The Charity Law & Practice Review

PRIVATE BENEFIT: A CONUNDRUM

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"... but vether it is worth while going through so much to learn so little, as the charity boy said ven he got to the end of the alphabet, is a matter o' taste."[2]

Rightly or wrongly, the Charity Commission has been criticised for canvassing the view of "Joe Public" about what is, or should be, charitable.[3] Whatever the merits of this, there is no doubt (to steal an image from the world of art) that Joe Public's broad brush approach would in fact have to rely, for its structure, on the myriad of tiny details from the lawyer's pointillist pen.

Here is a situation where there is a tension between the lawyer's pointillism, based on charity law as it now stands, and a broader view of "social value". At the very least there is a need for clarity as to what a charitable organisation may, and may not, do. Some would say there is a need for development as well as clarity.

We make no apology for the fact that, once one has been through the hoops, the conclusions of law in this article may seem obvious. Indeed, the discerning charity lawyer will not need to go through the neatly-lined-up hoops individually but, like

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2 Mr Weller in *Pickwick Papers*.

3 *Charity Commission: Framework for the Review of the Register* (henceforth "Framework"); *Promotion of Urban and Rural Regulation* and *Unemployment*, all published 28th April 1998. Results of the consultation have now been published - see the Charity Commission's Press Release of 18th March 1999.

a stunt man, will soar over the top of them and land gracefully and (with luck) right way up at the other end, wondering what all the fuss was about. We believe the topic is worth examining in some detail, however, because the charity world is not composed entirely of legal stunt men, and our experience shows that there is pressure, at the practical end of matters, not to treat the hoops with respect, but to drive a rolled up hedgehog through them using a well-aimed flamingo as a mallet.[4]

The practical issue is a familiar one. An instance that immediately evokes sympathy is the case where Mr and Mrs Smith have a child who is severely disabled. Good fortune, or substantial damages in the past, means that there is no particular shortage of funds to care for the child, but their worry is to set up a structure in their lifetime which they can feel confident will provide suitable care after they are gone. They want to make an arrangement with a charity so that the child's funds go to the charity and they can rest easy knowing that the charity is committed to looking after the child for the rest of its natural span. The child is very clearly a suitable beneficiary of the charity in question, and for simplicity we will assume that it is as certain as anything can be that he will remain so (his condition will not, for example, improve). The funds are demonstrably adequate for any reasonable expectation of life the child may have. Mr and Mrs Smith understandably feel that they are the lucky ones and this will all be quite simple. It is a reasonable enough wish, and one that any good legal system might be expected to meet.

Mr and Mrs Smith are indeed lucky compared to many, and their situation is much simpler than the harder cases we will come to. Even for them, however, it is not entirely straightforward. First, it may be that the charity will have to look to its charitable status: if the contract to care for this child is one of only a few of this kind that it enters into, and much of the care the charity provides is not charged for but is funded by donations, its charitable status is not in jeopardy. As the number of such deals increases, however, worries start to emerge:

> ".. a charity must be careful not to so structure its affairs that it ends up by providing benefits only for those persons in respect of whom some monetary payment has been made. Such a relationship between the charity and its beneficiaries would turn into a mutual benefit society or co-operative. To avoid this situation, the charity trustees must keep closely under control the proportions which the property transferred would bear to the overall receipts of the charity and the expenditure of money or effort on the proposed beneficiary would bear to the overall expenditure or effort of the charity. If this proportion

4 *Alice in Wonderland* Chapter 8.

> were too great in either case it could well be argued that the body had ceased to be a charity because it was really for the private benefit of the beneficiary or the transferor."[5]

If there is a need to keep the proportion right, the practical problem for Mr and Mrs Smith is that, although their child's contract may be one of the first such arrangements the charity has made, they have no control over the charity's future actions and have to take the risk that it will enter into more - possibly many more - of these deals (which, from the charity's point of view, can have considerable superficial financial attraction involving, as they often do, a large sum of capital "up front"). If the point may come where the charity's charitable status - or at least the *vires* of its actions - are challenged with the consequent possible loss of tax benefits and the negative impact on its position both financially and generally, the child's long-term security begins to look less rosy. Mr and Mrs Smith and their advisers can, however, do nothing more scientific than gaze into a crystal ball as to the charity's likely future actions.

We have assumed so far that Mrs and Mrs Smith plan to enter into a contract with the charity. Complex calculations will probably be made to determine the cost of caring for the child over the likely period, perhaps a discount will probably be given for the fact that a lump sum is paid in advance and, although the benefit the charity

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5 *Decisions of the Charity Commission*: 1993 vol. 1 page 19. If all that is meant by the body "ceas[ing] to be a charity" is that the charity will be in hot water with the Charity Commissioners, and that the Inland Revenue may begin to look askance at the availability of charitable exemptions, this is not controversial, but two distinctions need to be made. First, in practice one is probably not looking at that charity actually being removed from the register but rather coming under pressure to mend its ways and get a better balance between the proportions. Second, there is an important distinction, to which we return below, between non-charitable purposes on the one hand and, on the other, purposes which, if truly charitable, will remain charitable purposes even if the trustees use those charitable funds to confer non-incidental private benefits. If they apply charitable funds to confer private benefits their actions may be ultra vires or in breach of trust, but in principle this should not affect the charitable status of the trust itself. This distinction is nicely brought out, in a rather different context, in the Charity Commission's recent booklet CC37, *Charities and Contracts* (page 7): "If trustees enter into a contract that is within the charity's objects then, generally speaking, any liabilities that properly arise under the contract can be settled out of any money that belongs to the charity. If the charity does not have enough funds readily available to meet a liability, its other assets can usually be sold to raise money. However, trustees who enter into a contract that is not fully consistent with their charity's objects are acting in breach of trust. They can be personally liable for the performance of that contract and for any damages payable if they do not fulfil the terms of the contract." It is possible, however, in an extreme case that the view might be taken that the organisation was a "sham" and was therefore never a charity at all. In such a case, removal would be appropriate.

derives from tax exemptions may affect the terms the charity can offer as a commercial matter, there is no suggestion that the child is benefiting from those tax exemptions except in the most indirect manner, in that the establishment within which he will live is broadly tax exempt. A problem seen in practice, however, is that this arrangement does not really give Mr and Mrs Smith the long-term peace of mind for which they had hoped. It can, moreover, have a high capital gains tax entry fee, if investments have to be sold to pay a large lump sum to the charity.

This leads to pressure to develop the idea into something less acceptable. It can be very hard to estimate life expectancy. Suppose the child actually lives for many more years than has been calculated and the money runs out? He would be a perfectly proper beneficiary of the charity and his parents want to be certain that the charity would continue to look after him. Conversely, they are not seeking a return of the balance of the capital if the child should die early: they are grateful to the charity and are quite happy for any balance to be used by the charity, as its own, to care for other people with similar problems. The funds should be more than ample and both Mr and Mrs Smith on the one hand, and the charity on the other, would like simply to see the transfer of a generous sum as a donation but with the charity agreeing, or undertaking, to care for the child for the rest of his life.

Now there is no doubt that a charity can enter into a contract to provide benefits[6]. We believe that it is equally clear, on charity law as it now stands, that the "donation" and undertaking route cannot get off the starting blocks. It is, however, worth teasing out the reasons why this is, because proposals on these lines are certainly being made by charities, and this is one of the reasons why we believe that there needs to be a thorough re-evaluation of the detail of the private benefit issue in charity law. It is a topical subject. The first batch of subject-specific discussion papers published by the Charity Commission as part of the current review have all

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6 See, e.g. *Re Resch's Will Trust* [1969] 1 AC 514 and *Joseph Rowntree Memorial Trust v AG* [1983] Ch 159. The latter case, in particular, will give Mr and Mrs Smith's advisers, and the charity, assistance in making sure that their contract falls within the correct parameters. The position of the Rowntree charity was, however, much easier than that of the charity in the case we are imagining in at least one important respect: its aim was to provide housing for the elderly - nice, safe, relatively undemanding bricks and mortar; once provided, the home should be there for as long as needed. This is very different from trying to provide for the care of, say, a young disabled person where the need will continue without any likely discernible time limit, costs will rise, and the total bill may escalate over time in a way that is unpredictable and, indeed, frightening. Such a charity, looking ahead to its future financial stability and commitment, has problems that the Rowntree Trustees did not share, or at least not so acutely. And even though the charity's *contractual* obligation to Mr and Mrs Smith's child may run out after 5, 10 or 20 years, the moral obligation on it (particularly if Mr and Mrs Smith have by then died) is then considerable.

revolved, to a greater or lesser extent, around the thorny issue of what level of private benefit is acceptable, whether in the context of helping the unemployed or in encouraging urban or rural regeneration. The Framework discussion paper also promises a future discussion paper on the meaning in practice of "merely incidental private benefit."[7]

Private benefit is a slippery concept, because it is relevant at two different levels in determining charitable status. So, before looking in more detail at the donation and undertaking route, it is worth taking a little time to explore private benefit and the problems it poses.

To restate the familiar, it is essential that any trust, or similar body, must be for the "public benefit" if it is to be charitable: those who may benefit must come from a sufficiently wide class to count as the public, or at least a sufficient section of the public. This is true of all the heads of charity, except the relief of poverty where the class may be more restricted[8]. This easing of the "public" requirement does not, however, extend to the "aged or impotent" subgroups, where the class must still satisfy this requirement[9].

An aspiring charity which does not satisfy the public benefit test is naturally described as for private rather than public benefit, and its purposes will not be charitable. This case is to be distinguished from an organisation whose purposes are accepted as charitable - i.e. they pass the public benefit test - but the carrying out of those purposes involves (as it often necessarily will) benefit to individuals: a charity whose purpose is to provide shelter for the homeless can only do so by sheltering individuals. The classic formulation is that the private benefit must be only incidental to the carrying out of the charity's purposes. If the element of private benefit becomes too great then it is this requirement that the private benefit be only incidental that is infringed, with the consequent possibility that the trustees are acting ultra vires or in breach of trust. Infringing this "incidental" requirement does not, itself, cause the organisation to fail the anterior public benefit test, though obviously repeated or significant infringement of the incidental requirement could have serious implications for the future of the charity.

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7 Framework page 35.

8 *Dingle v Turner* [1972] AC 601 HL.

9 *Re Dunlop* [1984] NI 408.

The poverty case shows how easy it is for the sands to shift here. A trust for the relief of poverty is an exception to the general public benefit rule,[10] and an unusually narrow class is acceptable. Here is an example which makes the point clear even if the mathematics and practicalities would be problematic. John Brown is a very poor individual. A trust set up specifically for him in an amount that is carefully calculated so that it will relieve his poverty but do no more is not a charitable trust: it is a trust for John Brown individually. Compare this with a pre-existing, tiny charitable trust for the relief of poverty which has enough income to relieve one individual's poverty and no more. If the trustees (after due consideration) use the entire income to relieve John Brown's poverty the trust does not cease to be charitable: John Brown was relieved as the working out of the trust's charitable purposes.[11]

To a lawyer that is not a distinction without a difference, but it would not be surprising if Joe Public found it hard to grasp either this or some of the nicer points we have sketched on public and private benefit.

Mention of Joe Public brings us back to the proposal that Mr and Mrs Smith hope will solve all their problems: a generous donation to the charity combined with the charity giving an undertaking to look after their child for the rest of his life.

In fact, the legal and practical problems of a donation to the charity together with an agreement or undertaking from it are so great that we have doubts about whether it would be wise, even if it were possible, to make the necessary changes to allow this route to be adopted. The idea does, however, hold a superficial attraction. So a greater awareness is needed, not only among charity lawyers but "at the coalface" too, that this is not the panacea it seems. The problems are manifold:

Mr and Mrs Smith are giving a very substantial sum to a charity and naturally expect their IHT relief under s.23 Inheritance Tax Act 1984. Can it really be called a donation to a charity, however, when so very substantial a benefit is being received in return? The analysis is made a little easier because we have assumed that Mr and Mrs Smith are happy for the charity to receive, for its charitable purposes, any

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10 *Dingle v Turner, supra.*

11 The point is neatly stated by Lord Cross, in *Dingle v Turner*, when summarizing *Re Scarisbrick* [1951] Ch 622, CA. He says that the Court of Appeal "held that in [the field of poverty] the distinction between a public or charitable trust and a private trust depended on whether as a matter of construction the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular persons, the relief of poverty among them being the motive of the gift."

"balance" remaining at the end of the child's life. If they were not, we would need to be considering property held on temporary charitable trusts (assuming it can be said that the money is held on charitable trusts at all),[12] and section 70 IHTA 1984. Mr and Mrs Smith know that they can avoid capital gains tax on selling investments by transferring them in specie to the charity. Alternatively, being well advised, they know that in their case it may be more advantageous to sell the investments and take the benefit of Gift Aid relief.[13] On mature consideration, however, their advisers feel a little concerned about the availability of Gift Aid relief because of the specific prohibition of benefit to a relative of the donor[14], so perhaps they will take the capital gains tax exemption after all.[15]

All in all, the tax analysis of the expected reliefs on the gift is thorny, to say the least, and things get worse. Both Mr and Mrs. Smith and the charity are pleased because "their child's" funds will last much longer when invested in the charity's tax-free environment: no income tax and no capital gains tax. Perhaps all that is meant by this is that the money becomes truly the charity's and benefits from charities' tax exemptions. But if a free-of-tax return is the basis of the calculation of whether the fund is large enough to enable the charity to look after the child for the rest of his expected life span, it begins to look like charitable exemptions being taken for the benefit of a particular individual. The Inland Revenue will be far from comfortable with this kind of approach.

A donation is essentially "no strings attached", so is the charity acting in breach of trust or otherwise improperly in giving so onerous an undertaking as one for the lifetime care when, technically, it is receiving nothing in return?

The charity will need to do careful sums to make sure that it expects to have enough money. Complete certainty is impossible, however, particularly when it comes to inflation-proofing and, if the charity enters into a number of such arrangements, it could find itself burdened with heavy liabilities when the resources are dwindling or

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12 Compare the consideration of the trust for John Brown, *supra*.

13 See the very useful consideration of the relative benefits of CGT or Gift Aid relief in various situations in the article by Robert Venables QC in 1997/98 CL&PR , Volume 5, Issue 1, page 59.

14 Section 25(2)(e) Finance Act 1990.

15 Section 257 TCGA 1992 relief depends, of course, on its being a gift and not for consideration.

have run out, but the undertakings are still binding. Quite apart from the propriety of the charity giving such undertakings, the child's practical position will be unenviable if the charity gets into financial difficulties, or even goes into liquidation. His parents thought they had provided for him for the rest of his life, and they used all the available funds for that purpose, but how were they to safeguard "their child's moneys" in a way that was consistent with them being moneys held on charitable trusts? By the time the problem comes home to roost they may no longer be alive, or have no substantial funds left with which to make alternative arrangements. Obviously a well-advised charity will, if it takes on a liability on these lines, look for a long-term investment of the moneys (perhaps an annuity) which ensures, so far as possible, that it does have a continuing income of the right sort of size from those moneys to meet that liability. But even if it could as a practical matter achieve this goal, such an attainment would not help the case where the whole charity found itself in financial difficulties and maybe had to close.

One of the areas where there is pressure in practice for this kind of arrangement to be available is in relation to people who it is quite clear will need to be cared for in that institution, or one like it, for the rest of their lives: the classic case is the PVS case. But we have seen this arrangement suggested in cases where, although the adult individual was in clear need of residential care, he had a sufficient level of understanding to be able to form decided views about whether or not he was happy in a particular environment. If the "donation and undertaking" can all be organised as a legal and practical matter, the money will have passed into the coffers of this particular charity. Short of some arrangement, if such could properly be negotiated, to pay a sum on to another charity to which the individual would move, there is no

way that "his" money can move with him.[16] What started out as a comforting "Now we know he will be well looked after for the rest of his life" can become, in the mind of the patient, a life sentence.

Our sympathy so far has been for the concerns of Mr and Mrs Smith. Spare a thought, however, for the charitable trustee who may find himself landed in personal liability for giving an undertaking that was ultra vires. Of course, any trustee considering entering into a deal that involves large sums should be taking legal advice, but the idea of a beneficiary contributing so far as he is able (and contributing fully if that is how far he is able) seems so eminently reasonable, when it is put like that, that it is hard to censure the trustee who simply did not realize he was setting out across a minefield.

For all these reasons the reassurance of an undertaking from the charity to care for the child for the rest of his life should by now be looking rather less attractive to Mr and Mrs Smith, and to the trustees of the charity with which they are dealing. It is so fundamentally flawed - in particular the practical problems for the individual in deriving the comfort he thought he was obtaining - that we are doubtful whether it would be good if it were achievable.

At the level of "social value" one might argue that the child is undeniably a worthy

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16 Achieving portability is a real headache, if there if pressure to try do it within the context of a charitable "donation". A contract might make provision for a "running balance" to be kept and for it to be returned to the individual, or those responsible for him, if there is reason to move. That balance could then assist in purchasing alternative care. This contractual arrangement is conceptually straightforward, even if the figures might be difficult. All the other conditions being right, it could be entered into equally with either a charitable or a profit-making body. Portability when the idea is that the money is being applied for charitable purposes is quite another matter, however. If the funds may move with the beneficiary, can they really be said to be held on charitable trusts, rather than on trust for A, who happens to be cared for in one or more charitable institutions? John Brown's case is in point again. The difficulty with the apparently obvious solution of a gift over is the framing of an appropriate condition to trigger the gift over, given the multitude of different issues and concerns the condition would have to seek to meet.

Trying to achieve portability from the outset should be distinguished from the case where there is a true donation, the child being cared for dies early, the donor falls on hard times, and the charity wishes, ex gratia, to return some part of the donation. The authors are aware of a case where a donation was made in connection with a non-contractual arrangement for the care of a mentally handicapped child. However, the child died early in a tragic accident while his parents were alive. The father, who worked tirelessly for the charity in question, had made a gift of life policies, and subsequently fell on hard times. When he asked for the return of the policies, the charity's application for an order under s.27 Charities Act 1993, to permit the return of the policies was allowed.

recipient of charity, his money is being used in a charitable environment, and it might as well receive the benefit of tax relief so that it lasts that much longer and he does not become a burden on the State, particularly as any "balance" will become the charity's.[17] This line of argument might seek to build on the view of Lightman J in *IRC v Oldham TEC*[18] that "it is a matter of general public utility that the unemployed should be found gainful activity and that the state should be relieved of the burden of providing them with unemployment and social security benefits, and this object is within the spirit, if not the words, of the Statute of Elizabeth ..." - though that argument would still have to overcome the private benefit problem that caused the *Oldham TEC* case itself to founder.[19] This thesis could be developed by saying that it should surely not upset the charitable status of a charity to do what it is there to do: care for people with a certain kind of disability, they very properly making such contribution as they are able.

The worry is that this line of argument ignores the practical problem of false comfort as to just how real and long-term a solution such a deal actually provides in the case we have in mind; it does not answer the alternative (Micawberish)[20] approach of "let the money be taxed and, if and when it runs out, and not before, the State will intervene"; and it also ignores the temptations to which a charity is exposed, and the very difficult choices it might have to make.

Such deals can be financially very attractive. A large sum of money comes to the

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17 The ancient lineage of an approach that sees it as a charitable public purpose to relieve the State of burdens was brought to a wider audience in the Opinion of Hubert Picarda QC published in Annex III to the Charity Law Association's Response, published in November 1998, to the Charity Commission's Framework. He notes that Francis Moore, in his Reading on the Statute of Elizabeth delivered as long ago as 1607, "expressed the view that the preamble was intended to be almost wholly confined to purposes which would operate to the benefit of the public as a whole - in particular the parish ratepayer - by alleviating poverty and thereby reducing the burden of the poor-rates". The Charity Commission in a letter quoted by Peter Gibson J (as he then was) in his judgment in *Rowntree* acknowledge a similar point: "But if elderly people by being helped to obtain suitable accommodation ... can defer the time when they may fall onto state services ... such as a hospital or geriatric ward, then this is in the long term to the benefit of the community as well as to the benefit of the individuals concerned." ([1993] Ch 159 at 167).

18 [1997] STC 1218.

19 The Charity Commission's view on charities for the relief of unemployment have now been set out in the Charity Commission leaflet RR3, published in March 1999, but this does not, of course, affect the wider issue of the charitability of relieving the State of burdens or possible burdens.

20 Mr Micawber is usually misquoted as "Something will turn up".

charity and it may be tempted to use some of it to finance expansion, relying on future income to care for the child. If the funds are meant to be the charity's own then, as a charity, it should in general use the full income from that money for its charitable purposes unless there is justification for building a reserve. If the reality of the understanding of those involved was that it was a pot to provide long-term care for an individual, however, then inflation and investment considerations would dictate that an element of the income needs to be added back to the capital to preserve the purchasing power in the future: the money needs to be husbanded in the way in which an individual would, which is not necessarily the same as the way in which a charity invests, and uses, its capital and income.[21]

So far, we have looked at simple facts that make an immediate appeal to one's sympathy. It is probably true that this kind of issue arises most acutely in what one might call the "health-care" charities: the "aged and impotent" sub-group within the first head of charity.[22] For example, at least one national charity distributes promotional literature about an arrangement whereby the elderly are invited to donate their home to the relevant charity but to remain living in it, with the charity henceforth taking on responsibility for outgoings on the house and providing sheltered accommodation at a later stage if need be. These arrangements are no doubt carefully structured to fall on the right side of the line drawn in the *Rowntree*

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21 The extent to which a reserve might be appropriate, and how the moneys should be expended/invested is an article in itself, not a footnote. There is a clear discussion of the Charity Commission's approach in its leaflet CC19 *Charities' Reserves*, but it is hard to apply to the specific facts here. The starting point may be to ensure the donation itself is expendable endowment, so that at least the trustees are not under a basic obligation to expend it all as income. That done, a reserve created by keeping back some of the income on that endowment "so that the charity is behaving prudently in looking after the Smith child" does not look very charitable. Things get a bit better if the charity has a group of such beneficiaries and the reserve is billed as enabling the charity to meet commitments to long term care which could otherwise cause financial instability, but we are back on the shifting sands. If it is not acceptable to build a reserve for one such resident, but is acceptable where there are for a dozen such residents, at which number did it become acceptable? Here we get the reverse of the problem noted above: then it was the pioneers who could make contracts with charities, as long as the charity did not make too many. Here the pioneers are penalized until they have enough companions.

22 Contracts for benefits are obviously also a topical issue in relation to the advancement of education head of charity (see for example the discussion of school fee payment plans in the Charity Commissioners' 1996 Annual Report at page 28) but the same social issues tend not to arise there because the arrangements are generally much more straightforwardly commercial. The parent pays, whether term by term, or a lump sum in advance, and receives exactly what the contract stipulates. The charity's liability (whether in technical legal terms or in the sense of a moral obligation to care for someone who cannot care for themselves) is not open-ended; and both the parent and the charity will subject the question of whether a lump sum in advance is financially worthwhile to close commercial analysis.

case. It is, however, a fine line, even assuming it is in fact the appropriate line. Certainly (at least as medical science now stands) there is no doubt that someone who is aged will remain aged, and thus within the potential class, whereas it will generally be less certain that someone who is, say, disabled, will necessarily remain eligible to benefit from that charity. But although it is a truism of charity law that the rich can sometimes benefit from charity, the charity must, within the words of the Statute of Elizabeth, be for the relief of the aged. Suppose someone donates their home under this scheme, a year after that she wins the Lottery, and a year later needs to move into sheltered accommodation. Is it all right for this move to be made at the charity's expense? Although aged, she surely meets only half the necessary condition? Her age no longer needs relief, or at least not at the expense of the charity.

Using extreme facts seems to make the moral issues relatively easy and clear cut. Suppose, however, that instead of the massive win the elderly person had received a more modest, but still very comfortable, legacy on her brother's death. She is not rich, but there are now many, many others whose need is far greater than hers. She would certainly not have been chosen to benefit from the charity's limited amount of sheltered accommodation if a decision were being made on the present facts. Was the charity right at the outset, to have committed itself to go on supporting her?

In fact, it is acceptable to give a commitment to a beneficiary that may continue beyond the point where he needs it, if that degree of commitment was necessary to provide appropriate relief at the time it was given. One of the Charity Commission's four objections to the proposed housing schemes in *Rowntree* was that, because there was security of tenure, the schemes did not satisfy the requirement that the benefits they provided must be capable of being withdrawn if at any time the beneficiary ceased to qualify. Peter Gibson J found that there was no such requirement:

> "The nature of some benefits may be such that it will endure for some time, if benefits in that form are required to meet the particular need that has been identified ... If the grant of a long-term leasehold interest with the concomitant security of tenure that such an interest would give to the elderly is necessary to meet the identified needs of the elderly then in my judgment there is no objection to such a grant. The plaintiffs have put in evidence that they oppose the inclusion in a lease of any provision entitling the plaintiffs to determine the lease in the event of a change in the financial circumstances of the tenant. Their main reason - which to my mind is a cogent one - is the unsettling effect it could have on aged tenants. In any event the distinction between what prima facie is a short

term letting and a long lease has been rendered somewhat illusory by statute."[23]

Fine as far as it goes - but how far does it go? Will it stretch far enough to help Mr and Mrs Smith? Let us leave aside the constraints of leases and tenancies and look again at contracts for long term care, whether of the disabled or the elderly. Suppose an elderly person is moving into long term care and enters into a contract with a charity, paying a lump sum in advance. Calculations show that the lump sum should be ample for his expected life span but he could, of course, live longer than that. Worrying about the uncertainty is going to have an "unsettling" effect, so can the charity in fact properly decide, following *Rowntree*, that it will contract to care for him not only for X years but for the remainder of his life if longer?[24] Suppose, however, he suffers from Alzheimer's and will not be in the least unsettled about his future, because he is unaware of time? Would an "extension" of the period, so that it covered the remainder of his life, still be proper? Transpose it to the case of Mr and Mrs Smith: it is their worry, not the child's, that the charity is trying to meet in offering an undertaking or a contract to care for the child for the rest of his life. A subjective test (or at least subjective guidance) raises difficulties that a more objective approach would not.

What conclusions can one reach? Perhaps contrary to one's expectation when one first considered the problems facing Mr and Mrs Smith, we would argue that these issues may need to remain difficult: that it is in fact questionable whether it should be relatively routine to write out a large cheque and know that you have bought care for the rest of your child's life. So our view is that what is needed here is probably not a swift change in the law but a greater awareness of this issue, perhaps with further and more detailed guidance from the Charity Commission. The charity world needs to be clearer about the distinction between a donation and undertaking on the one hand, and a contract on the other; and charities need to know that they can enter into a limited number of contractual arrangements, and to be surer about how many and just what the parameters are.

What is certainly right is that this should not be an area full of traps into which "ordinary" people can fall: there is a social issue to be addressed here. It is perhaps true to say that, if there is a single nettle charity law must grasp in the coming years, it is the issue of private benefit. The aged and disabled examples demonstrate a gradual shift towards a consensus which sees charitable activity in some instances

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23 [1983] ChD 159 at 175-176.

24 Note, however, that we are contemplating here an extension of benefits beyond what the recipient has "paid for", whereas what was in issue in *Rowntree* was whether there should be an ability to *remove* benefits (while the beneficiary was still able to pay) if the beneficiary were to cease to be a suitable recipient.

as a partnership between the individual and the charity, each contributing to the other's benefit. We need to face that shift squarely, and to decide whether to accept it or reject it. The poor may be always with us, but in the 100 years since *Pemsel's case*, the nature of poverty, and of many other areas where we sense that charitable relief is appropriate, has changed. The issues have become more complex, because so many of those we want to help are not destitute. They cannot afford the enormous costs of residential disabled care, say, but they do have some means. They can contribute, and in many cases there would be a broad consensus that they should.

We need, as the Charity Commission's Discussion Papers recognize, to address these complexities. The detailed areas need to be discussed and aired, and guidance given, so that when Joe Public applies his broad brush he can start painting within a clear, well-known, framework that stops his picture from becoming too fuzzy at the edges. Perhaps what the lawyers need to do is put away their pointillist pens for a while, and to employ a hammer and some nails to build a good sturdy framework which will shape Joe's thinking.