common thread which runs through all the divisions of legal charity is the existence of public benefit. In such cases, charitable ascription is predicated upon not only the presence but also the quality of public benefit. In other words, there can be public benefit without charity,[26]but rarely a charity which is not public. The key question is to establish whether the donor's purposes are beneficial to the community in a way which the law regards as charitable. This is answered by looking for loose justification from the Statute of Elizabeth. The proposition has been variously stated as requiring the purpose to fall within the "spirit and intendment" or "equity", although not necessarily the letter, of the preamble. Thus, for example, trusts for the relief of the sick[27] and the advancement of religion will likely amount to charitable purposes as being analogous, respectively,

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22 See s.38(1) and (4) but see supra fn.20. In *Charities: A Framework For The Future* (Government White Paper Cmnd 694, 1989), the proposal to introduce a statutory definition of charity was rejected, it being concluded (at para 2.11) that any such reform "would be fraught with difficulty" and would risk compromising the flexibility of the current law, "its greatest strength and most valuable feature". Cf s.96(1) Charities Act 1993: "Charity" means "any institution...which is established for charitable purposes".

23 Such as the Charitable Trusts (Validation) Act 1954 and the Recreational Charities Act 1958.

24 (1805) 10 Ves 522.

25 [1891] AC 531.

26 See, for example *Farley v Westminster Bank* [1939] AC 430.

27 *Le Cras v Perpetual Trustee Co Ltd* [1967] 3 All ER 915. The Charity Commissioners have also held that the provision of advice and facilities concerning contraception is a charitable purpose, being analogous to the preamble's reference to the preservation and protection of good health: Annual Report 1985, para.5.

to the relief of the impotent and the repair of churches, purposes to be found specifically listed in the preamble. Russell LJ has noted, however, that close scrutiny of the preamble is unnecessary,[28] with the method of analogy being only the "handmaid" to the usual practice of finding a "vague and undefined" justification therein.[29] Accordingly, in *Incorporated Council of Law Reporting for England & Wales v The Attorney-General*[30] the Court of Appeal found the preparation and publication of law reports to be charitable, *inter alia*, as being beneficial to the community and relieving the government of responsibility for the same in a way broadly akin to the category of public works enumerated in the preamble.[31]

The "Common Thread" of Public Benefit

The existence or no of the requisite degree of public benefit represents a further complex issue with which the court or, more often in England, the Charity Commissioners must grapple. Indeed, the pool of legal charity has its waters further muddied by the fact that not only is the degree of public benefit a fluctuating one as between the four divisions, but that such variation exists even within the miscellany of charitable purpose to be found within division four. A review of the leading authorities reveals that whilst in the poverty trusts the requirement of public benefit has been effectively eliminated, with the only condition being that the recipients must be identified as a class rather than as individuals,[32] in relation to the remaining three categories a trust will not be

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28 Although there is evidence even in the modern authorities of minute inspection of the preamble: *Re Sahal's Will Trusts* [1958] 1 WLR 1243; *Re Cole* [1958] Ch 877.

29 *Incorporated Council of Law Reporting for England and Wales v The Attorney-General* [1972] 1 Ch 73 at 88. Lord Wilberforce has similarly remarked in *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Council* [1968] AC 138 at 154 that: " it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied".

30 [1972] 1 Ch 73.

31 "..the repair of bridges, ports, havens, causeways, churches, sea-banks and highways...[and the] maintenance [of] houses of correction."

32 Per Jenkins LJ in *Re Scarisbrick* [1951] Ch 622 at 655. This was explained by Lord Greene MR in *Re Compton* [1945] 123 at 139 on the footing that "the relief of poverty (may) be regarded as in itself...beneficial to the community". See also *Re Segelman Dec'd* [1995] 3 All ER 676.

considered charitable unless it is "for the benefit of the community or an appreciably important class of the community".[33] The foregoing requirement is to be read subject to the rebuttable presumption, however, that any purpose falling within the first three categories will be considered *prima facie* to be for the public benefit and therefore charitable. This important *caveat* was noted by Lord Simonds in *National Anti-Vivisection Society v IRC* who stated:[34]

> "..when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and therefore charitable unless the contrary is shown."

Until the decision of the Court of Appeal in *Compton*[35] it was arguable that, by application of a literal construction to all four categories, the requirement of public benefit was confined to cases falling within the fourth head. Since at least 1945, however, this proposition has been untenable,[36] although the requirement may well be at its strictest here. This category, coined "objects of general public utility" by Samuel Romilly, has consistently been recognised as the most problematic.[37] Vexed questions have presented themselves here in abundance, not least because, as has been noted, whilst public benefit is a necessary indicator of charity within the category, it is never of itself sufficient.[38] It was perhaps awareness of the category's titular tendency to deceive which was the source of Samuel Romilly's well-founded circumspection. The defining consideration once more is to determine whether the purpose has been shown to fall within the equity

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33 Per Lord Westbury in *Verge v Somerville* [1924] AC 496 at 499. Some commentators have interpreted the authorities as exempting not only poverty trusts but also those for the advancement of religion from the need to show public benefit. See, for example, Newark 'Public Benefit and Religious Trusts' (1946) 62 LQR 234. This view appears vindicated by recent authority: *Re Watson* [1973] 3 All ER 678; *Re Hetherington Dec'd* [1990] Ch 1.

34 [1947] 2 All ER 217 at 233; see also per Lord Wright at 220. The principle is graphically illustrated by the decision of Plowman J in *Re Watson* [1973] 3 All ER 678 (advancement of religion).

35 [1945] Ch 123.

36 See the authorities referred to supra fn.14.

37 Being described by Romilly himself in the course of argument in *Morice v The Bishop of Durham* as "the most difficult" of the heads of charity, [1805] 10 Ves 522 at 532.

38 See, for example, *Kendall v Granger* (1842) 5 Beav 300.

of the statute.[39] This matter was returned to by Viscount Cave LC in *Attorney-General v National Provincial Bank* where his Lordship stressed:[40]

> "Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning...it is not enough to say that the trust in question is for public purposes beneficial to the community...you must also show it to be a charitable trust."

Nonetheless, just as a trust which falls within one of Lord Macnaghten's first three categories is presumed to be for the public benefit,[41] so too, a trust manifestly for the public benefit will be presumed charitable within the fourth heading. Russell LJ, in a judgment heavily relied upon in the *Bridge Trust* decision, found against the Inland Revenue in ruling:[42]

> "In a case such as the present, in which in my view the object (the preparation and publication of law reports on a non-profit basis) cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the statute."

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39 The enduring influence of the preamble was aptly described by Lord Upjohn in the *Scottish Burial Reform* case [1968] AC 138 at 151 as likely to be considered "almost incredible to anyone not familiar with this branch of the English law".

40 [1924] AC 262 at 265. See also In *Re Macduff* [1896] 2 Ch 451 at 466-467 per Lindley LJ Rigby LJ in the same case noted (at 474)"..to deduce (from Lord Macnaghten's fourth category)...that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that 'persons insured with us may be divided into men, women and children' the deduction that every man, every woman and every child is insured in that society."

41 Supra fn.34.

42 In *Incorporated Council of Law Reporting for England & Wales v Attorney-General* [1972] 1 Ch 73 at 88. Sachs LJ concurred (ibid at 95). To like effect, see Lord Reid's judgment in *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corp* [1968] AC 138 at 146-147.

The Principle of Exclusivity

In contrast to the relative ease with which an ascertained purpose may be brought within the spirit of the preamble (a question of substance), a limitation that the courts have applied much more strictly, and which has been responsible for striking down many trusts, undeniably for the benefit of the community, is the necessity of showing the donor's purposes to be exclusively charitable (a question of construction). Whilst uncertainty of expression within the ambit of charity will never cause the trust to fail, with a charitable scheme being directed, the use by the settlor of language which would permit distribution amongst non-charitable objects will be conclusive against a finding of charity.[43] Fine distinctions, such as those which follow, have frustrated many good intentions, prompting the censure of the bench and the profession[44] and without doubt the more than 99.9% of the population who, according to Lindley LJ,[45] have no comprehension of legal charity. An instruction that property be left for "charitable and benevolent" purposes will usually [46]be construed as wholly charitable and therefore valid;[47] however, substitute "and" with the generally disjunctive "or" and the purposes will likely fail as not being exclusively charitable. Thus, the following language will be bad on application of this rule of construction:

(i) "charitable or philanthropic";[48]

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43 The insistence by the courts on the exclusivity principle is a product of the imperative nature of all trusts, including those of a charitable nature, and the overriding need of the court to be vested with control of the trust's administration. Sir William Grant MR, in *Morice v Bishop of Durham*, stated the principle succinctly (1804) 9 Ves 399 at 404-405: "There can be no trust over the exercise of which this court will not assume a control, for an uncontrollable power of disposition would be ownership and not trust."

44 See, per Lord Wright in *Chichester Diocesan Fund v Simpson* [1944] AC 341 at 356; per Goddard LJ in *Re Diplock* [1941] 1 Ch 253 at 266. Geoffrey (later Lord) Cross QC has objected (1956) 72 LQR 187 at 199: "...the question whether a purpose is or is not charitable is often a very difficult one, the answer to which is quite uncertain until the House of Lords has given it by a majority of three to two."

45 In *Re Macduff* [1896] 2 Ch 451 at 464.

46 Subject to this usual construction being consistent with the whole of the instrument, as determined by the court: *Re Hummeltenberg* [1923] 1 Ch 237. Thus in *Attorney-General of the Bahamas v Royal Trust Co* [1986] 1 WLR 1001 the word "and" was construed by the Privy Council to be disjunctive.

47 *Hill v Burns* (1826) 2 Wills & S 80; *Miller v Black Trustees* (1837) 2 Wills & S 866.

48 *Re Macduff* [1896] 2 Ch 451.

(ii) "charitable or benevolent".[49]

The donor's wide use of language will be equally fatal if, even theoretically, it goes beyond legal charity by embracing, for example, objects of "benevolence and liberality"[50] or "undertakings of general utility"[51] or the "education and welfare of Bahamian children".[52]

The *Bridge Trust* Decision

This brings us conveniently to a consideration of the *Bridge Trust* case, where the charitable nature of the trust's purposes turned upon the applicability of the fourth of Lord Macnaghten's categories. The width of language employed in purporting to create an *inter vivos* settlement formed the cornerstone of counsel's contention that it should be struck down as an invalid trust for purposes. The disputed settlement ("the Continental Foundation") had been executed in the Bahamas by a Memorandum of Agreement dated 20th July 1976. The critical language of the Memorandum was contained in clause 3 which purported to set out the trust's purposes. According to this clause, the income of the trust was to be applied at the trustees' discretion for the following purposes:

> "...to any one or more religious, charitable or educational...institutions or any organisations or institutions operating for the public good...the intention being to enable the trustees to endeavour to act for the good or for the benefit of mankind in general or any section of mankind in particular anywhere in the world or throughout the world."

A preliminary matter, calling for an application of principles of private international law, fell first for determination. By exercise of a shifting law clause contained in the July Memorandum, a further Memorandum of Agreement had been concluded on 22nd December 1976 by which the *situs* of the Foundation and the applicable law were expressed thenceforward as being that of "Grand Cayman B.W.I.". The first attack on the Foundation was the submission that it was invalid according to Bahamian law. By application of the Cayman Islands Trusts (Foreign

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49 *Chichester Diocesan Fund and Board of Finance v Simpson* [1944] AC 341.

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

51 (1842) 5 Beav 300.

52 *Attorney-General of the Bahamas v Royal Trust Co* [1986] 1 WLR 1001.

Element) Law 1987[53] however, the Chief Justice ruled that the sole significance of the law of the Bahamas was, in accordance with s.4(4),[54] whether that law recognised the change of law clause. The validity or otherwise of the trusts themselves fell to be determined exclusively by application of Cayman law.[55] This, in turn, depended upon whether clause 3 was effective in creating a charitable trust under the law of the Cayman Islands.

Resisting the entreaties of counsel for the Attorney-General to the contrary, the Chief Justice was resolute in holding there to exist no considerations of policy sufficient to justify any departure from the English common law principles.[56] His Lordship asserted[57] that it was not:

> "in the best interests of the Cayman Islands as a respectable offshore financial centre to take any radical new approach in relation to the law of Charity. Any perceived policy reason that I should do so is in my view misconceived."

Two prefatory observations may be made: (i) it is beyond doubt that had clause 3 of the Memorandum of Agreement been limited to "religious, charitable or educational institutions", on the basis of the existing English authorities a valid charitable trust would have been created; but (ii) on the basis of the same authorities it would appear, *prima facie*, that the addition of the words: "or any organisations or institutions operating for the public good" would be conclusive

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53 Which, by s.3, is retrospective in effect, applying to trust dispositions wherever the trust property is situated.

54 Section 4(4) provides: "If the terms of a trust so provide, the governing law of the trust may be changed to or from the laws of the Islands provided that: (i) in the case of a change to the laws of the Islands, such change is recognised by the governing law of the trust previously in effect..."

55 Transcript at 20-22.

56 As noted by counsel for the plaintiffs, however, (transcript at 13) it is arguable that the English common law definition of charity has never applied to the Cayman Islands, this corpus of law (*Morice v Bishop of Durham* (1805) is generally considered the genealogical root of the present law) having been developed since 1728, the cut-off date for the direct importation of English case and statute law into the Cayman Islands (not since repealed under Cayman law) according to s.40 Interpretation Law (1995 Revision). This argument was rejected by Harre CJ, (transcript at p 14) who relied upon the ruling of the Court of Appeal of the Bahamas in *Attorney-General of the Bahamas v The Royal Trust Company* (1983) 36 WIR 1.

57 Transcript at 10. There being no system of compulsory registration of charitable trusts in Cayman Islands, it is a matter of speculation as to how many such trusts exist.

against charitable designation due to the breadth of the objects encompassed by the statement. It is trite law, as we are reminded by Viscount Cave LC [58], that Lord Macnaghten's fourth category has not been taken at face value. Some purposes falling within the division will be charitable whilst others will not. Each case will depend upon a finding that the manner of conferral of benefit is rooted in the preamble or the stepping stones which lead therefrom.

It is, with respect, questionable whether the language of clause 3 of the *Bridge Trust* Memorandum satisfied these strict common law principles. Whilst broadly expressed altruistic sentiments may nonetheless be confined to legal charity[59] with the courts[60] injecting the necessary precision by directing a scheme of administration, where the instrument employs language in terms which may reach beyond legal charity the court is unable to discern the boundaries of the donor's intention and, denied residual control, must declare the instrument invalid.[61] A powerful authority which strongly suggests this outcome in England is *Kendall v Granger*[62] where Lord Langdale concluded that a trust for the purpose of "encouraging undertakings of general utility" was not exclusively charitable and therefore void. Likewise, in *Attorney-General v National Provincial Bank* the Court of Appeal[63] and the House of Lords[64] agreed that similarly broad language[65] was fatal to charitable construction.

In holding the objects of benevolence and liberality to be non-charitable in *Morice v Bishop of Durham*,[66] Lord Eldon LC remarked that the "true question" to be asked was:

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58 *Attorney-General v National Provincial Bank* [1924] AC 262 at 265.

59 For example, "I bequeath £100,000 for charitable purposes."

60 Or, in England, the Charity Commissioners: s.16(1)(a) Charities Act 1993.

61 See cases cited supra at fn 48-52. Cf trusts of imperfect obligation infra fn 112.

62 (1842) 5 Beav 300.

63 [1923] 1 Ch 258.

64 Supra fn.40.

65 "..for such patriotic purposes or objects and such charitable...institutions or charitable... objects in the British Empire" as the trustees should select.

66 (1805) 10 Ves 522 at 541. Cited with approval by Lindley LJ in *Re Macduff* [1896] 2 Ch 451 at 464-465.

> "...if upon the one hand (the Bishop) might have devoted the whole to purposes, (legally charitable), he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this court construes those words."

On the premise that English principles are to determine the validity of clause 3 above, the "true question" posed by Lord Eldon LC remains apposite, as does his conclusion. Like the Bishop, the trustees of the Continental Foundation could, in keeping with the intention of the settlor, have applied the whole funds to non-charitable objects such as the maintenance of condominiums along Seven Mile Beach or the provision of seminars on the benefits of investing in offshore jurisdictions.

Harre CJ, nevertheless, applying a benign construction to the definition of charity, as advocated *obiter* by Lord Hailsham in *IRC v McMullen*,[67] and holding applicable the equally benign interpretative principle enjoined by Russell LJ in *Incorporated Council of Law Reporting v Attorney-General*,[68] concluded that clause 3 created a valid charitable trust within the fourth of Lord Macnaghten's categories.[69] Building upon these liberal principles of construction, Harre CJ held[70] that the meaning of the words "public good" within Clause 3 were to be construed both contextually and conjunctively[71] and were therefore limited to wholly charitable objects within the spirit of the preamble. This was the preferred construction due both to the language which preceded[72] and succeeded[73] the

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67 [1981] AC 1. See supra fn.8.

68 That an identified purpose which is of benefit to the community is *prima facie* to be construed as charitable within the fourth heading, see text at fn.42 supra.

69 Transcript at p 27-30. It is also worthy of note that it was not considered objectionable that the whole of the Foundation's funds could have been expended on beneficial purposes outside the Cayman Islands (transcript at p 39). The Charity Commissioners in their Annual Report for 1963 have stated (paras 72-73) that in the context of the fourth head there must be benefit, even if indirect, to the *community of the UK*. See *Camille v Henry Dreyfus Inc* [1954] Ch 672. See infra n 163; cf the Canadian case of *Re Levy Estate* (1989) 58 DLR (4th) 375 where foreign benefit alone was held charitable within the fourth category.

70 Transcript at 41-44.

71 Whilst acknowledging (transcript at p 41) the presence within clause 3 of generally disjunctive language in the form of "or". See *Re Macduff* [1896] 2 Ch 451 and *Chichester Diocesan Fund and Board of Finance v Simpson* [1944] AC 341.

72 "...any one or more religious, charitable or educational... institutions."

reference to "public good". The present was "...a classic case for an *ejusdem generis* construction, the genus being 'charity'".[74] Moreover, a consideration of *Re Smith*[75] and the locality cases led the court to be fortified in the knowledge[76] that very general words of gift can, in appropriate cases, lead to a conclusion of charity.

By praying in aid these tools of benign construction, the Chief Justice was thus able to fashion an outcome of charity which, in the very different fiscal conditions of England, would only have been achieved within the limited compass of the Charitable Trusts (Validation) Act 1954. It is submitted, however, that Harre CJ's reasoning in bringing the language of clause 3 within the English principles is of less significance than his premise that English law was to apply with full vigour to the jurisdiction of the Cayman Islands.[77] As emphasised by counsel for the plaintiffs,[78] the court was "here with the first building block in a real sense of the jurisdiction of this country". It will be suggested below that this first building block has, in effect, been laid in the form of the adoption of an approach *de novo*, fully justified by the difference in consequence of being accorded charitable status in the Cayman Islands, in particular the absence of fiscal benefit from such ascription. As Cross has maintained:[79]

> "Once fiscal privilege is out of the way, it would seem unnecessary to limit the public benefit to be required of a charitable trust to benefit of any particular type. Lord Macnaghten's words 'a purpose beneficial to the

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73 "...to enable the trustees to endeavour to act for the good or for the benefit of mankind in general or any section of mankind in particular anywhere in the world or throughout the world."

74 Transcript at p 41-42. Having earlier (p 39) prayed in aid *Re Pardoe* [1906] 2 Ch 184. This is not to suggest, however, any doctrine of "charity by association": "if you meet seven men with black hair and one with red hair, you are not entitled to say that here are eight men with black hair" per Buckley J in *Re Jenkins Will Trusts* [1966] Ch 249 at 256.

75 [1932] 1 Ch 153, where a testamentary bequest "to my country England to and for-own use and benefit absolutely" was held valid by the Court of Appeal.

76 Transcript at p 36.

77 Notwithstanding the effect of s.40 Interpretation Law (1995 Revision) which does not require this result. See supra fn.56.

78 Transcript at p 9.

79 (1956) 72 LQR 187 at 205.

> community' could be taken at their face value and not limited to purposes analogous to those contained in the preamble..."

This Utopian picture painted by Cross has, it is submitted, been taken from the realm of pure abstraction and given substance by the *Bridge Trust* ruling with the fourth head transformed into a general category of Public Benefit Trust apt to uphold a wide range of meritorious purposes previously held invalid on technical rather than logical grounds.[80]

The *Bridge Trust* decision is therefore of significance as a probable indicator of the way English law would have developed had the recommendations of the Radcliffe Commission[81] to produce a limited definition of charity for fiscal purposes been implemented. It has been noted that the likely consequence of such reform would be the creation of a broad category of legal charity without fiscal advantages, a result entirely consistent with the model provided by the *Bridge Trust* decision. The "tangle of cases as to what is and what is not a charitable gift"[82] have, at a stroke, been unravelled by the Grand Court's ruling, with the essence of legal charity, the sufficiency of public benefit, being allowed to re-emerge as the defining characteristic. Although a literal reading of Lord Macnaghten's fourth category may be considered anathema by conceptual purists, the compensation in terms of introducing much needed certainty to the law would have been regarded by Lord Sterndale MR[83] as a benefit worthy of a much greater sacrifice. The concerns of the Master of the Rolls have been echoed by Cross,[84] who lamented:

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80 As a consequence, the divide between public and private trusts will narrow. Some significant advances were achieved in this regard, by broadening the category of valid *private* trusts, in *Re Denley's Trust Deed* [1969] 1 Ch 373 where Goff J held that although expressed for purposes, the trust in point was for the benefit of ascertained individuals, the employees of a company, and therefore valid. See Gravells (1977) 40 MLR 397 who concludes (at 417) "...the point at which a purpose trust ceases to be public...may be almost coincidental with the point at which the class of intended beneficiaries may reasonably be ascertainable to bring the trust within the *Re Denley* principle". On the assumption that *Re Denley* will be applied in the Cayman Islands, the evolution of the Public Benefit Trust should ensure that only unmeritorious or political purpose trusts (see below) are likely to be held invalid locally.

81 Supra fn.15.

82 Per Lord Sterndale MR in *Re Tetley* [1923] 1 Ch 258 at 266.

83 Ibid.

84 (1956) 72 LQR 187 at 198.

> "No lawyer will ever be able to advise with confidence whether a trust is a charity within the fourth class until either the class is extended to cover all classes which confer an appreciable benefit on the public or restricted to some clearly defined purposes - such as public works."[85]

In adopting the former solution, it is asserted that the *Bridge Trust* decision is to be welcomed and provides a paradigm example to English lawmakers of how readily the English concept of charity could be transformed into a less opaque formula. Following the Grand Court's decision, it is submitted that legal charity in the Cayman Islands may be broken down into:

(a) Established Benefit Trusts; and

(b) Public Benefit Trusts.

These broad categories equate, respectively, to:

(i) those objects falling within the first three categories from *Pemsel's Case*; and

(ii) those objects which, as in *Bridge Trust*, have been shown to confer significant benefit on a sufficient section of the community.

Both categories will continue to be subject to the limitation of not being overtly political in nature[86] and, whilst the common law's presumption of public benefit applicable to purposes within (i) above[87] may be expected to remain, in category (ii) cases tangible benefit to a section of the community will continue to require to be positively established.[88]

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85 Cross appeared for the appellants in *IRC v Baddeley* [1955] AC 572 and reports (supra fn. 79 at 198) that Lord Simonds, but not the majority of their Lordships, accepted in argument that beyond the first three categories of charity should be added only purposes falling within the description of "public works" as represented in the preamble. See supra at fn.31.

86 But see infra p 146 et seq.

87 See n.34 supra and associated text.

88 It is suggested that Lord MacDermott's degree of benefit test, proposed in the course of his dissenting judgment in *Oppenheim v Tobacco Securities Trust* [1951] AC 297, is likely to be preferred in Cayman over the *Compton* test endorsed by the majority in *Oppenheim*.

The foregoing categories may also serve as a useful basis for developing fiscal and non-fiscal definitions of charity. Charity, for fiscal purposes in England, it is suggested, should include: those purposes in category (i) above, adjusted to require tangible public benefit to a section of the community to be positively shown in all cases apart from the relief of poverty.[89] The necessary compromise between flexibility and certainty could be struck by reliance upon the preamble to add to this list:

(i) those purposes which, on a strict construction, fall under the umbrella of "public works", as proposed by Cross[90]; and

(ii) those purposes which have been held to fall within the relief of the aged and "impotent".[91]

Category (ii) charities, which would qualify for the non-fiscal benefits of charitable status, would merit these privileges by either:

(A) qualifying as a Public Benefit Trust by satisfying the sufficiency of benefit test, infra; or

(B) if unable to pass this test, by coming within one of the first three heads from *Pemsel's Case* where, for present purposes, the presumption of public benefit would remain.

It is to be regretted that the benefits of departing from the restrictive line of the English cases by opening the category of Public Benefit Trusts were not pursued by counsel in the *Bridge Trust* case with greater vigour. It would, for example, be hard to persuade the detached observer on the Rum Point ferry that there is merit in denying efficacy to a testator's wish to leave his estate on trust for: "philanthropic, charitable or public purposes" on the basis of fine distinctions of

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89 Thereby preventing the award of fiscal privileges to essentially private trusts as occurred in *Re Watson* [1973] 3 All ER 678 and *Re Hetherington Dec'd* [1990] Ch 1 for example, such purposes would qualify as a category (ii) charity however.

90 (1956) 72 LQR 187 at 205.

91 i.e., the relief of the sick: *Le Cras v Perpetual Trustee Co* [1967] 3 All ER 915. The main categories of existing charity which would be thus denied fiscal privilege under this formula would be the controversial animal cases (see, for example, Lord Sterndale MR in *Re Tetley* [1923] 1 Ch 258 at 266), certain miscellaneous entities such as The National Trust (held charitable in *Re Verrall* [1916] 1 Ch 100) and recreational charities currently falling under the Recreational Charities Act 1958. All of the foregoing would achieve *validity*, however, as category (ii) charities.

etymology and a failure to secure the approbation of a repealed English statute of 1601. It is confidently predicted therefore that should a trust in these terms arise for determination in the Cayman Islands, the liberal process commenced by Harre CJ will be openly embraced and the "refinements" of the common law expressly rejected.

The Fiscal Dimension of Charitable Status

Because of the fiscal implications of charitable status in England, our Rum Point traveller's counterpart on the Clapham omnibus cannot, by contrast, be described as "detached". The fiscal and rating advantages conferred automatically upon all English charities constitute an economic charge to the taxpayer[92] with the result that registration as a charity can only be justified if the organisation's activities have a corresponding benefit in relieving the government of expenditure which it would otherwise be obliged to make[93]. The generally narrow definition of charity favoured since *Pemsel's Case*, with a back-drop of steadily increasing taxation rates, is therefore unexceptional and wholly justified. Why should the taxpayer indulge by subsidy the whims of a testator who seeks governance by "the dead hand"[94] or a company which seeks to make itself more attractive in the recruitment market by offering to fund the education of its employee's children?[95] Indeed, when viewed in this light, the criticism most obviously to be levelled at the trend of the English cases, especially in relation to the advancement of

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92 Both charities and their benefactors receive a variety of fiscal exemptions. The Income and Corporation Taxes Act 1988 exempts charities wholly from the following taxes: (i) income tax on its investment income/profits applied solely to its charitable purposes; (ii) capital gains tax, provided that the gain is applied to the charity's purposes. Furthermore, the Finance Act 1982 exempts charities from stamp duty in relation to any conveyance/letting made to it; and the Local Government Finance Act 1933 provides for a mandatory 80% relief (rising in some cases by virtue of the 1988 Act to 100%) of non-domestic rates in respect of land used by a charity wholly or mainly for charitable purposes. Certain medical charities are also exempt from value added tax (VAT Act 1994). When donors' exemptions are also accounted for it has been estimated that the total public subsidy is in excess of £1,000m per annum; see Moffat *Trusts Law and Materials* (2nd Ed.) at p 638.

93 The Report of the Goodman Committee on Charity Law and Voluntary Organisations (National Council of Social Service, 1976) concluded at para 112: "..if a balance were drawn the advantages to the community derived from charitable funds' services would far outweigh the cost of the taxes and rates forborne".

94 *Re Endacott* [1960] Ch 232; *Re Pinion* [1965] Ch 85.

95 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

religion[96] and education,[97] is that charitable status has often been ascribed too readily.[98]

Returning to our postulant on the Clapham omnibus, he may cogently question why charitable status has to beget fiscal privilege. Better, surely, to allow philanthropic wishes to achieve expression without the additional dividend of fiscal privilege, than to frustrate many purposes of social value by making them hostages to tax legislation. This underlying theme of the Radcliffe Commission has been taken up by many eminent judges and jurists.[99] Leading the way once more has been Geoffrey Cross, who opined:

> "I am sure that the best hope of bringing some order into the law of charity lies in separating the question whether a trust should be regarded as a charitable trust for the purpose of the general law of trusts from the question whether it should enjoy any special fiscal privileges. A judge who is called upon to decide whether or not a trust is a charitable trust may thus find himself in a dilemma. If he decides that it is not a charity, he defeats the donor's intention altogether - since the trust will be void. If, on the other hand, he decides that it is a charity, he not only gives effect to the donor's intention but blesses it with a substantial public

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96 For example, see *Re Watson* supra n 33 and *Re Hetherington Dec'd* [1990] Ch 1.

97 *Re Dupree's Deed Trusts* [1945] Ch 16 (establishing a chess tournament for young people in Portsmouth); *Re Shaw's Will Trusts* [1952] Ch 163 (a "sort of finishing school for the Irish people"); *Re Koeppler's Will Trusts* [1984] Ch 243 (funding of conferences for academics with a political flavour).

98 The first judicial recognition of this view, giving notice of a more austere approach by the courts, is found in the judgment of Lord Upjohn in the *Scottish Burial Reform* case where it was stated in 1967 ([1968] AC 138 at 153) that as charitable status is now "..used so frequently to avoid the common man's liability to rates or taxes, this generous trend of the law may one day require reconsideration".

99 See *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corp* [1968] AC 138 at 153 and *Dingle v Turner* [1972] 1 All ER 878 at 889-890. For an early discussion of these issues see Brunyate (1945) 61 LQR 268 at 285. Gravells has returned to this theme at (1977) 40 MLR 397. There are also those who would wish to maintain the *status quo* however, including the members of the Goodman Committee (supra fn.93). Most beguiling are the assertions of those who, in the face of all the evidence to the contrary, (e.g., *Compton* and *Oppenheim*) seek to deny the existence of any correlation between fiscal considerations and charitable ascription: see the views of the majority of their Lordships in *Dingle v Turner* [1972] 1 All ER 878 at 880-881 (Viscount Dilhorne and Lords MacDermott and Hodson). See the criticism of Gravells supra at 401.

subsidy in the form of freedom of tax which he may feel it does not deserve."[100]

Harre CJ in the *Bridge Trust* litigation did not find himself on the horns of such a dilemma, and unless the diminishing trusts law privileges[101] reserved for charitable trusts in the Cayman Islands require a restrictive approach, an expansive interpretation of legal charity is necessarily unobjectionable. Lord Upjohn has remarked that the period of expansion of legal charity in English law in the nineteenth and early twentieth centuries coincided with an era in which the fiscal advantages of such ascription were limited and the uppermost concern of the courts was to prevent the failure of laudable purposes through the application of technical legal rules.[102] Taking this as our starting point, there would not therefore appear to be any compelling reasons why the trusts law privileges should be the sole preserve of a narrow range of legal charity. Indeed, such would be the premium in terms of certainty accompanying the introduction of the Public Benefit Trust, that one would expect that the rationale for limiting such trusts to the perpetuity period, for example, would need to be very powerful indeed.

It is timely therefore at this juncture to analyse these privileges with a view to establishing if there exist any cogent reasons for withholding them from the wider category of Public Benefit Trusts. Charities in Cayman, as in England, enjoy exemption from the following rules applicable to private trusts:

(i) rules against excessive duration of trusts;

(ii) rules requiring certainty of objects;

(iii) rules of enforcement: the beneficiary principle;

(iv) rules relating to lapse, where a cy-pres scheme is applicable.

These rules of limitation are well known and will not be rehearsed here except in so far as is necessary in order to identify the underlying reason for allowing charitable trusts to escape their embrace. Taking them in turn:

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100 (1956) 72 LQR 187 at 204. Cross re-iterated these concerns as Lord Cross in the course of delivering the leading speech of their Lordships in *Dingle v Turner* [1972] 1 All ER 878 at 889-890.

101 As the conditions of validity of private trusts are eased, the gap between public and private trusts necessarily narrows: *Re Denley* [1969] 1 Ch 373 and *McPhail v Doulton* [1971] AC 424. See supra fn.80.

102 *Scottish Burial Reform v Glasgow Corporation* [1968] AC 138 at 153.

(i) Excessive duration

With the exception of the rule in *Christ's Hospital v Grainger*,[103] charities are equally subject to the aspect of the perpetuities rule which proscribes remote vesting of interests. That aspect of the perpetuities rule to which charities are exempt, the rule against excessive duration,[104] reflects the economic imperative of preventing the stagnation of commercial interests by the long-term dedication of capital to non-charitable purposes. The exception extended to charitable purposes acknowledges that it is commercially insignificant and yet societally expedient for a framework to exist within which a limited range of laudable purposes may be continued into perpetuity. Whilst the benefits to society derived from perpetual charitable purposes outweigh any risk of economic stagnation, the need to subject such objects to temporal limitation disappears. Exemption from the rule in such circumstances is the more significant when it is recalled that failure by a purpose trust to satisfy its provisions will result in England in the trust being struck down *ab initio*.[105] The remaining question therefore is whether there are any reasons of policy why the exemption should not be extended to a wider range of Public Benefit Trusts. The answer seems clear: whilst the benefits accruing to society from effecting such purposes continue to outstrip any risk of economic stagnation, the position of net benefit should be pursued. The risk of collective beneficence becoming so great as to cause a significant diminution of capital in circulation would appear to be remote. With commercial vitality far more susceptible to the effects of inflation and cyclical trends in world markets, it is suggested that few economists would consider the extension of immunity under review to have even a marginal effect on the dynamics of a market economy. Accordingly, there would appear to be no basis in the application of the perpetuities rule for limiting the concept of legal charity to Lord Macnaghten's categories.

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[103] (1849) 1 Mac. and G. 460. This position is confirmed in Cayman by s.10 Perpetuities Law 1995.

[104] A period of 150 years commencing from the effective date of the instrument is specified under Cayman law: s.4(1) Perpetuities Law 1995. Cf ss 1(1),3(4),(5) and 9(2) Perpetuities and Accumulations Act 1964.

[105] The "wait and see" rule has no application to purpose trusts: s.15(4) Perpetuities and Accumulations Act 1964. Cf s.11 Perpetuities Law 1995 which provides that non-charitable purpose trusts, if otherwise valid, "become void for perpetuity *at the end of the perpetuity period*" [author's emphasis] (i.e., after 150 years, see fn.104 supra).

(ii) Certainty of objects

It has been often stated that the law knows what legal charity is and that a gift "for charitable purposes" is therefore not void for uncertainty.[106] The width of the testator's language will be supplied with the necessary precision by a charitable scheme being directed. Difficulties only arise, as has been seen, where the testator's language goes beyond that which is legally charitable by, for example, including, as alternatives, "benevolent" or "philanthropic" causes. Drawing the line thus is clearly artificial and the logic in its location difficult to defend,[107] but its capacity to uphold large numbers of inherently uncertain yet beneficial purposes[108] produces benefits which few would gainsay. Fewer objections still may be anticipated if, freed from fiscal considerations, this technique were extended to all trusts whose purposes satisfied a flexible concept of social utility. Furthermore, in extending the certainty exemption to all trusts of general societal benefit the legal drafting trap set by authorities which "bring no credit to our jurisprudence"[109] would mercifully be sprung. In a setting where fiscal privileges have been removed from the equation, the objections which may be anticipated against extending the scope of the present exemption would be: (i) that the dangers of departing from the testator's actual wishes would intensify; and (ii) that unacceptable levels of delegation of the testamentary power would be reached. These objections are of course equally well made against decisions such as *Re Best*[110] and it is suggested that the premise of this case, that the merits of effectuating public-spirited causes over-ride the demand for certainty, applies with equal force to a wider range of Public Benefit Trusts.[111] Moreover, only by removing the arbitrary limit set by the courts for the operation of the certainty

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106 See, for example, Lord Simonds in *Chichester Diocesan Fund v Simpson* [1944] AC 341 at 371.

107 See Cross (1956) 72 LQR 187 at 199.

108 *Re Sutton* (1885) 28 Ch D 464 ("charitable and deserving objects"); *Re Best* [1904] 2 Ch 354 ("charitable and benevolent objects"); *Re Rumball* [1956] Ch 105 (to the Bishop of the Windward Islands "to be used by him as he thinks fit in his diocese.")

109 Hanbury and Martin (14th ed. at p 433.)

110 Supra fn.108.

111 Although there will be little likelihood of close adherence to the testator's unexpressed priorities in expending the fund, Uthwatt J has provided a workable guideline in suggesting that the scheme should seek "to give effect to the drift of the ideas embodied in the expression": *Re Gott* [1944] Ch 193 at 197.

exemption can the inherent tensions and inconsistency of the existing law be addressed.[112]

(iii) Enforceability

According to the decision of Roxburgh J in *Re Astor's Settlement Trusts*,[113] the principal objection to non-charitable purpose trusts is not, however, founded in the need for certainty but rather in the absence of any human beneficiary to enforce the trust. For this reason, the settlor's purposes, which included "the improvement of good understanding between nations" and "the preservation of the independence and integrity of newspapers", were held invalid. It is well known that a trust for charitable purposes will be enforced by the Attorney-General acting on behalf of the Crown as *parens patriae*; but a trust which is expressed to be for "public purposes", for example, being regarded as non-charitable, will fail for want of a human beneficiary.[114] Accordingly, the role of enforcement played by the equitable owner in a private trust is fulfilled by the Attorney-General who, however, lacking intimate knowledge of the vast array of trusts under his ultimate stewardship will, in reality, be much more likely to find himself aligned with the trustees in discharging the collective responsibility of "trust defender"[115] than enforcing the due administration of the trust. It is again submitted that the law's relaxation of the usual conditions of validity in the case of a charitable trust is attributable to a desire to effectuate meritorious public purposes and is not predicated upon any absolute confidence that the Attorney-General, assisted by five[116] Charity Commissioners, are together a prophylactic against abuse. Accordingly, it is submitted that the same concession should be extended to all trusts of social utility which, if promoting non-specific purposes, would continue to be enforceable by the Attorney-General, and, in more specific cases such as *Re*

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112 The case in favour of extending the certainty exemption to Public Benefit Trusts in general is strengthened by the admitted validity of certain classes of *private* purpose trusts out of "concessions to human weakness or sentiment". Per Roxburgh J in *Re Astor's Settlement Trusts* [1952] 1 Ch 534 at 547. See for example, *Re Hooper* [1932] 1 Ch 38 and *Re Dean* (1889) 41 Ch D 552.

113 Ibid.

114 See *Morice v Bishop of Durham* (1805) 10 Ves 522.

115 Harre CJ's description of all the proponents of charitable designation in the *Bridge Trust* case: transcript at p.24.

116 Pursuant to the power provided by para 1(5) Schedule 1 Charities Act 1993 two part-time Commissioners have been appointed in addition to the three full-time officers.

Bushnell,[117] by the relevant department of government or other watchdog organisation. This conclusion has been reached by Gravells who suggests,[118] for example, that the Press Council could be expected to exert the necessary control in relation to "many of the purposes" of the Astor Trust. In a small jurisdiction such as the Cayman Islands the setting up of workable enforcement mechanisms to police all Public Benefit Trusts could be achieved with a minimum of difficulty and, once again, it is suggested that the logic which demands concessions in favour of certain purposes of public benefit can, on principle, only be defended by the uniform application of this principle to all such purposes.

(iv) Lapse

It has been stated that "the courts have gone very far ...to resist the conclusion that a legacy to a charitable institution lapses".[119] Thus whether the charitable donee has ceased to exist by the date of operation of the gift (initial failure) or where, the gift having come into effect, the donee becomes defunct (subsequent failure)'[120] it may be possible by application of a cy-pres scheme to rescue the appointed assets and apply them to similar charitable purposes. The responsibility for exercising this "rescue" jurisdiction lies largely, but not exclusively, with the courts.[121] In cases where the trust property is thus saved from the operation of the doctrine of lapse a very real advantage over private trust law rules, which would demand the return of the property to the donor or his estate, is discernible. This limited protection from the doctrine of lapse[122] may be seen to be entirely complementary to the exemption from the rule against excessive duration in facilitating the continuation of purposes perceived to be of societal benefit. The

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117 [1975] 1 WLR 1596, where, prior to the enactment of the National Health Service Act 1946, the testator left the residue of his estate to promote a socialist system of public health. Goulding J held the purpose to be political and therefore to fail. See text infra at p 146 fn 136.

118 (1977) 40 MLR at 397.

119 Per Wilberforce J in *Re Roberts* [1963] 1 WLR 406 at 412.

120 For the meaning of "failure" see s.13(1) Charities Act 1993.

121 S.18 Charities Act 1993. Cf the modernisation aspect of cy pres schemes (where no failure of purposes is called for) which is largely exercised by the Charity Commissioners.

122 No cy-pres scheme will be ordered if, in a case of initial failure, there cannot be found a width of charitable intent: *Re Rymer* [1895] 1 Ch 19. If, having dedicated the property to charitable purposes, the settlor wishes the property to revert to his estate he must expressly so provide with reversion to take effect within the perpetuity period (now subject to "wait and see" rules; cf. *Re Peel's Release* [1921] 2 Ch 218).

policy of the law thus holds that it is preferable for the property to be applied to similar such purposes, where the testator's intention permits this, than to provide a windfall for the next of kin. There exists no reason for limiting this principle to a narrow conception of charity, with logic dictating that once a trust's purposes are considered generally beneficial it is in the public interest that they should not be allowed to lapse.

Thus we may conclude from the foregoing that Lord Cross was, with respect, correct in stating in *Dingle v Turner*[123] that on the basis of trusts law privileges alone:

> "..there would be no reason for the courts not to look favourably on the claim of any 'purpose' trust to be considered as a charity if it seemed calculated to confer some real benefit on those intended to benefit by it...if it would fail if not held to be a charity."

This being so, we must now consider what validating conditions we may expect Public Benefit Trusts to be subjected to.

Continuing Conditions of Validity of Public Benefit Trusts

Whilst the development of the new category of Public Benefit Trusts has the major advantage of avoiding the myriad fine distinctions of the existing law, it must not be supposed that every trust with a public aspect will necessarily fall within the category. A test which marks the public/private divide must therefore be formulated. Moreover, the continuing validity of the so-called political purpose objection will need to be assessed. These matters will be taken in turn.

1. Defining Sufficiency of Public Benefit

The fiscal consequences of being conferred charitable status have for long influenced the definition applied to public benefit and it has been observed that as fiscal privileges have increased so too has the need to establish sufficiency of such benefit. Notwithstanding the emergence of this limitation, it has been seen[124] that the "familiar categories" of charity which contain a public element (advancement of religion and education) have been accorded a rebuttable presumption of public benefit. Having first eliminated fiscal considerations, one would expect this legal presumption to become more compelling, if not

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123 [1972] 1 All ER 878 at 889-890.

124 Supra fn.34.

irrebuttable. The only purposes dependent upon positive proof of public benefit in the Cayman Islands will therefore be those falling for consideration as Public Benefit Trusts, and it is accordingly here that the sufficiency of benefit debate will be staged.

It is submitted that the absence of fiscal considerations leans heavily towards the exclusion of Lord Greene's rigid personal nexus test from *Re Compton* which would be unduly limiting. Here the Court of Appeal held bad a gift for educating the descendants of three named persons. This was regarded on appeal as an inherently familial purpose, and as such the antithesis of a charitable trust. In overturning the decision of Cohen J at first instance, the Master of the Rolls asserted:[125]

> " a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift."

The majority of the House of Lords in *Oppenheim v Tobacco Securities Trust*[126] allowed the *Compton* test to claim its most notable victim - a purported trust for education - whose sizeable class comprised the children of existing and former employees of the British-American Tobacco Company Ltd. Lord Simonds, who gave the leading majority speech, was unmoved by the fact that the class numbered in excess of 110,000 individuals. He asserted:[127]

> "..the quality which distinguishes (the class) from members of the community must be a quality which does not depend on their relationship to a particular individual. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."

Lord MacDermott, in a powerful dissenting speech, charged the *Compton* test with being both "arbitrary and artificial".[128] His Lordship preferred to apply the pre-*Compton* authorities[129] which tested the public quality of a trust by subjecting it

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125 *Re Compton* [1945] Ch 123.

126 [1951] AC 297.

127 Ibid at 306.

128 Ibid at 318.

129 See, for example, *Verge v Summerville* [1924] AC 499.

to a broad survey without pre-determined limits. The matter was to be viewed as one of degree in each case, with the numerical composition of the class one relevant consideration.[130] Lord MacDermott's flexible approach was approved, in principle, by all their Lordships in *Dingle v Turner*.[131] Lord Cross, in delivering the judgment of their Lordships, asserted:

> "In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust."

Thus, even in a jurisdiction where charitable status begets fiscal privilege, there is clear judicial evidence of discontent for the *Compton* test as a universal proposition. It is possible to predict with some confidence therefore that Lord MacDermott's degree of benefit test will prevail in the Cayman Islands. On this basis, Public Benefit Trusts in the Cayman Islands may be expected to attain validity if it can be shown, adopting a broad approach, that the trust, in the court's assessment,[132] will benefit a sufficient section of the local[133] or international community.[134]

By embracing the new category of Public Benefit Trusts, thus defined, it is submitted that a conclusion of legal charity under Cayman law would be likely to be reached on the facts of the most troublesome of the English cases.[135] For the

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130 [1951] AC 297 at 314.

131 The status of the *Compton* test in English law remains unclear, the view of the House of Lords in *Dingle v Turner* [1972] AC 601 (a poverty case) being necessarily *obiter*.

132 Sufficiency of public benefit is clearly an objective question; the view of Chitty J in *Re Foveaux* [1895] 2 Ch 501 that the view of the donor was paramount was over-ruled by their Lordships in *National Anti-Vivisection Society v IRC* [1948] AC 31 (see, for example, Lord Wright ibid at 46-47). Their Lordships confirmed the test to be objective affirming *Re Cranston* [1898] 1 IR 431 and *Re Hummeltenberg* [1923] 1 Ch 237 in this regard. In the former case, Fitzgibbon LJ stated (at 446) "the benefit must be one which the founder believes to be of public advantage and his belief must be at least rational and not contrary either to...the general law... or to the principles of morality".

133 Bearing in mind that the resident population of the Cayman Islands is approximately 30,000.

134 Aplying *Bridge Trust* and following *Re Levy Estate* (1989) 58 DLR (4th).

135 In *Re MacDuff* [1896] 2 Ch 451; *Re Astor's Settlement Trusts* [1952] Ch 534; *IRC v Baddeley* [1955] AC 572 and *IRC v Williams* [1947] 1 All ER 513, for example.

reasons which follow, it is further contended that many trusts held non-charitable in England on political grounds[136] merit reconsideration in the light of the *ad hoc* development of this limitation. This applies *a fortiori* once the fiscal dimension has been removed.

2. The Scope of Political Purposes

The fiscally motivated concern to see legal charity narrowly circumscribed by raising the profile of the public benefit requirement has also developed a more specialist weapon in the form of the political purpose exclusion. As with legal charity itself, the definition of political purposes has become a term of art. The origins of the principle are traceable back only to the judgment of Lord Parker in *Bowman v Secular Society*,[137] with the previous cases showing little concern for the possible political dimensions of trusts coming before them.[138] Having already determined that a valid private trust in favour of the donee corporation had been raised, Lord Parker stated *obiter* that[139]:

> "...a trust for the attainment of political objects has always been held invalid, not because it is illegal...but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit."

Following this dictum it was unclear what the term "political objects" connoted, but it was strongly arguable that Lord Parker intended the limitation to apply singularly to those trusts whose direct purpose was only capable of fulfilment by effecting legislative change.[140] The watershed decision, however, was that of the majority[141] of their Lordships in *National Anti-Vivisection Society v IRC*.[142]

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136 See, for example, *Re Shaw* [1957] 1 WLR 729 and *Re Bushnell* [1975] 1 WLR 1596.

137 [1917] AC 406.

138 See, for example, *Re Cranston* [1898] 1 IR 431 and *Re Scowcroft* [1898] 2 Ch 638.

139 [1917] AC 406 at 442. The only authority cited by Lord Parker in support of this proposition was that of *Themmines v De Bonneval* (1828) 5 Russ 288 which turned on principles of public policy.

140 All the purposes of the Secular Society under review fell within this narrow ambit: e.g, the disestablishment of the church, the secularisation of education, the alteration of marriage laws and laws prescribing the observance of the Sabbath.

141 With Lord Porter dissenting.

142 [1948] AC 31.

Here, Lord Simonds expressly eschewed a narrow interpretation of Lord Parker's dictum and regarded the political purpose objection to be so clear and settled[143] as to lead him to "neither expect nor require much authority"[144] in support of it. In his Lordship's leading majority speech, clear notice was served of the arrival of the new restrictive approach to legal charity, which he would confirm three years later in *Oppenheim*. The principal reason for invoking Lord Parker's limitation was stated as being the inability of the courts to judge whether a proposed change in the law was for the public benefit or not.[145] His Lordship expressly approved the statement[146] that:

> "[T]he law could not stultify itself by holding that it was for the public benefit that the law itself should be changed."

The flaw in this statement, it is submitted, is that it views the concept of public benefit too narrowly. What of the public interest of any democracy which demands that freedom of expression should not be stultified? It is submitted that in relation to quasi-political issues the law should stand neutral by allowing Public Benefit Trusts to embrace the cause of both sides. Examples might include campaigns for tighter gun and drug control laws.[147] There is much to be said, therefore, in favour of ascribing a more limited significance to Lord Parker's dictum, as asserted by Lord Greene MR in the Court of Appeal[148] and Lord Porter in their Lordships' House. In Lord Greene's view,[149] the principle from

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143 Whilst at the same time admitting (ibid at 63) there to be "a paucity of judicial authority" Lord Porter (ibid at 54) likewise commented upon how "scanty" the authorities were in support of the political purpose limitation. There were just two reported decisions on political purpose between *Bowman*, and the *Anti-Vivisection* case, the later (and more senior) authority held inapplicable Lord Parker's principle: *IRC v Temperance Council* (1926) 136 LT 27; *Re Hood* [1931] 1 Ch 240.

144 [1948] AC 31 at 63.

145 Somewhat inconsistently, however, in the course of applying the public benefit requirement, the majority did not hesitate in making this value judgment in reaching the conclusion that the reforms of the Anti-Vivisection Society would be to the public disadvantage. See, for example, the strong position taken by Lord Wright supra fn 142 at 49.

146 Appearing in *Tyssen on Charitable Bequests*, 1st Ed.

147 See infra fn 155.

148 *National Anti-Vivisection Society v IRC* [1946] KB 185 at 207-208. Lord Greene MR was the only member of the Court of Appeal to consider the political purposes objection.

149 Ibid.

Bowman was to be limited to matters of "acute political controversy" and not extended to "non political" questions such as changes in the law. The Master of the Rolls reasoned that any legislative goal of the Society was necessarily ancillary to its main objective[150] of suppressing cruelty to animals, but that in any event:

> "A charitable institution must surely be at liberty to achieve its object by the most efficient and practical means, which may well be legislation."[151]

In their Lordships' House, Lord Porter endorsed Lord Greene's reasoning in asserting that charitable status would only be compromised on the political ground if the main object being pursued necessarily required legislative reform. Unlike the purposes of the Secular Society, which sought to promote individual liberty in a way only achievable by repeal of laws of "positive injunction",[152] the present Society's objectives could, as a theoretical matter, be achieved by universal consensus. Lord Porter maintained that the position could not be otherwise[153] or legal charity would historically have excluded campaigns against slavery[154] and the use of child chimney sweeps[155] once legislative reform was placed at the forefront of their agenda.[156]

The majority rejected these arguments, however, and held the purposes of the Anti-Vivisection Society to be non-charitable, *inter alia*, on the political ground. As a result of the broad terms in which the political purpose limitation was affirmed by the majority, its operation has not since been confined to trusts having as their primary purpose to effect a change in the law. Accordingly, as has been noted, a trust to disseminate the benefits of a socialised system of public health has

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150 The trust in *Re Hood* [1931] 1 Ch 240 was held charitable on this basis, although its purpose was to "extinguish the drink traffic".

151 [1946] KB 185 at 208.

152 [1948] AC 31 at 54.

153 Ibid at 55.

154 Cf *Jackson v Phillips* (1867) 96 Mass (14 Allen) 539.

155 More modern examples would include anti-smoking and gun control campaigns, although each would fall within Lord Porter's "reform by societal consensus" category.

156 All their Lordships were agreed that if the political purposes could be considered merely ancillary to the charitable there would be no grounds for objection.

been held non-charitable.[157] Equally, trusts intended to foster international relations[158] and even to check abuses in human rights in all parts of the world[159] have been denied charitable status on the score of the political purpose objection.

It is suggested that the foregoing cases go too far in restricting the scope of legal charity and that the original concern of the political purpose objection requires to be reasserted. In the absence of the fiscal pull towards a conservative definition of legal charity, it is hoped that the Cayman Islands courts, which have yet to confront the issue of political purposes, will be pushed by the momentum of the *Bridge Trust* case into embracing Lord Parker's narrow conception of political purpose. On this premise, a trust which passes Lord MacDermott's degree of benefit test will be charitable, even if it has an objective of legal reform, unless its primary objective is societal influence against a rule enjoined by Cayman Islands law. Obvious examples of political purposes, thus defined, would include campaigns to restore capital punishment for murder, to extend alcohol licensing laws or to effect electoral reform. A limitation in these terms is easily justified, for in each case a judge would have genuine difficulty in quantifying public benefit. On the other hand, campaigns for reform of a foreign country's laws should not be brought within the limitation if the available evidence allows an objective determination[160] of the balance of public benefit. As acknowledged by Slade J in *McGovern v Attorney-General*,[161] there is no obligation on a judge to assume that a foreign law is correct as it stands and many reform campaigns can be expected to be directed against laws and practices which all fair-minded individuals would consider opprobrious. It should not, for example, be considered arrogant for a judge in the Cayman Islands to apply his standards in concluding that the abolition of capital punishment in an Islamic country for the crime of adultery[162] is for the public good of the affected populace.[163]

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157 *Re Bushnell* [1975] 1 WLR 1596. Equally, a trust to promote any political party is invalid for example, *Re Ogden* [1933] Ch 678.

158 *Re Strakosch* [1949] Ch 529.

159 *McGovern v Attorney-General* [1982] Ch 321. For a more benign ruling of the same judge on the ambit of political purpose see *Re Koeppler's Will Trusts* [1984] Ch 243.

160 Supra fn. 134.

161 [1982] Ch 321 at 338.

162 See Slade J *contra*, ibid at 339-340.

Such cases aside, the court should be concerned only to ensure that the trust's primary purpose is not political in the narrow sense herein advocated, leaving the ultimate determination of charitable status to the public benefit test and the wider question of political purpose to the general public, without whose support any judicial label of charity rings decidedly hollow. Charitable designation will continue to elude some purposes having a political flavour in the wide sense, but this should be determined by application of the public benefit test and not that of political purpose. This, it is submitted, is the preferred construction of the *Anti-Vivisection* decision where the majority's primary ruling was that the trust's purposes were detrimental to society.[164] In most cases a judicial determination of the public benefit question should be possible, and it is noteworthy that Chitty J was censured by their Lordships in the *Anti-Vivisection*[165] case for "standing neutral" on the merits of anti-vivisection in *Re Foveaux*.[166]

Conclusion

The proposal of the Radcliffe Commission to create a limited category of fiscally privileged charities has been allowed to languish for too long and, with the current state of the law in England as described, is ripe for implementation. It is submitted, however, that the definition of "fiscal charity" proposed above[167] is preferable to the formula proposed by the Radcliffe Commission,[168] having the advantage of certainty without absolute rigidity. The introduction of a general Public Benefit limb of charity (category ii above), for the purposes of qualifying for exemption from the technical legal rules only, would complete the reform in eliminating the most troublesome of the somewhat schizophrenic existing rules which call for both utmost fidelity to "charity" as a linguistic matter and yet encourage great violence to the preamble as an historic matter.

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163 Cf the view of Sir Raymond Evershed MR in *Camille and Henry Dreyfus Inc v IRC* [1954] Ch 672 at 684 who considered that the relevant community to be considered by an English court in all cases was that of the UK. Cf the views of Slade J in *McGovern v Attorney-General* [1982] Ch 321 at 338.

164 Supra fn.145.

165 See, for example, per Lord Wright [1948] AC 31 at 46-47.

166 Supra fn.132.

167 See text supra at p 134-135 et seq.

168 Supra fn.15

It has been shown that the overwhelming consideration in limiting the English concept of legal charity has been the myriad fiscal privileges which such designation automatically attracts. It has been suggested that once introduced to an environment where this nexus does not exist, legal charity will evolve into a broad genus of purpose trust identifiable from its forebears only by the continuum of public benefit. The Cayman Islands provide just such an environment and in the decision of the *Bridge Trust* case is to be found the first evidence of the metamorphosis of legal charity into an inherently workable concept. By applying the definitions suggested in this article to the concepts of public benefit and political purpose, the transformation of the substantive law of charity will be complete. This will make minute questions of construction a relic of the past. Like the Statute of Elizabeth itself.