

Poor relations

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considers the status of trusts for poor relations

In addition to falling within one of the four statutory heads of charity (the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community, in s 5(1) of the Charities Act 2005 or s YA1 of the Income Tax Act 2007), a purpose must also satisfy the “public benefit” test, in order to be considered charitable.

THE PUBLIC BENEFIT TEST

The public benefit test is imported as a key element of the “charitable purposes” test through the medium of the common law. In New Zealand common law, the “public benefit” test has two parts: a “benefit” limb, and a “public” limb. It asks, firstly, whether the purpose is beneficial to the community, and secondly, whether the class of persons eligible to benefit constitutes the public, or a sufficient section of the public (see for example *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) (“NZSA”) at 152).

Public benefit is an elusive quality. It is “not always open to sound reason, but it is a quality often plainly recognised when it exists” (*Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) per Joseph Williams J at [55]).

An example of the impact of the public benefit test is the famous case of *Oppenheim v Tobacco Securities Trust Ltd* [1951] AC 297 (HL), which concerned a gift for the education of the children of employees and former employees of a tobacco company. At the time of the testator’s death, the number of relevant employees exceeded 110,000. Being for the advancement of education, a recognised head of charity, the purposes of the trust satisfied what we would describe as the “benefit” limb of the public benefit test. However, the trust failed to qualify as charitable on the basis that the persons eligible to benefit were “neither the community nor a section of the community” (*Oppenheim*, at 306): the attribute by which the class of persons eligible to benefit was determined was a personal relationship, namely, an employment contract. The House of Lords held that a purpose directed to a class determined in that way will not qualify as charitable, irrespective of how large that class may be.

Similarly, in *Re Compton* [195] Ch 123 (CA), the Court held that a perpetual trust for the education of three named persons was not charitable, as the qualification of “beneficiary” was defined by reference to a personal relationship, in that case a relationship of blood.

Public benefit in relief of poverty

Paradoxically, if the testators in *Oppenheim* and *Compton* had directed their gifts to the relief of poverty of the beneficiaries, rather than their education, the gift would likely have qualified as charitable. The “poor relations” and “poor employees” cases, such as *Re Scarisbrick* [1951] Ch 622

(CA) and *Dingle v Turner* [1972] AC 601 (HL), demonstrate that trusts for poor persons within a restricted category, not meeting the requirement that the benefits be available to the community or a sufficient section of it, may be held charitable (see also *Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) (“*Queenstown*”) at [38]).

Why have trusts for poor relations or poor employees have been held charitable? Is it because:

- public benefit is “presumed” in the context of the relief of poverty?
- the public benefit test is not required to be met at all in the context of the relief of poverty?
- a restricted class constitutes a “sufficient section of the community” in the context of the relief of poverty? or
- the relief of poverty gives rise to such a significant indirect benefit to the public as a whole that it satisfies the public benefit requirement by itself?

CHARITIES ACT 2006 (UK)

These questions took on a particular significance in England and Wales following amendments made by the Charities Act 2006 (UK) (now incorporated in the Charities Act 2011 (UK)). In particular:

- s 2(1)(b) now expressly requires that a purpose must be “for the public benefit” if it is to be a charitable purpose; and
- what is now s 4(2) of the Charities Act 2011 (UK) specifically removes any presumption that a purpose is for the public benefit.

In 2008, the Charity Commission for England and Wales considered that these amendments may have rendered charities for the relief of poverty with restrictions on eligibility based on “personal connections” no longer eligible for charitable registration. The Commission argued that, if relief of poverty trusts did not have to satisfy a public benefit requirement at all under the previous law, that was no longer acceptable following the changes in the 2006 Act.

The Charity Commission estimated that 1,500 or so benevolent charities were potentially affected, with affected beneficiaries potentially numbering in their millions.

ATTORNEY GENERAL’S REFERENCE

In order to clarify the law for all concerned, the Attorney General for England and Wales exercised his power, under what is now s 326 of the Charities Act 2011 (UK), to refer the issue to the Charity Tribunal (now the First-tier Tribunal (Charity)) for a ruling.

The “Reference” procedure essentially invites the Tribunal to give an advisory opinion, and is intended to relieve individual charities of the burden of litigation (*Appealing the*

Regulator: Experience from the Charity Tribunal for England and Wales, Alison McKenna, conference on *Defining, Taxing and Regulating Not-for-Profits in the 21st Century*, Melbourne Law School, July 2012 at 2).

Charity Commission for England and Wales v Attorney General [2012] UKUT 20 (TCC) sought to determine whether institutions for the relief of poverty satisfy the public benefit test, and are therefore capable of being charities under English and Welsh charity law as it applies post-2006, in three scenarios:

- where the potential class of beneficiaries are defined by their relationship to one or more individuals, for example by a blood or family relationship to the founder (“poor relations charities”);
- where the potential class of beneficiaries are defined by contract, such as:
 - o by common or former employment of them or a family member by one or specified employers (“poor employees charities”); or
 - o by their membership of a society or organisation (“poor members charities”).

Given the potential impact of the issue, the Attorney General’s Reference was transferred from the First-tier Tribunal to the Upper Tribunal (Tax and Chancery Chamber). The Upper Tribunal includes High Court judiciary and is a Superior Court of Record, which means it provides charities with an opportunity for precedent-setting where novel points of law arise.

By the time of the hearing, there were eleven parties to the Reference, including the trustees of the Professional Footballers’ Association Benevolent Fund and of the Grand Steward’s Lodge 250th Anniversary Benevolent Fund. The Tribunal recognised that many charities were keen to have their say on this issue, and allowed 19 “interveners” to that end (at [17]).

By the time of the hearing, it was common ground amongst most of the parties (including the Attorney General) that the 2006 Act did not in fact cast doubt on the continued charitable status of the three types of charity in question, and that institutions with objects for the relief of poverty which had been charitable prior to the coming into force of the 2006 Act had remained so afterwards. The Charity Commission has been criticised for persuading the Attorney General to pursue the Reference: “One might wonder...why the Reference was felt to have been necessary” (at [21]). However, the Attorney General considered that sufficient doubt had been raised, both by the Commission and within the sector, for it to be appropriate to make the Reference.

Conclusions

The Upper Tribunal held that:

- poor-relations, poor-employees and poor-members charities were all capable of being charitable; and
- the Charities Act 2006 had not reversed the leading cases in this regard.

The Tribunal first considered the position prior to the 2006 Act, noting that what satisfies the public benefit requirement may differ markedly between different types of charitable purpose (and limiting its comments to charities for the relief (and prevention) of poverty only).

The Tribunal found, as it had in *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT

21 (TCC), that although neither the Charitable Uses Act 1601 nor the preamble to it contained any express reference to public benefit, a public element was nonetheless inherent to the concept of charity.

The Tribunal also noted that the development of the law on public benefit has been ad hoc. The authorities do not provide a comprehensive statement of the public benefit requirement, but rather, a series of examples of when the public benefit requirement is or is not satisfied: “there is no application of some overarching, coherent, principle by which the courts have been guided” (at [34]).

Somewhat unhelpfully, the Tribunal referred to the two aspects of the public benefit test as “public benefit in the first sense” (referring to the benefit limb), and “public benefit in the second sense” (referring to the public limb).

The Tribunal considered that public benefit in the first sense, the “benefit” limb, is a necessary requirement for any purpose to qualify as charitable, including a purpose for the relief of poverty. The Tribunal also considered that the relief of poverty would ordinarily meet this test: the Preamble to the Statute of Elizabeth itself includes in its long, but not exhaustive, list of purposes “the relieve of aged impotent and poore people”, meaning that such a purpose is “of a nature which is charitable”. However, there could be a trust for the relief of poverty which does not meet the “benefit limb”, as noted by Lord Simonds in *National Anti-Vivisection Society v Inland Revenue* [1948] AC 31 (HL) at 69–70:

If today a testator made a bequest for the relief of the poor and required that it should be carried out in one way only and the court was satisfied by evidence that that way was injurious to the community, I should say that it was not a charitable gift, though three hundred years ago the court might upon different evidence or in the absence of any evidence have come to a different conclusion.

Interestingly, the statutory abolition of the presumption of public benefit was held not to have had any impact on whether a trust for the relief of poverty is charitable (at [39]):

There is no presumption that a trust for the relief of poverty is for the public benefit, any more than there is a presumption that education is for the public benefit. In either case, the Court or Tribunal will form its own view on the evidence before it whether the trust is for the public benefit and it will do so, not by way of assumption but by way of decision. It will no doubt take into account other decided cases, and it will take judicial notice of facts where appropriate. But...this is far from a “presumption” in the usual sense.

This finding is discussed further below.

Anomalous treatment

The Tribunal then considered whether the “benefit” limb was a separate and distinct requirement that had to be satisfied if a purpose is to be “charitable”, and not in fact part of the public benefit test at all. The Tribunal had no difficulty dismissing this suggestion, and holding that the “benefit” limb was part and parcel of the public benefit requirement (at [62]):

Before the 2006 Act, the purpose of a trust in order to be charitable, had to fall within, or within the spirit of, the Preamble. After the 2006 Act, the purposes of the trust must fall within [what is now the expanded list of purposes in section 3(1)]. But in each case, there is (or was) a

requirement that the purpose is (or was) also one which is of its nature capable of being for the benefit of the community. Thus, a school for pickpockets, fails the test even though it is educational; and there may be a trust for the relief of poverty which is to be carried out in such a way that it fails the test too.

Post-2006 Act position

Nevertheless, the Charity Commission argued that, even if the purpose of a trust for the relief of poverty is for the public benefit in the first sense, it is not, if restricted to a narrow class, for the public benefit in the second sense, and is therefore not charitable.

The Tribunal rejected that submission, reiterating that what is a sufficient section of the public to satisfy the second aspect of public benefit varies depending on the nature of the charity. Trusts for the relief of poverty need to satisfy the public benefit test, but they only needed to show public benefit in the first sense, that is the “benefit” limb, and the 2006 Act had not changed that (at [64]).

Trusts for the relief of poverty, therefore, did not need, either because of an exception to the general rule, or an anomaly (it was not for the Tribunal to decide which), to provide benefits to a “sufficient” section of the community in order to be for the public benefit. It was not clear from the authorities whether this was because the relief of poverty of a narrow class was sufficient in itself, or whether the indirect benefit to the community generally of the relief of poverty was enough of itself to provide the necessary public benefit. The Tribunal did not decide this point (at [65]).

Prevention of poverty

Another change introduced by the 2006 Act was an expansion of the statutory “heads” of charity. What is now s 3(1) of the Charities Act 2011 lists a number of descriptions of purposes in paras (a) to (m), the first of which is “the prevention or relief of poverty” (an expansion from the traditional relief of poverty, which remains the statutory position in New Zealand).

There had been calls to extend the definition of “charity” to include the prevention as well as the relief of poverty in England and Wales since at least 1976, so that the concerns, particularly of development charities, that a charity should be able to address the causes as well as the effects of poverty could be addressed (see Lindsay Driscoll, “England and Wales: Pemsel plus” in M McGregor Lowndes and K O’Halloran eds, *Modernising Charity Law — Recent Developments and Future Directions*, Queensland University of Technology, 2010 at 57).

The Tribunal had no doubt that a purpose of the prevention of poverty could be charitable, even before the 2006 amendment. Further, as with trusts for the relief of poverty, it is not necessary to demonstrate public benefit in the second sense for a purpose for the prevention of poverty to be charitable (at [78]–[79]). Trusts for the prevention and relief of poverty, and trusts for the prevention of poverty on its own, could therefore both be charitable with limited beneficiary classes, provided any restrictions on those who could benefit were appropriate in the circumstances.

This reasoning may be helpful in New Zealand. The material published by the Department of Internal Affairs – Charities (“the DIAC”) certainly seems to indicate that the relief of poverty head is directed to relief of poverty only <http://www.charities.govt.nz/news/information-sheets/relief-of-poverty-example-wording/>. Whether this or the fourth

head of charity might be able to be extended by analogy, or by natural incremental development, to include a purpose for the prevention of poverty might be usefully considered.

APPLICATION IN NEW ZEALAND

The finding that there is no presumption of public benefit in the context of trusts for the relief of poverty needs to be considered carefully in a New Zealand context.

New Zealand courts have clearly held that there is a presumption of public benefit for the first three heads of charity: see *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [24]; *Re New Zealand Computer Society Inc* HC Wellington CIV-2010-485-924, 28 February 2011 at [13]; *Queenstown* at [32]; and *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [99]–[101].

This means that, in New Zealand, as a matter of law, a court (or the DIAC) should reach a view as to whether a relief of poverty purpose is charitable on the evidence, but with the benefit of a predisposition towards finding public benefit, that is, on the basis of a presumption of public benefit.

Such a view should also be reached, as a matter of law, on the basis of a predisposition towards a finding of charity generally (see the discussion of the case law at “The presumption of charity” [2012] NZLJ 295, and the comments of the Court of Appeal in *Re Greenpeace of New Zealand Inc* [2012] NZCA 533; [2013] 1 NZLR 339 (CA) at [43]).

Clearly, the Tribunal in the Reference was striving to find that the statutory abolition of the presumption of public benefit had not changed the law, such as would call into question the charitable status of the 1,500 affected charities.

However, unlike England and Wales, New Zealand does not have a statutory public benefit requirement, or a statutory removal of any presumption of public benefit.

Further, our law on the concept of public benefit has diverged from English law in many respects. An example is the comments of Gallen J in *Educational Fees Protection Society Incorporated v Commissioner of Inland Revenue* [1992] 2 NZLR 115 (HC) at 125:

the distinction between personal and impersonal relationships may no longer be totally acceptable as a test and the decision in Oppenheim’s case may no longer represent unquestioned law.

Also relevant are NZSA at 156, and *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [38] (this point not in issue on appeal). See also Inland Revenue Department Issues Paper IP3168 “*The Public Benefit Test*”, January 2000, at [1.2] and [1.6], and the discussion in the 2002 officials’ report on the Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill at 7: this Bill introduced what is now s 5(2)(a) of the Charities Act 2005, the statutory override of the *Compton* test in New Zealand, in both a Maori and a non-Maori context, for beneficiaries or members who are “related by blood”.

Care therefore needs to be taken in applying the reasoning of the UK decision to New Zealand. In the writer’s view, the two most helpful aspects of the decision are:

- its affirmation that the prevention, as opposed to the relief, of poverty is a charitable purpose under pre-2006 English common law; and
- the fact that indirect benefits to the public from the relief of poverty generally are potentially sufficient to satisfy the public benefit test by itself. □