Charitable trusts

Aims and objectives

After reading the chapter you will:

- Understand the position of charities as exceptions to the rules on perpetuity, and to the requirements of beneficiaries and certainty.
- Have a critical knowledge of the meaning of charity and charitable purposes and the recent developments in this area.
- Appreciate the significance of the requirement of public benefit for charitable status and the changes brought in by the Charities Act 2006.
- Have a knowledge in outline of the various bodies and agencies which administer and supervise charities.
- Be aware of the role of the Charity Commission.
- Understand the mechanisms by which money dedicated to charitable purposes may be allocated to alternative purposes.

Introduction

This area of the law, particularly the meaning of ‘charity’ and ‘charitable purposes’, has for centuries been a matter of case law, and of a process of ‘reasoning by analogy’, dependant ultimately on the interpretation of the Preamble to the Charitable Uses Act 1601, the so-called ‘Statute of Elizabeth’. The definition of charity has now been put on a statutory basis, with the passage of the Charities Act 2006, the bulk of which is now in force. The administration of charities, already subject to statutory intervention, has undergone a further overhaul under the 2006 Act.

We shall see, however, that the legal meaning of charity has not in fact been changed significantly, but rather that the new statutory definition seeks to preserve the previous meaning whilst clarifying those areas which did not sit easily within the previous definitions but which were in practice recognised as charitable.

Note that a good deal of guidance on the definition, recognition and supervision of charities can be obtained from the Charity Commission website, www.charity-commission.gov.uk.
Charitable organisations

It is traditional to consider the law of charities as part of the law of trusts, since many charities are organised as trusts, but in fact charitable organisations may take a number of forms. They may be organised as companies, incorporated and having legal personality. They may be unincorporated and organised as trusts. Then again the 2006 Act introduces a new form of organisation, to be known as a ‘Charitable Incorporated Organisation’, or CIO, a special type of corporate body. In each case the organisation will have purposes which comply with the definition of charity, as will any gift expressed to be for charitable purposes. Those who manage charities may be trustees or they may be directors of a charitable company, but in either case their role and duties are substantially the same, and are subject to the supervision of the Charity Commission, as described below. The Charities Act 1993 s 97 states:

‘charity trustees’ means the persons having the general control and management of the charity: . . .

‘trusts’ in relation to a charity means the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect as a trust or not, and in relation to other institutions has a corresponding meaning.

Use of the terms ‘trust’ and ‘trustees’ in this chapter must be read in the light of these definitions.

Definition of charity and charitable purpose

To be recognised as a charity, however, the trust must have purposes which fall exclusively within the definition of charity. The Charities Act 2006 states in subsection 1(1):

For the purposes of the law of England and Wales, ‘charity’ means an institution which

(a) is established for charitable purposes only, and

(b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

It has also been held, in Gaudiya Mission v Brahmachary [1997] 4 All ER 957, that the definition does not include institutions and organisations constituted under foreign jurisdictions, but applies only to charities established in England and Wales.

What, then is a ‘charitable purpose’?
The Charities Act 2006 provides a list of specific purposes which are charitable:

2(2) A purpose falls within this subsection (i.e is a charitable purpose) if it falls within any of the following descriptions of purposes—

(a) the prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of amateur sport;
(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmentally protection or improvement;

(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown or the efficiency of the police, fire, rescue or ambulance services;

(m) any other purposes within subsection (4).

At the same time, it should not be thought that this represents a complete list of the recognised purposes, for two reasons.

First, the preservation of existing charities. Purpose (m) on the list above refers to subsection (4). This states:

The purposes within this subsection (see subsection (2)(m)) are–

(a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law . . .;

(b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and

(c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.

In other words anything which is not specifically listed but which is already recognised under existing law as charitable, continues to be charitable; nothing which was a charitable purpose under existing law will cease to be so under the 2006 Act. The Act further preserves the existing law in s1(3), which states:

A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c. 4) or the preamble to it is to be construed as a reference to a charity . . .

Secondly, reasoning by analogy. Subsection (4) refers, in (b) and (c) to anything being charitable which is regarded as analogous to or within the spirit of the specific purposes listed in section 2(2) or to any existing charity, and to anything with is analogous to that analogy.

This means that the process of reasoning by analogy, which was regarded as one of the main benefits of the case law approach, and a major barrier to the introduction of a statutory definition which might prove inflexible, is preserved. It means that something which is not currently recognised, in that it is not, for example on the section 2(2) list, may nonetheless be upheld as charitable if it can be argued that it is similar to and fulfils a comparable purpose to something which is already recognised. A classic example given under the previous law was that the promotion of cremation and establishment of crematoria was analogous to the establishment and upkeep of graveyards and would thus be charitable; both these activities fulfill a similar purpose, the disposal of the dead. As the section is worded the process can be infinite, with analogy upon analogy upon analogy, to allow continuous development of the law. Several of the specific purposes referred to above will be consider in more detail later.
Motive of the donor

It is clear that the reason why the donor has chosen to give money to charity is irrelevant to the charitable status of the gift. As was stated in *Re Delany* [1902] 2 Ch 642:

The care of the aged, poor and the like is a charity . . . whether the persons who devote their lives to it are actuated by the love of God, a desire for their own salvation, or mere pique, or disgust with the world.

The same would seem to apply to those who donate money for those, or any other, charitable purposes. The converse is also true. The fact that a donor is motivated by charity or considers his purpose to be charitable will not make the gift charitable. As has already been stated, charity is a matter of legal definition and the donor's opinion is irrelevant.

Charities and the Human Rights Act 1998

It should be noted that the Human Rights Act 1998, which came into force in October 2000, may have an impact in this area. The Act makes it unlawful for ‘public authorities, including private bodies that carry out public functions’, to act in a manner which is incompatible with the European Convention on Human Rights.

Charities are not ‘public bodies’ for these purposes merely because they are charities, but if they carry out public functions, particularly if they do so in conjunction with, for example, local authorities, they may be caught by the Act. Thus, for example, the provision of care homes could be subject to Article 3, the right not to be subjected to torture or inhuman treatment, and Article 8, the right to respect for private and family life. It seems unlikely that the Act will have any dramatic effect in this area, but time, and case law, will tell.

The Court of Appeal, in *Heather v Leonard Cheshire Foundation* [2002] 2 All ER 936, has held that a charity providing residential care in the private sector does not perform a public function within the meaning of s 6 of the Human Rights Act 1998.

Advantages of charitable status

Certainty

It has already been stated that purpose trusts will fail if the purpose is not stated with sufficient certainty. This rule does not apply to charities. Provided the wording of the gift allows it only to be spent on charity, it does not matter that the charitable purpose is only vaguely stated, or that no purpose is stated at all. Thus, a gift simply ‘for charitable purposes’ or, as in *Moggridge v Thackwell* (1792) 1 Ves Jr 464, a gift to A ‘to dispose of to such charities as he shall think fit’ will be valid.

Beneficiary principle

As has already been stated, the Attorney-General, representing the Crown, appears on behalf of the objects or ‘beneficiaries’ of charities, thus removing the problem of enforceability which lies behind the requirement of ascertainable beneficiaries in other trusts.
Perpetuity

Since purposes may last forever, so might a trust for a purpose, thus offending the rule against perpetual trusts unless a limitation is expressly stated in the gift (see Chapter 8, page 188 above). Charities are not bound by this rule and may therefore last forever. There are many charities of considerable age which continue to operate. Thus, where a gift is made of the income from a particular fund to a charity in perpetuity, it will never be possible to release the capital from the fund: Re Levy [1960] Ch 346 (subject to the power to authorise a ‘scheme’ – see further below).

Charities are, though, bound by the rule against perpetuities proper, which is to say the rule is that a gift must vest within the perpetuity period. Thus, in Re Lord Stratheden and Campbell [1894] 3 Ch 265, money was bequeathed to the Central London Rangers, a charity. The gift was to take effect ‘on the appointment of their next lieutenant colonel’. Since this might not occur within the perpetuity period, the gift was void. This situation would now be covered by the ‘wait and see’ provisions of the Perpetuities and Accumulations Act 1964 s 3.

There is, however, an exception to this. If the gift takes effect as a gift over from one charity to another, then the gift to the second charity does not have to take effect within the perpetuity period, on the principle, stated by Shadwell V-C in Christ’s Hospital v Grainger (1849) 60 ER 804, that there is no more perpetuity created by giving to two charities rather than one. In other words, once the money has been given to one charity it may remain there for ever. If it is subsequently transferred to another charity, it is no more tied up than it would have been if it remained with the first.

Taxation and related advantages

Charities enjoy considerable tax advantages and this is often a significant motive in seeking charitable status: many cases on charitable status arise because that status is challenged by the Revenue. The principal advantages are:

(a) Income tax. Charities are not liable to income tax on any trading profits they make, provided these are spent exclusively on the purposes of the charity and arise either from a trade carried on in pursuit of the primary purpose of the charity, or from work done by the beneficiaries of the charity, for example sale of work by the residents of a home for the elderly. A similar exemption applies in respect of corporation tax.

In many cases the trade of a charity became mixed with a non-exempt trade so that the tax exemption would become ‘tainted’ and leave the charity potentially exposed to tax on the trade as a whole. The Finance Act 2006 has addressed this problem and introduced a provision which allows a trade to be split and the profits apportioned between the exempt and taxable activities. A similar exemption applies in respect of corporation tax.

Additionally, gifts to charities are sometimes within the Gift Aid scheme which gives significant income tax advantages. Under the scheme, a donor is allowed a deduction against income tax for gifts of money as well as gifts of qualifying securities or land. If a donor gives a charity £780, the charity can claim £220 from HMRC meaning that the charity benefits by £1000 for an outlay of £780 by the taxpayer.
The donor is treated as giving the grossed up amount i.e. £1000. If the donor is a high rate tax payer the charity still claims the £220 and the donor can claim £180 rebate from HMRC. In the 2007 Autumn Statement the Chancellor of the Exchequer announced that the basic rate of income tax would be reduced to 20 per cent. This caused much alarm amongst charities as the value of Gift Aided donations would be reduced by, it was estimated, a total of about £90m a year. In his 2008 Budget, the Chancellor of the Exchequer announced that charities will be able to claim at 22 per cent until 2011. This, at least, gives charities a chance to adjust to the new lower basic rate and the consequent reduction in their income.

(b) Inheritance tax. Payments to charities are not liable to inheritance tax.

(c) Capital gains tax. Charities are not liable to tax on any capital gain made by them, provided it is applied solely to charitable purposes. Additionally, donors to charities are not liable to pay capital gains tax on their donations.

(d) Rates. Charities are entitled to an 80 per cent reduction in non-domestic rates on premises they occupy. This may be increased to 100 per cent by the charging authority. Certain religious buildings are wholly exempt.

It should be noted that charities are generally subject to value added tax but there are, however, some VAT reliefs on certain goods and services which are purchased and on income from qualifying fund-raising events.

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### Requirement of public benefit

As a general rule, a gift, to be charitable, must be for the benefit of the public or a section of the public, as opposed to a private or closed group. The question must be considered in relation to each of the heads of charity in turn, but some general observations may be made.

The 2006 Act, s 2(1)(b) states that to be charitable, a purpose must be for the public benefit, but it does not provide a definition; s 3(3) merely states:

In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

We must therefore look initially to the previous case law on this issue.

The requirement of public benefit excludes all organisations where private individuals take profits or dividends. Thus, education is generally charitable, so that even public schools where fees are paid may be charitable, but only so long as they are not run for private profit, as in *Re Girls' Public Day School Trust* [1951] Ch 400.

Similarly, this requirement will exclude anything in the nature of a mutual benefit society, where benefits are limited to those who have contributed to the funds. Thus, in *Re Holborn Air Raid Distress Fund* [1946] Ch 194, a fund collected by employees of a certain firm to provide money for the relief of distress suffered by any employees as a result of air-raids could not be charitable. The benefits were limited to the employees of a company which, as we shall see, is too limited a class anyway, but the deciding factor for Lord Greene MR was the self-help nature of the fund:

The point, to my mind, which really puts this case beyond doubt is the fact that a number of employees of this company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question
of poverty coming into it. Such an arrangement seems to me to stamp the whole trans-
action as one having a personal character, money put up by a number of people, not for
the general benefit, but for their own individual benefit.

A question of some difficulty arises, however, when attempting to define public benefit.
Charities must in general be for the benefit of the public or of a section of the public and
the meaning of these terms was considered at length in Oppenheim v Tobacco Securities
Trust [1951] AC 297. In this case, a fund was created to provide education for the
children of the employees and former employees of British American Tobacco Ltd. This
constituted a substantial number of people: it was estimated that the total number of
employees was over 110,000. Size was not, though, the crucial factor. The House of Lords
concluded that this group did not constitute a section of the public because there existed
between them a ‘personal nexus’, which is to say they were defined by a common rela-
tionship, in this case that of employment by one particular company. Lord Simonds said
in his judgment that to constitute a section of the community the group eligible to
benefit must not be numerically negligible and:

that the quality which distinguishes them 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.

This means that a group which is defined by being, for example, descendants of a
named individual or employees of the same firm or members of the same club cannot be
a section of the public and so a gift limited to their benefit cannot be charitable.

Lord Simonds himself described this as a difficult, artificial and even illogical branch
of the law and others have criticised this ‘personal nexus test’. It takes little account
of the number of potential beneficiaries involved except to recognise that the number
must not be negligible. Valid trusts exist where the number of beneficiaries is very much
smaller than was the case in Oppenheim. It is also rather absurd that the same group may
be defined in a different way so as to avoid offending the rule. An educational trust for
the benefit of children of tobacco workers, for example, would be valid. It appears that
certain ‘common denominators’ are acceptable where others are not. It is valid to limit
a charitable trust’s benefit to the inhabitants of a particular town or village or to the
members of a profession, or even to the pupils of a particular school, as in the case of
closed scholarships to certain university colleges. By contrast, it is not valid to limit such
benefits to employees of the same firm or descendants of the same ancestor, as has been
shown.

While a trust cannot be charitable if it is exclusively for such a restricted group, it is
apparently acceptable to give preference to a restricted group, as in Re Koettgen [1954]
1 All ER 581. In that case a trust had the stated object of commercial education among
the public, but directed that preference be given to the employees of a particular company
for the expenditure of up to 75 per cent of the fund. This appears to be the maximum
percentage that would be acceptable and it should be noted that only preference is given:
the restricted group has no exclusive right to any part of the fund.

It should also perhaps be remembered that it is not necessary that the public at large
actually takes advantage of the charity, but merely that it should be available to them.
Indeed, the terms of the charity may be restricted to the poor, or to children requiring
education or to the members of a particular faith and in that sense not all the public are
elgible. The important feature, however, is that no restriction other than that defining the purpose of the charity should be imposed. It has been pointed out that a bridge is open to all, even though not everyone will have occasion to use it.

Though the Charities Act 2006 does not alter the meaning of public benefit, it is nevertheless in this area that the definition may in practice be affected most by the Act.

First the former presumption of benefit which applied to the poverty, education and religious charities is removed by section 3(2):

In determining whether that requirement (of public benefit) is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.

Previously unless the benefits were limited to a class, as in Oppenheim, the issue was unlikely to arise. Under the new Act it is necessary to prove public benefit in practice.

Secondly, it will continue to be the job of the Charity Commission, to monitor whether the public benefit requirement is being met. Section 4 provides that the Charity Commission should issue guidelines in pursuance of its public benefit objective, which is to promote awareness and understanding of the operation of the public benefit requirement. Such guidelines are not legally binding and function as advice. Much will continue, therefore, to depend, as it did before, on the Charity Commission’s interpretation of public benefit.

After consultation, the Commission has issued the following general guidelines:

1. There must be an identifiable benefit,

This is further qualified by statements that:
(a) it must be clear what the benefits are,
(b) benefits must be related to aims, and
(c) benefits must be balanced against any detriment or harm.

2. The benefit must be to the public or a section of the public,

This is further qualified by statements that:
(a) beneficiaries must be appropriate to the aims,
(b) if the benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted either by geographical or other restrictions, or by the ability to pay any fees charged,
(c) people in poverty must not be excluded, and
(d) any private benefit must be incidental.

Further guidance on the interpretation of these guidelines can be found at the Commission’s website: www.charity-commission.gov.uk.

The Commission has subsequently issued draft guidelines on public benefit in relation to specific charitable purposes, which will be referred to below when those purposes are discussed. At the time of writing these guidelines are the subject of consultation and final definitive guidelines are awaited.

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**Charities which charge fees**

A specific concern with regard to public benefit has been the position of charities which charge fees for their services, such as public schools and ‘private’ hospitals, since the very act of charging suggests exclusion of the public at large.
The Commissioners (as they then were) indicated that they would follow the guidelines indicated in *Re Resch* [1969] 1 AC 514 (which concerned a fee-charging hospital), that:

(a) both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an organisation does, or can, operate for the public benefit;
(b) the fact that charitable facilities or services will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean that the organisation does not operate for the public benefit; and
(c) an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.

The Commission has now issued draft guidelines for consultation. It has reiterated the general guidelines, that, if the benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted . . . by the ability to pay any fees charged, and also that people in poverty must not be excluded. The Commission further states:

When considering the effect of any charges we will take account of:

- The nature of the particular charitable aim (and the law that applies to it);
- The level of fees charged;
- The particular circumstances of the organisation; and
- The social and economic conditions under which it carries out its work.

In particular, the higher the fees the greater the need to prove that those unable to pay them are not excluded; in the words of the Commission:

Trustees will have to be able to show that people who are unable to pay the fees charged have sufficient opportunity to access the charity’s benefits in a material way related to the charity’s aims.

### Charitable purposes: specific examples

Given that the Act provides for the preservation of previous law, it is appropriate to look at some of the purposes listed in the Act and look at the previous case law to see how these purposes may be interpreted.

#### Trusts for the prevention or relief of poverty

This is analogous to the previous category, trusts for the relief of poverty, though with the extension to prevention.

#### Poverty: absolute or relative?

Poverty may mean different things to different people. Those who have been wealthy but are no longer so may regard themselves as poor even though still comparatively well off. Support for the relative approach is to be found in the words of Sir Raymond Evershed in *Re Coulthurst* [1951] Ch 661:
Poverty, of course, does not mean destitution. It is a word of wide and somewhat indefinite import, and, perhaps, it is not unfairly paraphrased for present purposes as meaning persons who have to ‘go short’ in the ordinary acceptation of that term, due regard being had to their status in life and so forth.

Two points may be elucidated from this statement. First, a person may in legal terms be poor without being entirely without means. The term is wide enough to embrace anyone who does not have enough. Thus, in Re de Carteret [1933] Ch 103, the term was taken to cover women with an income of between £80 and £130 per annum. Though in straitened circumstances such a level of income would not have put them among the poorest in 1933. Secondly, the reference in Sir Raymond Evershed’s statement to ‘regard being had to their status in life’ seems to imply that poverty is different for different people and dependent on the level of wealth to which they are accustomed. Does a millionaire become poor when he loses half his millions? It would appear from Re de Carteret that one may be legally poor even though others are poorer but there must surely be some limit on the extent to which accustomed lifestyle can affect a person’s individual definition of poverty. Such a limit appears to have been identified by Lord Simonds in IRC v Baddeley [1955] 1 All ER 525:

There may be a good charity for the relief of persons who are not in grinding need or utter destitution . . . but relief connotes need of some sort, either need for a home, or for the means to provide for some necessity or quasi-necessity, and not merely for an amusement, however healthy.

It is submitted that the reference to necessity or quasi-necessity implies an objective, absolute standard, rather than one relative to the station in life of the claimant.

Restriction to those who are poor

It is clear that, whatever the definition of poverty is to be, the gift must be in terms that exclude those who are not poor. The gift in Re Gwyon [1930] 1 Ch 255 failed on this ground. The purpose of the somewhat eccentric gift in this case was to provide ‘knickers’, a variety of short trousers, for boys in Farnham. It may be that the provision of trousers could be regarded as a necessity, but the gift did not restrict the claimants to poor boys in Farnham. It could thus not be for the relief of poverty and so failed as a charity. Nor have the courts been very ready to assume that poverty is implied by other terms used to identify the class, except in exceptional circumstances. Such an exceptional case is Re Niyazi [1978] 3 All ER 785. A relatively small sum (£15,000) was left to build a working men’s hostel in Famagusta, Cyprus. The size of the gift, the use of the term ‘hostel’ and the chronic housing shortage in Famagusta were all regarded as evidence that the hostel would only be used by those too poor to afford anything better. This case has been and should be regarded as borderline, if only because it fails to interpret the gift on its face, normally a basic principle of charity law, and seeks to go behind the actual wording and take account of extrinsic facts.

Public benefit requirement in poverty cases

Trusts for the relief of poverty form a major exception to the usual rule as laid down in Re Oppenheim. The courts have long accepted the so-called ‘poor relation’ exception, whereby a valid trust can be established for the relief of poverty among the settlor’s poor
relations. This is valid so long as the class of beneficiaries is not further restricted, for example, to a group of named relations. The question was reviewed in *Dingle v Turner* [1972] 1 All ER 878. In this case, a trust was established for the benefit of poor employees of Dingle & Co. The class was therefore identified by a personal nexus, that is they were all employees of the same firm, such as had been held invalid in *Re Oppenheim*. On the authority of the ‘poor relations’ cases the court held that poverty was an exception: a trust for poor persons who are also identified by a common ancestor, employment by the same firm or some other personal nexus, does not lack the necessary public benefit.

The essential difference between charitable and private trusts in this area is between gifts for the relief of poverty among poor people of a particular description (which is charitable), and gifts to particular persons, the relief of poverty being the motive of the gift (which is not charitable). A gift for the relief of poverty in a particular class of relations could therefore be charitable: in *Re Scarisbrick’s Will Trust* [1951] 1 All ER 822, the class named was ‘the relations of my son and daughter’. It appears that even a selected group of relations may qualify, in the light of *Re Segelman* [1995] 1 All ER 676. In that case the testator listed some, but not all, of his siblings, and stated that they, together with their issue, formed the class to be benefited.

The Commission accepts that traditionally Poverty cases have been viewed more generously, in that the benefits may be limited to a more closely knit group than is possible under other heads of charity. The Commission recognise as a general principle that what is acceptable as a restriction will depend upon the purpose of the charity, so public benefit will vary. Accordingly, there might be circumstances where a narrow beneficial class, such as employees of a firm or relations of an individual, is a sufficient section of the public for relief of poverty. Nonetheless, the Commission clearly regard the ‘poor relations’ cases as anomalous and invite debate on this issue. They do not appear to share the same concern about restriction to a firm’s employees, as long as the purpose is purely relief of poverty.

**Trust for the advancement of education**

This is specifically referred to in the list in S2(2) of the 2006 Act, and once again, the previous case law is instructive.

Lord Hailsham, in *IRC v McMullen* [1980] 1 All ER 884, said of education:

> when applied to the young [it] is complex and varied . . . It is a balanced and systematic process of instruction, training and practice containing both spiritual, moral, mental and physical elements.

It may be assumed therefore that anything which forms part of the normal educational process and which can be said to fall within that definition will be regarded as education and that any trust for the advancement of such things will be charitable, subject to the requirements of public benefit. Certainly, physical education and sports, together with games of a more cerebral nature and other extracurricular activities such as field trips, have all been held to fall within the ambit of education, provided they are for the young, who it is assumed are still undergoing a process of education and development. The courts will reserve to themselves the right to exclude things which they regard as harmful: Harman J in *Re Shaw* [1957] 1 All ER 748 stated that schools for prostitutes or pickpockets would not be regarded as charitable. Subject to such value judgments, however, those things which are normally associated with education both mental and physical,
together with ancillary activities, will ordinarily be recognised as valid objectives to be promoted through charity.

**Education and politics**

Attempts to disseminate political propaganda under the guise of education have been consistently rebuffed by the courts. Similarly, educational charities will be restrained from using their resources for political purposes. Thus, in *Baldry v Feintuck* [1972] 2 All ER 81, Sussex University Students’ Union, a registered charity, was restrained from spending money on a campaign to restore free school milk. Since this was an attempt to challenge government policy, it was regarded by the courts as political and not charitable.

This has been confirmed in the case of *Re Webb v O’Doherty* (1991) *The Times*, 11 February, where an injunction was granted to restrain a students’ union from spending money in support of a campaign against the Gulf War. Hoffmann J drew a clear distinction between the discussion of political issues, which could be a legitimate educational activity and so charitable (see *A-G v Ross* [1985] 3 All ER 334), and campaigning in the sense of seeking to influence public opinion on political matters, which cannot be charitable. The whole issue of political activity by charities is a difficult one and will be considered further at a later stage.

That the line between education and political propaganda is a fine one is indicated in the Charity Commissions’ own policy on the issue, as stated in their guidelines. Where the charity’s objects include the advancement of education, care should be taken not to overstep the boundary between that and political propaganda. If the avowed objects of the organisation are ambiguous, the Commission is entitled to look at the surrounding circumstances to determine the true purpose of the organisation before deciding whether or not to register it as a charity. Thus, in *Southwood v A-G* (1998) *The Times*, 26 October, the express objects of PRODEM were ‘the advancement of the education of the public in the subject of militarism and disarmament’. In practice this went beyond educating the public in peaceful means of dispute resolution, and identified ‘militarism’ with current policies of western governments with the intention of challenging those policies. This ‘clear and dominant message’ was political, and, accordingly, Carnwath J upheld the Commissioners’ decision to refuse registration. The decision was subsequently confirmed by the Court of Appeal ((2000) *The Times*, 18 July).

In the conduct of research, a charity must aim at objectivity and balance in the method of conducting research projects; and in publishing research the aim must be to inform and educate the public rather than to influence political attitudes. (One is tempted here to observe that research which is not balanced and objective is hardly good research and would surely be of little educational value anyway.)

**Educational charities: public benefit**

The test for public benefit in educational charities, which states that, to be charitable, an educational trust must be for the benefit of the public or a section of the public, and not be limited to a group identified by some personal nexus, has already been discussed above. The specific issue of fee-paying schools under the 2006 Act is referred to above.

**Advancement of the arts, culture, heritage or science**

This new heading would appear to cover in part those things which were formerly, rather uncomfortably, placed under the head of education.
Research

Research could come under a number of headings, depending on the topic of the research, but it is clear that the subject of the research must itself be useful, a value judgment, and that the gift must make some provision for the information gained to be disseminated and made available for study. The essential characteristic here is that gifts, to be charitable, must be for the advancement of the subject researched, not merely the acquisition of knowledge in a vacuum.

Thus, in *Re Hopkins* [1964] 3 All ER 46, money was given to the Francis Bacon society to search for the Bacon–Shakespeare manuscripts. In other words, money was provided to discover documentary proof that Shakespeare's plays were written by Francis Bacon and to discover the original manuscript of these plays. This gift was held to be a charitable one. In the words of Wilberforce J:

A search for the original manuscript of England's greatest dramatist (whoever he was) would be well within the law's conception of charitable purposes. The discovery would be of the highest value to history and to literature.

The broader requirements of research, if it is to be charitable, were also identified by Wilberforce J:

... the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation.

In *Re Shaw* [1957] 1 All ER 748, in which George Bernard Shaw left money for the development of a 40-letter alphabet and the translation of one of his plays into this new alphabet, Harman J indicated that the mere acquisition of knowledge would not per se be a charitable object. *Re Hopkins*, on the other hand, indicated that it would, provided it was of educational value to the researcher. The whole issue of the position of research as a charitable object has been further considered and clarified in *McGovern v A-G* [1981] 3 All ER 493 by Slade J, who stated:

(1) A trust for research will ordinarily qualify as a charitable trust if, but only if (a) the subject matter of the proposed research is a useful object of study; and (b) it is contemplated that the knowledge acquired as a result of the research will be disseminated to others; and (c) the trust is for the benefit of the public, or a sufficiently important section of the public. (2) In the absence of a contrary context, however, the court will be readily inclined to construe a trust for research as importing subsequent dissemination of the results thereof. (3) Furthermore, if a trust for research is to constitute a valid trust for the advancement of education, it is not necessary either (a) that the teacher/pupil relationship should be in contemplation, or (b) that the persons to benefit from the knowledge to be acquired should be persons who are already in the course of receiving ‘education’ in the conventional sense.

Artistic pursuits

A gift for the promotion of artistic pursuits per se is not charitable, if for no other reason than that it is too vague. Trusts for specific artistic purposes, on the other hand, may be charitable. As Lord Greene said in *Royal Choral Society v IRC* [1943] 2 All ER 101: ‘In my opinion, a body of persons established for the purpose of raising the artistic state of the country is established for charitable purposes.’
So it has been held that a trust for the promotion of the works of a famous composer is charitable: *Re Delius* [1957] 1 All ER 854. Artistic purposes may also include social graces, as was shown in *Re Shaw's Wills Trust* [1952] 1 All ER 49, where the wife of George Bernard Shaw left money for what was described as a sort of finishing school for the Irish people, where ‘self control, oratory, deportment and the arts of personal contact’ were to be taught. Vaisey J concluded that the gift was charitable, stating that education included ‘the promotion and encouragement of those arts and graces of life which are, after all, perhaps the finest and best part of the human character’.

To hold such a gift to be charitable, the court has to be convinced that the thing to be advanced is of artistic merit. The work of an established composer or social graces have been held to be meritorious, as the two cases previously mentioned indicate. Where there is any doubt as to the merit, however, the court may take the evidence of expert opinion. Once again, it does not matter whether the donor himself considers the matter of merit.

This was made very clear in the case of *Re Pinion* [1964] 1 All ER 890. Here, the testator left his studio and contents to be used as a museum to display his collection of art. Experts were of the opinion that the collection was virtually worthless and of no artistic merit whatever. One expert even expressed surprise that the testator had not managed to acquire even one item of value, if only by accident. The display of this collection could not be regarded as of any educational value and, accordingly, the gift failed as a charity. In the words of Harman LJ, ‘I can conceive of no useful object to be served by foisting on the public this mass of junk.’

These purposes, which fitted rather awkwardly under the general educational heading, are now specifically articulated in the 2006 Act, which refers in section 2(2) (e) to ‘the advancement of citizenship or community development’; and in (f) to ‘the advancement of the arts, culture, heritage or science’. Science is thus formally added to the arts as a legitimate topic for promotion.

**Charitable Purposes: Specific Examples**

**Trusts for the advancement of religion**

Under previous law the term ‘religion’ was held, by Lord Parker in *Bowman v Secular Society* [1917] AC 406, to include any monotheistic theism or belief in one God. The Charities Act 2006, while preserving, in section 2(2) (c), the advancement of religion as a charitable purpose, formally recognises the wider scope of religion, by stating, in section 2(3) (a): that religion ‘includes (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god’.

It should be noted that also included under this heading are satellite religious purposes, such as the maintenance of religious buildings. This extends even to tombs and monuments if they are part of the fabric of the church. Other satellite purposes include the support of sick and aged clergy: see *Re Forster* [1938] 3 All ER 767.

Despite the obvious implications for the issue of public benefit, it does not apparently matter that the members of the religious group are few or that, at least in the context of Christian sects, their theology is doubtful. In *Thornton v Howe* (1862) 54 ER 1042, a trust was established for the publication of the writings of Joanna Southcott, a religious mystic who believed herself to be with child by the Holy Ghost. This was held to be charitable. More recently, in *Re Watson* [1973] 3 All ER 678, a similar trust was established to publish books and tracts by Hobbs, the leader of a very small non-denominational Christian group. Though expert theologians considered the works to have no merit, the group were sincere in their beliefs.
Public benefit in religious charities

The public benefit requirement of religious trusts is met not from the numbers of persons who participate in the religious group or activity but rather that the community as a whole benefits from the presence of religious people in it. The law assumes that some religion is better than none and that religious people are an asset and an example to everyone. As Cross J said in *Neville Estates v Madden* [1961] 3 All ER 769: ‘The court is entitled to assume that some benefit accrues to the public from attendance at places of worship of persons who live in this world and mix with their fellow citizens.’

In the draft guidelines on public benefit and the advancement of religion the Commission expresses this in terms of a range of social benefits, the broadest of which are ‘the promotion of social cohesion’ and ‘the inspiration religion can provide for others’.

The principle that public benefit derives from the presence of religious people in the community inevitably implies that religious people who are isolated from the community cannot benefit it. This was held to be so in *Gilmour v Coats* [1949] 1 All ER 848.

A gift was given to a small contemplative order of nuns. This community was cloistered and had no contact with the outside world. The House of Lords held that the gift was not charitable. The necessary public benefit was not to be found in the prayers and intercession which the nuns made on behalf of members of the public who requested it; this was held to be ‘manifestly not susceptible of proof in a court of law’. Nor was benefit to be found in the edifying example set by the nuns’ spiritual life, nor in the fact that that religious life was open to any Catholic woman who might choose it.

In short, then, the public benefit derived from religious charities is not the direct one of membership of a religious group nor the spiritual benefit which believers presumably believe they derive from living a religious life. For a religious gift to be charitable the public must be able to derive a benefit from the presence of religious people in the community.

The public accessibility argument seems also to have held sway in *Re Hetherington* [1989] 2 All ER 129, a case concerning the saying of masses for the soul of the testator. There had previously been doubts over the charitable status of such gifts since, as in *Gilmour*, the primary intended benefit, to the soul of the deceased, was not quantifiable in the court-room. However, in *Hetherington*, Browne-Wilkinson V-C held, first, that the saying of masses for the dead was *prima facie* charitable as a religious purpose and, secondly, that the public benefit was provided by the fact of the masses being said in public. Once again, it was not that individuals might participate in the ceremonies, but rather that their public nature provided an edifying example of religious observance.

That purely private religious services are not charitable has been confirmed in *Re Le Cren Clarke* [1996] 1 All ER 715. The contrast between this case and *Re Hetherington* was that in *Re Hetherington* the services could be conducted either in public or in private and the judge was entitled to take a benignant view of the gift and assume that they would be held in public. In *Re Le Cren Clarke*, on the other hand, evidence clearly indicated that the services were conducted in private, so there was no room for a benignant assumption where the facts were clear (though it was also held on the facts that the services were merely ancillary, so the gift as a whole was upheld as charitable). The case appears also to recognise faith healing as charitable within this heading of charity.

On the ‘access’ point the Commission states that it would generally expect the religion to be open to anyone interested and that if some form of tithing (i.e. the members of the group paying some of their income for the church’s support) were applied, there would be a need to ensure that the poor were not excluded. As in all public benefit, any
exclusion could not be arbitrary and should relate to the fulfilment of the charities purposes.

### The advancement of health or the saving of lives

This will include, among other things, trust formerly recognised under the heading of trusts for the sick and aged. Examples of valid charitable trusts for the aged or sick are numerous: *Re Robinson* [1950] 2 All ER 1148 provided for gifts to persons over 60 years of age; *Re Lewis* [1954] 3 All ER 257 provided for a gift of £100 each to ten blind girls and ten blind boys in Tottenham. Neither of these, it should be noted, contained an additional requirement of poverty. The absence of a poverty requirement means that the poor can even be excluded, by, for example, charging for the facilities provided. In *Re Resch’s Will Trusts* [1969] 1 AC 514, a private hospital charging fees to patients was held to be charitable. (Note, however, that no private profit was made.) In *Joseph Rowntree Housing Association v A-G* [1983] 1 All ER 288, the question arose of whether such associations had to limit themselves to poor tenants in order to retain their charitable status. The court held not. However, this must be seen in light of the discussion about public benefit in fee charging charities above.

Relief of the sick and aged includes ancillary purposes such as providing nurses’ accommodation or facilities for the relatives of the critically ill.

Section 2(2)(d)), and states that this heading includes the prevention or relief of sickness, disease or human suffering. The Act also identifies as a charitable purpose the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage (section 2(2)(j)), which would cover this heading as well as poverty cases.

### The advancement of animal welfare

The benefit involved here is not that which animals may derive from being protected or cared for, but rather the indirect moral benefit to mankind. As Swinfen-Eady LJ observed in *Re Wedgewood* [1915] 1 Ch 113:

A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals; and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

Once again, it is the indirect benefit to the community as a whole which counts and so as with religion it is necessary that the example of kindly behaviour is a public one. An attempt to protect animals in isolation from humans thus lacks the necessary benefit, as emerged in *Re Grove-Grady* [1929] 1 Ch 557. In this case, the testator left money to provide ‘a refuge or refuges for the preservation of all animals, birds or other creatures not human . . . so that they shall be safe from molestation and destruction by man’. Since man was entirely excluded, he had no opportunity to be elevated and so there was no public benefit. Valid animal charities have often been concerned with organisations such as animal hospitals and homes: it is submitted that organisations involved in wildlife preservation and nature reserves satisfy the benefit requirements because humanity, though controlled, is not excluded. There is also commonly a strong educational element. That the animals’ own benefit is irrelevant is further stressed by the fact that human benefit outweighs animal welfare in matters such as vivisection and organisations opposed to vivisection are not charitable.
SPORTING AND RECREATIONAL TRUSTS

Sporting and recreational trusts

The 2006 Act refers specifically to the advancement of amateur sport as a charitable purpose (s 2(2)(g), and expands on this in s 2(3)(d) by explaining that ‘sport’ means sports or games which promote health by involving physical or mental skill or exertion. The Act also, in s 2(4), preserves anything which was charitable by virtue of section 1 of the Recreational Charities Act 1958. This warrants some explanation.

Purely recreational pastimes were not recognised as charitable purposes and many trusts have failed to achieve charitable status because they have included the promotion of sports and recreation. Thus, in IRC v City of Glasgow Police Athletic Association [1953] 1 All ER 747, the Association had as its object ‘to encourage and promote all forms of athletic sport and general pastimes’. Although it existed to improve the police force’s efficiency, the inclusion of a merely recreational element was fatal to its charitable status. Advancement of amateur sport under the 2006 Act would not save it either since the purposes included ‘pastimes’ outside sport.

Fears for the charitable status of a number of organisations having a partly recreational purpose led to the passing of the Recreational Charities Act 1958, s 1 of which, as amended by the 2006 Act, provides:

(1) Subject to the provisions of this Act it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interest of social welfare.

Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

(2) The requirement in subsection (1) that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

(2A) The basic conditions are—

(a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and

(b) that either—

(i) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or

(ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

Subsection (3) then states that the section refers in particular to certain specific facilities such as village halls and women’s institutes.

The purpose of the statute was therefore, in effect, to add to the categories of valid charity the provision of certain recreational facilities. It is to be noted that the general requirement of public benefit is not removed. This would presumably mean that recreational facilities for the disabled, while perhaps satisfying the requirement of social benefit, would not be for public benefit if the benefit were restricted to the employees of a particular firm. This would even be so if the intended beneficiaries were poor, despite Dingle v Turner, because a recreational facility would not be for the relief of poverty.

The section only validates those recreational facilities which are for ‘social welfare’. Subsections (2) and (2A) then state the minimum requirements for social welfare. Clearly, the courts could decide that social welfare is lacking even where subsection (2) is...
satisfied: for example, if the court felt that the leisure activity were harmful, despite being intended to improve the conditions of life of the primary beneficiaries. These minimum requirements are intended to exclude facilities run for profit, which would not be provided with the object of improving conditions of life, but rather with the object of making money. Facilities open to the public generally must still be there for the object of improving the conditions of life of the primary beneficiaries. These beneficiaries may be the public at large or perhaps some more restricted group who it is anticipated will make most use of the facilities. Thus, a public bath-house will, as its name implies, be open to the public, but it is presumably intended primarily to improve the lives of those too poor to have their own baths. Whoever the primary beneficiaries are, it is clear that their condition of life can be improved even if they do not fall into one of the specified deprived categories identified in the Act. As Bridge LJ stated in IRC v McMullen: ‘Hyde Park improves the condition of life of residents in Mayfair as much as for those in Pimlico or the Portobello Road.’ This view was approved by the House of Lords in Guild v IRC.

**Guild v IRC [1992] 2 All ER 10**

In this case the testator left the residue of his estate to the Town Council of North Berwick ‘for use in connection with the Sports Centre in North Berwick or some similar purpose in connection with sport’. At the time of his death the Town Council of North Berwick had ceased to exist, so the question arose whether the money could be applied cy-près (the principles of which are explained below). However, it was first necessary to decide whether the bequest was charitable. Was a sports centre provided in the interests of social welfare in accordance with the Act? Applying Bridge LJ’s view, Lord Keith stated:

> The fact is that persons from all walks of life and all kinds of social circumstances may have their conditions of life improved by the provision of recreational facilities of a suitable nature.

Accordingly, the facilities here were so provided and the gift was charitable. It appears to follow that, where facilities are available to the general public, they will only fail for lack of social welfare if they are for private profit, or the facilities are ‘unsuitable’. The House of Lords was satisfied that the facilities of a sports centre were ‘suitable’. Only if access is restricted, it seems, must the class benefited, or at least the group primarily benefited, be within the deprived categories.

It should also be noted that the testator did not restrict the gift solely to the sports centre, but allowed it to be spent, in the alternative, on ‘some similar purpose in connection with sport’. It was argued that this was too uncertain and might allow the money to be spent on purposes outside the Recreational Charities Act and hence not charitable. The House of Lords adopted the ‘benignant’ approach which is traditionally adopted by the English courts to the interpretation of charitable gifts. (Though this was a Scottish case, concerned with tax, the same approach must be adopted.) As a matter of construction of the gift, the testator must have intended something similar to the sports centre, and since the sports centre satisfied the requirements of the Act, then so would the ‘similar’ purpose. This will clearly be significant to the broader issue of certainty in charities, considered above, and also to the requirement of exclusive charitability. Though this case could, presumably, now fall within the specific heading of the advancement of amateur sport, the general approach to interpretation is still valid.
Trusts for the benefit of localities

It has already been noted, in discussing public benefit, that the inhabitants of an area such as a town or parish can constitute a section of the public and thus satisfy the requirement of public benefit. This is subject to the Commission’s guideline that if the benefit is to a section of the public, the opportunity to benefit must not be unreasonably limited either by geographical or other restrictions.

There is in addition a long-established rule of construction that if a trust is created for the benefit of a particular area, town, village, etc., it is treated as being for charitable purposes within that area, even though no specific purposes are stated. The most extreme example of this is probably *Re Smith* [1932] 1 Ch 153, where the gift was simply ‘to my country, England’. This was treated as being limited exclusively to charitable purposes in England. It should be noted that this rule will not apply if the testator identifies specific purposes. If these are charitable then the gift will be charitable, but if the money is to be spent, or could be spent, on non-charitable purposes the gift will fail and the fact that it is for a particular place will not save it. Thus, in *Houston v Burns* [1918] AC 337, money was left for public, beneficial or charitable purposes in a particular parish. As will shortly be seen, public and beneficial purposes are not necessarily charitable and so the gift could not be a valid charitable one. The idea of locality has been contrasted with other attempts to restrict to racial or ethnic groups: such restrictions are not taken as implying charitable intent.

It appears, however, that the locality argument can apply to uphold a gift as charitable even where the class to be benefited is some defined group within the locality, rather than merely for the benefit of the locality as a whole, again subject to the Commission’s guidelines. Thus, in *Goodman v Saltash Corporation* (1882) 7 App Cas 633, the House of Lords interpreted rights held by the corporation for the benefit of the freemen of the borough as being held on charitable trust. As Lord Selborne stated (at 643): ‘A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of a particular class of such inhabitants, is (as I understand the law) a charitable trust.’

Whether the limitation is merely to a locality, or to a class within that locality, it must be stressed that, though no specific purpose is stated in the gift, the trustees can only apply it to charitable purposes within the class.

This point was brought out clearly in the case of *Peggs v Lamb* [1994] 2 All ER 15. Since time immemorial the freemen of the Borough of Huntingdon had enjoyed grazing rights on certain common lands. In the course of time these rights had been commuted to money payments, and some of the lands had been sold off and the money reinvested, so that there was now a substantial money income available for distribution. At the same time the number of freemen (originally the voters of the borough, but since 1835 for most purposes an obsolete category of residents in the borough), had declined, so that by 1991 there were only 15 members of the class.

The issue before the court was the nature of the freemen’s rights, and the possibility of amendment of the terms of the trust, which was registered as a charity.

After a lengthy discussion of the nature of the right, Morritt J, following *Goodman v Saltash*, concluded that the property was held on charitable trust. It followed, therefore, that the trustees must apply the funds to charitable purposes. The trustees had been in the habit of distributing the income equally among the freemen, so that, with the rise in income and the fall in the number of freemen, each freeman was now receiving about £30,000 per annum. In Morritt J’s view this was clearly not a proper application of the
funds. The vital point here was that, however the money was applied, it must be in fulfilment of the purpose of the gift. Morritt J recognised that in some cases an equal distribution might be a proper fulfilment of the purpose, but it was not so here:

I do not think that the usage since time immemorial justifies the presumption that the trust existed for the purpose of benefiting the freemen individually, though the provision of such benefits might in suitable circumstances be the way in which the purpose is achieved. There is a difference between the purposes of the trust and the means by which the purpose may be achieved.

A trust whose purpose was equal distribution could not be charitable, because such a purpose could not come within the spirit and intendment of the preamble. Neither could the trust in this case be interpreted as a private trust, because it would have been void for perpetuity.

The purpose of the charitable trust must be fulfilled in some way other than by equal distribution, and yet the rights were clearly restricted to the class of freemen, which by 1991 was very small. The terms of the trust were therefore amended (see below, under ‘Cy-près’). It seems rather unlikely that the anomalous and anachronistic class of freemen would constitute a section of the public under present guidelines, but the issue of equal distribution is still valid, and would apply even if the class were, for example, the inhabitants of Huntingdon.

A political trust is one which has as its purpose the changing of the law. Thus, in *National Anti-Vivisection Society v IRC* [1947] 2 All ER 217, one of the purposes of the society being to change the law regarding vivisection, the court held that it could not be a charity. One former reason for not holding political trusts to be charitable, as indicated by Russell LJ in *Incorporated Society for Law Reporting v A-G* [1971] 3 All ER 1029, is that such a purpose could not have been contemplated when the Statute of 1601 was passed. The more conventional reasoning, applied in the *National Anti-Vivisection Society* case, is that given by Lord Parker in *Bowman v Secular Society* [1917] AC 406:

\[\ldots\] a trust for the attainment of political objects has always been held invalid, not because it is illegal \ldots 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.

The issue of political activities by charities has been a matter of concern of late, with organisations such as Oxfam being censured. The line between seeking to treat society’s ills and seeking to cure them through legislation is a difficult one to draw, but the Charity Commission has indicated that charities who indulge in political activity which is more than merely ancillary to their main purposes risk loss of charitable status. It is also clear that political activity includes activity in relation to foreign governments, as in the case of Amnesty International, which seeks to influence foreign government policy: for example, by seeking the release of political prisoners and banning torture. It was held, in *McGovern v A-G* [1981] 3 All ER 493, not to be charitable.

In its report, ‘Private Action, Public Benefit’, which lead to the passing of the 2006 Act, the Government Strategy Unit recognised the important potential role of charities as advocates of social change, and suggested the current law was unclear as to what activities are permitted.
The latest guidelines from the Commission, issued in April 2008, state that a charity cannot exist for a political purpose, which is any purpose directed at furthering the interests of any political party, or securing or opposing a change in the law, policy or decisions either in this country or abroad. Nevertheless, campaigning and political activity can be legitimate and valuable activities for charities to undertake, but only in the context of supporting the delivery of its charitable purposes. Thus charities can campaign for a change in the law, policy or decisions where such change would support the charity’s purposes. An example would be campaigns for an increase in social security benefits, if this would further the charity’s objective of relief of poverty. Further guidance can be found on this on the Commission’s website: www.charity-commission.gov.uk.

The crucial distinction is between having political aims, which could not be charitable, and having charitable aims, which one might seek to promote through political activities, which could be within a charity’s function.

**Exclusively charitable requirement**

**The general rule**

Since, to achieve charitable status, a gift’s purposes must fall within the definition of charity, it follows that a gift cannot be charitable if some of its purposes are not charitable. It has already been seen, for example, that the inclusion of political purposes will prevent an organisation from being charitable (McGovern v A-G), even though the organisation may have other purposes which by themselves would be charitable. Settlors who identify a number of purposes for their gifts must therefore be particularly careful to ensure that all these purposes are charitable, otherwise the whole gift may fail: if a trust is created for several purposes it will not usually be possible to save the charitable ones and reject the others. It is therefore customary to include some saving clause to the effect that the gift is to take effect only in so far as the purposes are recognised as charitable. Even where no specific purposes are stated, the settlor must ensure that the money can be spent only on charity. A direction that money be spent on ‘charitable purposes’ is, of course, perfectly valid since there is no need to identify purposes with the certainty required for other trusts, but if some other general adjective such as ‘benevolent’ is used, this will normally fail as a charity: beneficence is not synonymous with charity. Thus the Privy Council, in A-G of the Cayman Islands v Wahr-Hansen [2000] 3 All ER 642, has recently held that gifts to ‘organisations or institutions operating for the public good’ and acting ‘for the good or for the benefit of mankind . . .’ were not exclusively charitable purposes; the words used were wider than charity. It is also a general rule that a limitation to, for example, ‘charitable and deserving’ is effective whereas a gift to ‘charitable or public’ is not, for in the first case the money must go to charitable purposes whereas in the second it can go to public purposes which are not necessarily charitable. (Indeed, the phrase seems to recognise that the two words are not the same.) See Re Sutton (1884) 28 Ch D 464 and Blair v Duncan [1902] AC 37 respectively. Another example is the benignant approach adopted in Guild v IRC, where the phrase ‘or some similar purpose’ was held to imply ‘some similar charitable purpose’, since the primary purpose was charitable (see further under ‘Sporting and trusts’ recreational, above). Such cases must be seen as matters of construction on the words of each case, however.

To this exclusivity rule there are, however, several exceptions.
Ancillary purposes

A trust will not fail as a charity if the non-charitable purpose is merely ancillary to the main, charitable one. This is inevitably a matter of degree. It is also a matter of the function of the non-charitable purpose. It appears from McGovern v A-G (above), in the words of Slade J, that:

The distinction is between (a) those non-charitable activities authorised by the trust instrument which are merely incidental or subsidiary to a charitable purpose and (b) those non-charitable activities so authorised which themselves form part of the trust purpose. In the latter but not the former case the reference to non-charitable activities will deprive the trust of its charitable status.

Thus, the political activities of Amnesty International discussed above fell into the second category and so the organisation could not be charitable.

Whether a purpose is merely ancillary is very much a matter of considering the underlying purposes of the gift, viewing the gift as a whole. Thus, in Re Le Cren Clarke [1996] 1 All ER 715, the testatrix left her estate ‘for the furtherance of the Spiritual Work now carried on by us’. The context made it clear that the testatrix was thinking of the faith healing which she and a small group of friends participated in: this was the essence of the work referred to, and the religious services she and her friends held which, being private, were not in themselves charitable, were merely ancillary to that essence.

Severance

Depending upon the wording used by the settlor, it is sometimes possible to separate charitable and non-charitable purposes and divide the fund between them, or in other words to sever the charitable part from the non-charitable. This will allow the charitable part to take effect validly, provided it does not fail on some other ground. The validity of the non-charitable part will then be determined by the application of the rules relating to non-charitable trusts or may possibly take effect as some other form of transfer. Severance is only possible, however, where it is clear from the wording of the gift that the donor intended some form of division of the fund; it cannot apply where the donor simply lists a number of purposes or beneficiaries to which a single fund is to be applied or where the trustees are allowed to choose from a range of purposes. Thus, a common form may be to state that such of the fund as is needed may be applied to a charitable purpose and the residue be applied to something else. The question arises of how the fund is to be divided between the charity and the non-charitable gift. The *prima facie* rule is for an equal division based on the maxim that equality is equity. Thus, in Salisbury v Denton (1857) 3 K & J 529, money was left for the founding of a charity school and for the testator’s relatives. No indication was given as to the division of the fund, so the court ordered equal division. Often, however, such a division is impractical and indeed is clearly not the donor’s intention, as in the example given above where only the residue is to be spent on the non-charitable purpose. The court still has to make a division and must find sufficient evidence upon which to make that division.

Re Coxon [1948] Ch 747

In this case, the testator left £200,000 to the City of London for charitable purposes but also provided that out of this fund the members of the board of trustees were to be paid an attendance fee of £1 at meetings and that £100 be spent on an annual banquet for the trustees. The court held that equal division was not appropriate and decided that the maximum amount
needed to meet these non-charitable costs be set aside and that the rest of the fund was applied exclusively to charity.

Where the amount to be spent on charity cannot be quantified the whole gift will fail as a charity, though, as a matter of construction, where the gift is for a charitable and a non-charitable purpose, if the non-charitable purpose fails the whole fund can then be applied to charity. It is also the case that where money is given to a charity with the understanding that the charity will maintain the donor’s tomb the gift is regarded as exclusively charitable even though part of the fund will be spent on that non-charitable purpose. (Note that there must not be an obligation on the charity to maintain the tomb, though the continuance of the gift may be dependent on their doing so.)

Charitable Trusts (Validation) Act 1954

The function of this legislation is to protect certain charitable trusts whose validity had been brought into question by the decision in the following case.

Chichester Diocesan Fund v Simpson [1944] 2 All ER 60

In this case the testator had left his residuary estate for ‘such charitable institutions or other charitable or benevolent object or objects as his executors might in their absolute discretion select’. The use of the term ‘charitable’ or ‘benevolent’ was fatal since it permitted the trustees to select benevolent purposes which might not be charitable within the meaning of that term. The House of Lords stressed that ‘charity’ had a technical, legal meaning and that ‘benevolent’, besides being uncertain, did not have the same meaning. The testator’s use of the term benevolent may indicate that he intended the money to go to purposes that were charitable ‘in the popular sense’, but that sense was not necessarily the same as the legal meaning. Thus, the gift failed as it was not exclusively charitable.

This decision called into question the validity of a large number of trusts previously assumed to be valid charities and so the Charitable Trusts (Validation) Act 1954 was passed to protect them. It is of declining importance since it applies only to trusts taking effect before 16 December 1952. It therefore preserves existing trusts but not later ones, presumably on the grounds that the drafters of later trusts and gifts should be aware of the problem and take account of it.

The Act applies where the terms of the gift are such that the money can be applied exclusively to charitable objects but can be applied to other, non-charitable objects as well. Such a provision is referred to in the Act as an ‘imperfect trust provision’. The Act further states:

any imperfect trust provision contained in an instrument taking effect before the sixteenth day of December 1952, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies –

(a) as respects the period before the commencement of the Act, as if the whole of the declared objects were charitable; and

(b) as respects the period after that commencement, as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable objects.
In other words, whatever these charities were spending their money on before the date of commencement is deemed in retrospect to be charitable. After the date of commencement they are allowed to spend it only on charitable purposes, whatever the terms of the trust say.

The Act does not apply where the terms of the trust divide the fund between charitable and non-charitable purposes (though severance might apply here). It applies only where there is an undivided fund which by its terms can be applied exclusively to charity. This will be clear if the settlor refers to charity specifically or lists purposes including charitable ones. A problem arises where charity is not specifically mentioned. It is submitted that provided there is reference, express or implied, to charitable and non-charitable purposes, this will be sufficient to bring the trust under the Act. Charity may be inferred from phrases such as ‘charitable or benevolent’ or even ‘benevolent or welfare purposes’, as in *Re Wykes* [1961] Ch 229. It should be added, however, that in *Re Gillingham Bus Disaster Fund* [1958] 2 All ER 749, the Court of Appeal was divided on whether the reference to charity needed to be express rather than implied.

The Act was recently considered in *Ulrich v Treasury Solicitor* [2005] EWHC 67 [2005] 1 All ER 1059. This case concerned a trust deed of 1927 established for the benefit of a class of beneficiaries; the employees of a company and their families. The trust was not specifically limited to the relief of poverty, and it was therefore argued that it was not a charitable trust and that it did not have a sufficient flavour of charity to be an ‘imperfect trust provision’ under the Act. Hart J applied a broad construction to the wording of the Act and held that it was not confined to trusts where charitable purposes were expressly stated, but included cases where the purposes could be construed as including charitable ones. It was possible within the broad wording of this trust to apply the money to a charitable purpose, the relief of poverty, and the money had so been applied. Accordingly it fell within the Act and so would be construed as for charitable purposes only.

**Discrimination**

The effects of anti-discrimination legislation on charity should be noted.

It would appear that the general principle of the Race Relations Act 1976, that discrimination on the grounds of colour, race, nationality or ethnic or national origin is unlawful, applies to charitable trusts. Additionally, s 34 of this Act provides that where the class to be benefited is defined with reference to colour, that reference is to be disregarded, and the charity is to be available to benefit the class which results when the reference to colour is ignored (see below for the application cy-près of charities previously restricted to certain races). By contrast, it is perfectly possible to have a charity whose benefits are restricted to a single sex and, by s 43 of the Sex Discrimination Act 1975, nothing done to comply with that provision is rendered illegal by the Act. Under s 78, however, educational charities may apply to the Secretary of State for an order to remove any restrictions as to sex in the terms of the charity, which the Secretary of State may grant if satisfied that to do so would advance education.

**Administration of charities**

The general rules as to the administration of trusts and the nature of trusteeship, its powers and duties, will be considered later (see chapters 14 and 15). Many of these rules apply to charitable trusts as to private ones. It is the purpose of this section to consider
those rules which are particular to charities and the bodies which have special functions in relation to charities. Many of the regulations regarding the administration of charities, particularly relating to the Charity Commission, are now to be found in the Charities Act 1993, as amended by the Charities Act 2006. It is not intended to deal with administration in detail, but to outline the main agencies of charitable administration.

The principal authorities having a role in the functioning of charities are: (1) the Attorney-General; (2) the trustees; (3) the Charity Commission; and (4) the Official Custodian for Charities.

The Attorney-General

The Attorney-General represents the Crown as parens patriae, which means that he appears in any proceedings on behalf of the charitable objects or potential beneficiaries. He will be joined as a party to any action concerning charities, he may act against charity trustees in any dispute as to the existence of a valid charity and he has the power to act to recover charity property from third parties. The nature of his role as representative of the objects of charity was discussed in Brooks v Richardson [1986] 1 All ER 952, where the court quoted with approval Tudor on Charities:

By reason of his duty as the Sovereign’s representative protecting all the persons interested in the charity funds, the Attorney-General is as a general rule a necessary party to charity proceeding. He represents the beneficial interest; it follows that in all proceedings in which the beneficial interest has to be before the court, he must be a party. He represents all the objects of the charity, who are in effect parties through him.

Trustees

Charity trustees, as has already been stated in the introduction, are defined in s 97 of the Charities Act 1993 as persons having the general control and management of the administration of the charity. In general, they are in the same position as trustees of private trusts, except that they do not have to act unanimously, but may act by majority. The 1993 Act has placed significant restrictions upon who may be a charity trustee. Section 72 of the 1993 Act, as amended by the Charities Act 2006, provides a long list of those who are excluded, including those convicted of offences of dishonesty or deception, bankrupts and those who have made a composition with creditors, those who have been removed from charity trusteeship by the Commission or the court and those who are disqualified from company directorship. To assist them in enforcing such ineligibility, the Commission keeps a register of those removed from office, and it is also empowered to waive the disqualification upon application from the person disqualified. The Act also makes it a criminal offence to act as a trustee while disqualified.

In addition to the general powers and duties of trustees, charity trustees have specific duties which include seeking registration, informing the Commission of any changes in the charity, and informing it if the charity ceases to exist. Their powers include the right to seek the advice of the Commission on any matter to do with the charity. They may be removed by the Commission for misconduct or mismanagement.

Charity accounts, reports and returns

Part VI of the 1993 Act, as amended, requires trustees to keep accounts in prescribed form, to prepare an annual statement of accounts, to have these audited in the case of
large charities, and to prepare and send to the Commission an annual report detailing the charity’s activities for the year and an annual return for each financial year. The annual report will be available for public inspection. Failure to file an annual report or return is a summary offence. The Commission has power in some circumstances to dispense with these requirements. For unincorporated charities with an annual income of less than £100,000 there is a simplified accounting procedure.

The Charity Commission

Under section 6 of the 2006 Act, the office of Charity Commissioner was abolished and replaced by a body corporate called the Charity Commission, to which all the Commissioners’ functions are transferred. The Commission has five general objectives, which are:

(a) the public confidence objective,
(b) the public benefit objective,
(c) the compliance objective,
(d) the charitable resources objective, and
(e) the accountability objective.

These objectives are defined as follows:

1. The public confidence objective is to increase public trust and confidence in charities.
2. The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
3. The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
4. The charitable resources objective is to promote the effective use of charitable resources.
5. The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

The general functions of the Commission mirror are listed as follows:

1. Determining whether institutions are or are not charities.
2. Encouraging and facilitating the better administration of charities.
3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein.
4. Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.
5. Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission’s functions or meeting any of its objectives.
6. Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission’s functions or meeting any of its objectives.

These include the maintenance of a register of charities and the production of the annual report.

Annual report

Under Schedule 1A, paragraph 11 of the 1993, as inserted by the Charities Act 2006, the Commission must submit a report annually to the Secretary of State, to be placed before Parliament. This has proved to be a useful source of information on the current thinking of the Commissioners, which is very important to those bodies seeking recognition as charities.
Institution of inquiries

Section 8 permits the Commission to institute inquiries from time to time into particular charities or groups of charities. Such inquiries may be made by the Commission itself or by a person appointed by it. Such inquiries can take many forms: they may be public or private, and may consist of anything from an exchange of letters to a formal inquiry under oath. In carrying out this inquiry the powers of the Commission to obtain information are very wide. It may direct any person to furnish accounts and written statements and answers to questions and to verify these by statutory declaration. It may require such persons to furnish copies of any relevant documents and if necessary to attend in person to give evidence. Evidence may be taken on oath. The Commission also has wide discretion to publish the report of the inquiry, or its results, in such form as it thinks fit.

Apart from the powers in connection with inquiries, s 9 of the 1993 Act also gives the Commission wide powers to require documents to be produced, and to take copies of them, and to have furnished to it any information relating to any charity relevant to the discharge of its functions.

Powers to act for the protection of charities

If, having made an inquiry under s 8, the Commission is satisfied that there has been misconduct or mismanagement in the administration of a charity, or that it is necessary to act to protect charity property, it has wide powers under s 18 to act for the protection of charities. Among other things, it may suspend (for up to 12 months) any trustee or officer of the charity, may order the appointment of additional trustees, may vest charity property in the official custodian, may order anyone holding charity property not to part with it without their approval, may order any debtor of the charity not to pay money to the charity without their approval, may restrict the transactions which may be entered into on the charity’s behalf without their approval, and may appoint a receiver and manager in respect of the property and affairs of the charity. In addition, if it is satisfied both that there has been mismanagement etc. and that it is necessary to protect charity property, the Commission may, by its own motion, remove trustees, officers or employees, or establish a scheme for the charity’s administration.

Removal of trustees

Section 18(4) also allows the Charity Commission to remove trustees on the grounds of bankruptcy, mental incapacity, failure on the trustee’s part to act or declare his willingness or unwillingness to act, or on the ground of the trustee’s absence from the country, when such absence impedes the proper administration of the charity. Trustees removed under this section are thus ineligible and liable to prosecution (see ‘Trustees’, above). The Commission may also appoint trustees either to replace ones removed or, where there are no or insufficient trustees or where the Commission deems it necessary, to increase the number of trustees.

Concurrent jurisdiction with the court

Under s 16, the Commission has concurrent jurisdiction with the High Court to make orders appointing or removing trustees and employees of charities and vesting and transferring property, as well as powers to establish schemes for charity administration (the term ‘scheme’ is discussed further below). It may only exercise its powers under this section upon the application of the charity or the Attorney-General or, in the case of
schemes, on an order of the court. In the case of very small charities (with an income of less than £500 p.a.) it may act upon the application of the charity trustees, or of any person interested in the charity, or, where the charity is local, of any two or more inhabitants of the local area. It may proceed as if it had received an application from the charity itself in cases where the trusteeship is vacant or the trustees absent or incapable, or where a sufficient number of the trustees apply. (Ordinarily, a majority of trustees would have to agree to the charity’s applying.) It may also act to establish a scheme in the case of a charity where the Commission is satisfied that the trustees should have applied for such a scheme and have not, and then only if 40 years have elapsed since the date of the charity’s foundation: this is a way in which very old and useless charities can be changed and their funds reallocated, even if the trustees refuse to act.

The Commission is also required to give notice to the trustees before exercising any jurisdiction under this section.

Registration

Section 3 of the Charities Act 1993, as amended by the 2006 Act, provides:

(1) There shall continue to be a register of charities, which shall be kept by the Commission.

(2) The register shall be kept by the Commission in such manner as it thinks fit.

(3) The register shall contain—
   (a) the name of every charity registered in accordance with section 3A below (registration), and
   (b) such other particulars of, and such other information relating to, every such charity as the Commission thinks fit.

S 3(B) further provides:

(1) Where a charity required to be registered by virtue of section 3A(1) above is not registered, it is the duty of the charity trustees—
   (a) to apply to the Commission for the charity to be registered, and
   (b) to supply the Commission with the required documents and information.

(3) Where an institution is for the time being registered, it is the duty of the charity trustees (or the last charity trustees)—
   (a) to notify the Commission if the institution ceases to exist, or if there is any change in its trusts or in the particulars of it entered in the register, and
   (b) (so far as appropriate), to supply the Commission with particulars of any such change and copies of any new trusts or alterations of the trusts.

Thus, it is the duty of the Commission to maintain the register and of the charity trustees to apply for registration and to inform the Commission if the charity is wound up. Certain excepted charities are permitted, but not required, to register.

The effect of registration and non-registration is set out in s 4(1):

An institution shall for all purposes other than rectification of the register be conclusively presumed to be or have been a charity at any time when it is or was on the register of charities.

This section also provides for mechanisms for interested parties to object to registration or to apply for de-registration, indicating that the decision whether to grant registration is the Commission’s, subject to appeal to the Tribunal. In practice, therefore, it is the
presence of an organisation on the register which determines whether it is charitable, with all the advantages that that entails. The view of the Commission on what is charitable is therefore crucial.

There are certain charities which are not required to register. These fall into three categories. First, those referred to in the 1993 Act as exempt charities, which are listed in Schedule 2, and include such bodies as universities, the British Museum, the Church Commissioners and Friendly Societies, among others. These bodies may not be registered and are not subject to the Commission’s supervision, being expressly excluded from ss 8 and 18, for example, as they are accountable in other ways. Secondly, charities whose gross income does not exceed £100,000 and which are excepted by the Commission or by ministerial regulation, are not required to register, but are otherwise subject to the Act. Thirdly, very small charities, whose total annual income does not exceed £5,000, are similarly not required to register, but are otherwise subject to the Act.

Advice to charity trustees

Section 29 provides that the Commission may, on written application of any charity trustee give its opinion or advice on any matter affecting the performance of the trustee’s duties as such. It also states that a trustee acting in accordance with the opinion or advice of the Commission shall be deemed, as regards his responsibility for so acting, to have acted in accordance with his trust. The trustee will therefore not be in breach of trust if he follows the advice, unless he knew or had reasonable grounds to suspect that the advice was given in ignorance of material facts or that a decision of the court had been obtained or was pending on the issue.

The Official Custodian for Charities

This officer of the Commission, designated by it to act as such, acts as trustee for charities in accordance with directions from the Commissioners. Charitable property may therefore be vested in him, but he has no powers of management which may be exercised by other trustees. His function is thus simply to provide greater security in respect of trust property. In particular, either the Commission, under s 18, or the court, under s 21, may order that charity property be vested in him.

The Charity Tribunal

This was created by the Charities Act 2006 s 8. It will hear appeals from a range of decisions by the Commission, for example decisions not to register an organisation as a charity, or decisions to institute inquiries into the running of a charity. Person who may institute an appeal include the Attorney General and, as appropriate, the trustees of the relevant charity.

Decisions of the Commission are subject to a review process, by which an interested party can request an internal review of the decision within three months. This results in the Commission making a final decision. Previously such a final decision could only be challenged in the High Court. The creation of the Tribunal offers an alternative and, it is to be supposed, cheaper appeal route. The Tribunal can consider requests for review of the Commission’s decisions and references by the Attorney-General or the Commission on points of law, as well as appeal against final decisions. Decisions of the Tribunal are subject to appeal to the High Court.
Schemes and cy-près

Schemes

The High Court and, under the Charities Act 1993 s 16, the Charity Commission, have a concurrent jurisdiction to establish schemes for the administration of charitable funds. Thus, it may be that money has been left by will for a charitable purpose without any arrangement being stipulated for the fund to be managed, or the testator may not have identified a specific charitable purpose. Thus, a scheme may be approved to appoint new trustees, unless the identity of the trustees is crucial to the testator’s intentions (Re Lysaght [1965] 2 All ER 888), or to resolve administrative difficulties arising out of uncertainty (Re Gott [1944] 1 All ER 293). A scheme may even be ordered by the court where this would defeat a gift over, though the court declined to exercise this power in Re Hanbey’s Wills Trust [1955] 3 All ER 874.

In all these cases some arrangement will need to be made if the money is to be used effectively and it will be necessary for the court or the Commission to approve an arrangement for this. Alternatively, the trustees may wish to extend their powers of investment to increase the yield of the fund or to consolidate different funds held separately; again a scheme will need to be approved. It will be recognised that in this case a form of variation is taking place. In its most extreme form, the trustees may wish to change the purposes to which the fund is put: this will require application of the doctrine of cy-près, explained below, which will again be effected by a scheme. In general, the Commission cannot itself institute a scheme, but may act when the trustees apply to them, and occasionally even when the trustees do not so apply (see ‘Concurrent jurisdiction with the court’, above). The courts may direct a scheme as a result of proceedings, for example, for the determination of the validity of the charity, and will commonly then refer the matter to the Commission to draw up the details of the scheme.

A relatively straightforward example of a scheme can be seen in Re Robinson [1923] 2 Ch 332, where the terms of a religious charity required the preacher to wear a black gown during services. The ‘scheme’ was simply to remove that stipulation from the gift, and this was duly done.

The term ‘scheme’ can therefore cover any arrangement or amendment to the charity, from changing its name, up to a major reorganisation of its funds or even changing its purposes. This latter change is referred to as application cy-près and requires further consideration.

Cy-près doctrine

The meaning of application cy-près

To apply funds cy-près is to apply them to purposes as near as possible to the purposes originally specified. A number of preliminary points may be made before considering the details of this principle. First, the trustees of a charity, like the trustees of a private trust, have the duty to fulfil the donor’s wishes: if, for example, a testator leaves property for a charitable purpose, it will be the duty of the trustees to apply it to that purpose. If a charitable organisation has certain specified charitable purposes, then those having control of its funds must apply them to those purposes. To apply funds cy-près is therefore a form of variation and will require the sanction of the courts or the Charity Commission.
Secondly, the doctrine will apply only to funds devoted to charity, so it is a prerequisite that the original gift, or organisation, is charitable.

Where an express private trust fails, the money or other subject matter of the trust is held on resulting trust for the donor. Where a charitable trust fails at the outset the property may either be held on resulting trust for the donor or in certain circumstances the property may be applied cy-près to another charitable purpose. Failure at the outset, or initial failure as it is usually known, arises where for some reason the gift can never take effect or, for reasons discussed below, it is felt inappropriate that it should. The cy-près doctrine applies also to subsequent failure where a valid charitable fund or organisation has existed but, on one of a number of possible grounds, is wound up and the funds applied to other charitable purposes.

### Conditions for the application of funds cy-près

Until the passing of the Charities Act 1960, these rules could apply only where the original purpose had actually failed or at least was impracticable and it therefore could be realistically said to have ‘failed’. The Charities Act 1960 extended the application of the rules to situations not of failure but rather of convenience, in effect giving trustees a discretion to seek to apply the money in other ways on the grounds of efficiency. While this should no doubt have led to the more effective use of charitable funds, it has created difficulty in the application of cy-près rules and it is submitted that it is necessary to consider the position before 1960 and then look at the effect of the statutory amendments.

### Before the Charities Act 1960

Prior to the Charities Act 1960, the circumstances where charitable funds could be applied cy-près were extremely limited. Cy-près could arise only where the original purpose was impossible or impracticable.

**A-G v Ironmongers Company** (1834) 2 My & K 576

In this case, money had been devoted to ‘the redemption of British slaves in Turkey and Barbary’. By 1833 there were no such slaves and it was felt that ‘the altered circumstances of those countries left little or no demand for the bounty of the testator’, and, accordingly, Lord Brougham ordered the money to be applied cy-près. It will be noted that the failure was subsequent. The fund had presumably been applied to the original purpose for many years [the gift was originally made in 1723] but now there was no longer any use for it. The same principle applied to initial failure, that is that the purpose had to be impossible or impracticable, but in this case that would be decided when the gift was originally made. Thus, to give money in a will to the redemption of slaves in 1833 would have failed at the outset.

The requirement of impossibility or impracticability clearly restricted the opportunity for application cy-près, though the courts interpreted the phrase quite widely. For instance, in **Re Dominion Students’ Hall Trust** [1947] Ch 183, the object of the charity was to provide a community of citizenship, culture and tradition among members of the British Community of Nations and to that end it maintained a student hostel in Bloomsbury. The terms of the trust required, however, that the benefits be limited to students of European origin. Cy-près was ordered to remove the racial bar on the ground that to continue it would render the trust impracticable. Evershed J pointed out:
It is not necessary to go to the length of saying that the original scheme is absolutely impracticable. Were it so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire . . . it is said that to retain the condition [of excluding non-whites], so far from furthering the charity’s main object, might defeat it and would be liable to antagonise those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain.

**Effect of the Act**

The Charities Act 1960 substantially extended the situations in which charitable funds may be applied cy-près. It should be stressed, however, that it amended only the requirement of impossibility or impracticability: other conditions for application cy-près, which will be considered later, still apply as before the Act. Section 13(1), now s 13(1) of the 1993 Act, as amended by the Charities Act 2006, provides:

(1) Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows—

(a) where the original purposes, in whole or in part—
   (i) have been as far as may be fulfilled; or
   (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or

(b) where the original purposes provide a use for part only of the property available by virtue of the gift; or

(c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to [the appropriate considerations], be made applicable to common purposes; or

(d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to [the appropriate considerations], or to be practical in administering the gift; or

(e) where the original purposes, in whole or in part, have, since they were laid down,—
   (i) been adequately provided for by other means; or
   (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or
   (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to [the appropriate considerations].

(1A) In subsection (1) above ‘the appropriate considerations’ means—

(a) (on the one hand) the spirit of the gift concerned, and

(b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

(2) Subsection (1) above shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près except in so far as those conditions require a failure of the original purposes.

223
Subsequent failure

It was undoubtedly the principal objective of this section to allow reallocation of funds in useless charities to more effective purposes and to that end most of the instances provided for are cases of ‘subsequent failure’. It enables trustees to apply for cy-près and avoids the necessity for continuing pointless charities which were not actually impossible. In cases where money had already been applied to charity it would continue to be so applied and the court or the Charity Commission will approve a suitable scheme for the use of the money on new purposes. There is no question in such a case of the next of kin of the original donor recovering the money, for as Romer LJ said in *Re Wright* [1954] 2 All ER 98: ‘Once money has been effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator’s next of kin or residuary legatees are for ever excluded.’ The issue that the court will be required to determine is whether the situation before it falls within the provisions of s 13. The approach to this has been to view s 13 in the light of the ‘spirit of the gift’, which is taken to mean the basic intention underlying the gift. Thus, in *Peggs v Lamb* (considered above under ‘Trusts for the benefit of localities’), Morritt J, having concluded that the rights of the freemen were held on charitable trust, took the view that it would not be necessary to use s 13 merely to declare the terms of the trust as they then were, i.e. general charitable purposes among the freemen. (He felt entitled to assume these purposes, even though the original grant of the common land was very ancient and any documentation had been lost.)

The class of freemen was now, however, very small (15 members), so that it was doubtful if it still constituted the public or a section of it. In any case, Morritt J considered the underlying purpose of the gift to be the benefit of the borough as a whole, though restricted directly to the freemen, who would at one time have constituted a significant proportion of the population. Accordingly, he felt able to apply s 13(1)(d), to conclude that the original gift was defined by a class which had ceased to be suitable for the achievement of the underlying purpose, and to direct a scheme for application cy-près for the benefit of the inhabitants of the borough as a whole.

In *Varsani v Jesani* [1998] 3 All ER 273, the Court of Appeal considered the meaning of s 13(1)(e)(iii). This case concerned a religious charity in which property (a temple) was used for the benefit of a Hindu sect. The sect had undergone a schism, splitting into two groups, both of which claimed to be the true successors to the original sect (and thus that the property could continue to be applied to the original purpose through them). The court held that the facts that the sect had split, and that the minority group could no longer use the facilities previously available, was sufficient to indicate that the original purpose, the promotion of the sect, was no longer a suitable or effective use of the property and a scheme was ordered. In further proceedings to determine the scheme ([2002] P & CR D11), Patten J held that in such a case the court must adopt an essentially agnostic role and could not enter into a debate as to the relative merits of the different religious groups. Articles 9 and 14 of the European Convention on Human Rights (freedom of conscience, thought and religion, and anti-discrimination, respectively) were described as a ‘long stop’ in the exercise of any scheme-making power, but were not directly relevant to the facts. The court should aim at a division of the assets which facilitated the carrying out of the two new charitable purposes (of the two divisions of the religious sect) and achieved a fair balance between the two groups. Accordingly, the minority group would be paid £250,000 out of the sect’s assets to enable it to establish a new temple, while the majority group would retain the existing temple and the balance of the other assets.
Note that the amendment made by the 2006 Act now requires the court or the Commission to take into account not only the spirit of the gift but also the social and economic circumstances prevailing at the time of the proposed alteration.

Initial failure

A rather different problem presents itself in cases of initial failure. Here it is not a question of taking the opportunity to reallocate money to new charitable purposes when the old ones fail but rather whether, the original purposes having failed, the money can be applied to charity at all. As we shall shortly see, if it is to be so applied further conditions must be met. In cases of alleged initial failure two questions must be asked: has the original charitable gift failed, and, if it has, can the money be applied cy-près or must it go on resulting trust to the settlor’s estate? To rephrase, a gift may be saved in one of two ways: either the court may determine that the initial gift has not failed, in which case cy-près is not relevant, or the court may hold that the initial gift has failed but that the money may be applied cy-près. The first of these questions requires us to consider the wording of the gift and what constitutes failure, and the second requires us to consider the other requirement for application cy-près in cases of initial failure, that requirement being that the settlor or testator demonstrates general charitable intent.

Has the original gift failed?

It is submitted that for these purposes failure means literally that the gift cannot, or cannot practicably, be carried out. It cannot have been the purpose of s 13 to extend the situations where charitable gifts fail at the outset, even if the wording of the section can be taken to include situations of initial failure. Before deciding whether the original gift has failed, however, it will be necessary to consider the precise wording of the gift; it may be possible to interpret the gift in wider terms than appear literally, or it may be that a purpose which has apparently disappeared has not in fact done so. It must be stressed that this is not the same question as whether the donee had a general intention to benefit charity.

Turning first to the form of the original gift, as a general rule the terms of gifts must be taken literally. If a specific purpose or organisation is stated as the donee then that is presumed to be what the settlor intended and his specific gift is no wider or narrower than that. Thus, in Re Spence [1978] 3 All ER 92, the testator left money to the Blind Home, Scott Street, Keighley. This home was run by an organisation that also ran other homes. It was held that the money must be applied only for the home referred to in the will and not for the general purposes of the organisation. In certain special situations, however, a more generous interpretation may be applied.

Re Faraker [1912] 2 Ch 488

In this case, the testatrix left money to a particular named charity. Some years earlier this charity and several others had been amalgamated under a scheme by the Charity Commissioners. At first instance it was held that the charity thereby ceased to exist and so the gift failed. The Court of Appeal, however, reversed this and held that the amalgamated charities were entitled to the legacy. In effect the named charity continued as part of the amalgamated charities.
In the words of Farwell LJ:

In all these cases one has to consider not so much the means to the end as the charitable end which is in view, and so long as that charitable end is well established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided.

It should be noted that this continuation was held to exist despite the fact that the new consolidated charity was not limited to the benefit of widows as had been the original one and to that extent the gift was applied to slightly wider purposes than the testatrix had stated. The Court of Appeal seem to have regarded this change as a matter of drafting and not sufficiently substantial to destroy the original charity, which the Charity Commissioners in any event had no power to do.

In Re Finger [1971] 3 All ER 1050, Goff J was prepared to hold that the original gift had not failed, by virtue of the nature of the organisation to which it was given. He drew a distinction between gifts to corporate bodies and gifts to unincorporated associations. In the case of the latter Goff J applied the dictum of Buckley J in Re Vernon's Will Trust [1971] 3 All ER 1061n:

Every bequest to an unincorporated charity by name without more must take effect as a gift for a charitable purpose . . . If the gift is to be permitted to take effect at all, it must be as a bequest for a purpose. A bequest which is in terms for a charitable purpose will not fail for lack of a trustee but will be carried into effect . . . by means of a scheme.

Commenting on this, Goff J went on:

As I read the dictum . . . the view of Buckley J was that in the case of an unincorporated body the gift is per se a purpose trust, and provided that the work is still being carried on will have effect given to it by way of a scheme notwithstanding the disappearance of the donee in the lifetime of the testator.

In other words, where the gift is made to an unincorporated charity, it is to be regarded as a gift to the purpose of that organisation (it cannot be a gift to the organisation itself since that is not a legal entity and cannot hold property). It is not, therefore, relevant that the organisation has ceased to exist: provided the purpose itself continues, the gift has not failed. On the facts in Re Finger, a gift to the National Radium Commission, a defunct unincorporated charity, did take effect and the fund would be applied by a scheme. Of course, this will not always be the case: both Buckley J and Goff J stated that the gift would not take effect if the organisation had ceased to exist if the terms of the gift made it clear that the continuation of the organisation was an essential prerequisite of the gift.

This approach to gifts to unincorporated charities cannot, however, be applied to charitable corporations. Since they have legal personality a gift to a corporation without any further qualification will prima facie be a gift to the organisation itself. Therefore, if that organisation has ceased to exist the gift will fail. As Buckley J said in Re Vernon:

A bequest to a corporate body, on the other hand, takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as trustee. There is no need in this case to infer a trust for any particular purpose.

Applying this to the facts of Re Finger, Goff J felt that there was no ground for inferring a purpose trust on the facts before him in the case of a gift to a charitable corporation and accordingly, the charitable corporation having ceased to exist, the gift failed.
Goff J compared the present case, where gifts were made to a number of different sorts of charity, to the case of Re Meyers [1951] 1 All ER 538, where it had been possible to infer a purpose gift in circumstances where a large number of bequests had been made, all of them to hospitals, both corporate and unincorporated. Whether a gift can be interpreted as one to the named organisation or one to its purposes must depend upon the facts in each case, but it is clear from Re Finger that a purpose gift will be readily inferred where the donee organisation is unincorporated, but will only exceptionally be inferred where the donee organisation is a corporation. It is also interesting to note in passing that the courts will readily infer a gift to a charitable purpose but they cannot do this if the purpose is not charitable: a gift to a non-charitable unincorporated association cannot take effect as a gift to its purposes; it must take effect, if at all, in other ways (see pages 194–199).

The fact that a charitable corporation takes the gift outright (subject to evidence of a contrary intention) means that it may be applied to the corporation’s activities generally, and not necessarily to the charitable purposes of the organisation. It can, for example, be available to meet the charity’s debts (Re ARMS Alleyne v A-G [1997] 2 All ER 679), even where the charity was insolvent at the time of the gift taking effect.

General charitable intention

When charitable gifts fail ab initio, for example because the intended donee organisation has ceased to exist, the court must then consider whether the gift may be applied cy-près. As has already been stated, this may only happen in a case of initial failure if the donor has shown general charitable intention. This means that the terms of the gift and the surrounding circumstances indicate that the donor had more than merely the intention to give to a particular purpose or organisation but was motivated to give to charity in a broader, more general, sense. Parker J, in Re Wilson [1913] 1 Ch 314, highlighted the difference between two kinds of case:

First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect.

In such a case, though the particular purpose fails, the general purpose survives and must be put into effect by means of application cy-près. This is in contrast with the other type of case: ‘... where, on a true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift – a gift for a particular purpose – and it being impossible to carry out that particular purpose, the whole gift is held to fail’.

Therefore, the question is whether the true construction is that the settlor had in mind one particular charitable purpose and no other or whether he wished to benefit charity generally and merely identified the particular purpose or organisation as the means to achieve this.

Since the existence or otherwise of the necessary general charitable intention is a matter of construction to be decided on the facts of each individual case, it follows that it is very difficult to give any general rules. Some individual pointers may, however, be noted.
First, in the case of gifts to particular organisations, it appears that where the testator leaves money to a particular organisation, the *prima facie* assumption is that the testator intended the gift to go to that organisation alone and had no broader charitable intention (subject, of course, to the purpose gift argument in *Re Finger*). Where the testator leaves a gift to an organisation which never existed, the court may be able to find general charitable intention.

*Re Harwood* [1936] Ch 285

This approach was taken in this case. The testatrix left money to two organisations: the Wisbech Peace Society and the Peace Society of Belfast. The Wisbech society had existed but had been wound up before the testatrix’s death. Accordingly, the gift failed and Farwell J further found that the testatrix had no general charitable intention in respect of this gift.

He said:

I do not propose to decide that it can never be possible for the Court to hold that there is a general charitable intent in a case where the charity named in the will once existed but ceased to exist before the death. Without deciding that, it is enough for me to say that, where the testator selects as the object of his bounty a particular charity and shows in the will itself some care to identify the particular charity which he desires to benefit, the difficulty of finding any general charitable intent in such a case if the named society once existed, but has ceased to exist before the death of the testator, is very great.

Such difficulty could not be overcome in the present case. Farwell J pointed to such matters as the precise way in which the testatrix had identified the organisation and it may be taken that the more precise the reference to the organisation, the less likely is the possibility of finding general charitable intent.

The ‘Peace Society of Belfast’, on the other hand, had never existed. It could not be said, therefore, that the testatrix had any particular organisation in mind. As Farwell J stated:

I doubt whether the lady herself knew exactly what society she did mean to benefit. I think she had a desire to benefit any society which was formed for the purpose of promoting peace and was connected with Belfast. Beyond that, I do not think that she had any very clear idea in her mind.

He concluded:

there being a clear intention on the part of the lady, as expressed in her will, to benefit societies whose object was the promotion of peace, and there being no such society as that named in her will, in this case there is a general charitable intent, and, accordingly, the doctrine of cy-près applies.

A number of further comments may be made on this case. First, it would appear that an alternative solution in respect of the Belfast society might have been that which was used in *Re Finger*, to the effect that the testatrix intended to promote a charitable purpose which had presumably not ceased, and, accordingly, the gift need not have failed in the first place. Secondly, it is clear from Farwell J’s words that his finding of general charitable intention was not based solely on the fact that the Belfast society had never existed; although it did tend to show that the testator had wider intentions, this was
apparently supported also by the whole tenor of the will. Thirdly, it seems, with respect, a little strange to have general charitable intent in respect of the one gift and not of the other. These last two points may be answered, perhaps, by remembering that this issue is always a question of construction: the existence or otherwise of the society intended to benefit is merely one factor in determining the presence of general charitable intent.

In *Re Finger*, Goff J felt able to distinguish *Re Harwood* on the matter of gifts to particular organisations which had ceased to exist. Faced with a gift to a corporate charity which had ceased to exist, though that gift could not be saved on the purpose trust argument discussed above, nevertheless Goff J felt able to find general charitable intent. He pointed out that Farwell J had not said that it would be impossible to find general charitable intent, merely that it would be difficult. He regarded the circumstances in *Re Finger* as very special in that the bulk of the estate was left to charity, that the organisation to which this bequest had been made was a co-ordinating body for various charitable purposes rather than having one purpose, and that, therefore, the testator cannot have had a particular purpose in mind, and finally there was external evidence that the testatrix regarded herself as having no relatives and, therefore, cannot have envisaged the money going other than to charity.

A second pointer to the finding of general charitable intent, or rather to not finding it, is the principle that the court is not entitled to assume that, because the testator has made several charitable gifts, he necessarily has charitable intent in relation to other money in the estate. As Buckley J rather memorably put it in *Re Jenkins’s Will Trusts* [1966] 1 All ER 926:

> The principle of *noscitur a sociis* [a man is known by his associates] does not in my judgment entitle one to overlook self-evident facts. 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. Finding one gift for a non-charitable purpose among a number of gifts for charitable purposes the court cannot infer that the testator or testatrix meant the non-charitable gift to take effect as a charitable gift when the terms are not charitable, even though the non-charitable gift may have a close relation to the purposes for which the charitable gifts are made.

It will be observed that the issue here was not of an organisation which had ceased to exist, but one of the interpretation of a purpose. If the interpretation was that it was non-charitable, as was *prima facie* the case here, then the gift must fail, since no trust can generally exist for a non-charitable purpose. Cy-près would have no relevance. External evidence was admissible to refute that *prima facie* interpretation in *Re Satterthwaite’s Will Trusts*.

*Re Satterthwaite’s Will Trusts* [1966] 1 All ER 919

The testatrix left money to nine different organisations, seven of which were charities, one of which was not and one of which did not exist as a charity at the date of the will. The manner of the drafting was clearly important here. The testatrix had informed an official of the Midland Bank that she hated the human race and wished to leave her estate to animal charities. Nine were selected apparently at random from the telephone directory. Both these facts indicated that the testator really had no specific organisations in mind but had the necessary general intent. The gift to the London Animal Hospital was therefore treated as one to a non-existent charity rather than to a specific non-charitable organisation of the same name. The evidence of the circumstances of the drafting also outweighed the fact that one of the gifts was to a valid non-charity, since the testatrix probably did not know that it was not charitable.
It is clear that this approach must be viewed with caution. Commenting upon this principle of ‘charity by association’, as he called it, Megarry V-C said in *Re Spence* [1978] 3 All ER 92:

If the will gives the residue among a number of charities with kindred objects, but one of the apparent charities does not in fact exist, the court will be ready to find a general charitable intention and so apply the share of the non-existent cy-près . . . [I]t seems to me that in such cases the court treats the testator as having shown the general intention of giving his residue to promote charities with that type of kindred objects, and then, when he comes to dividing the residue, as casting around for particular charities with that type of objects to name as donees. If one or more of these are non-existent, then the general intention will suffice for a cy-près application. It will be observed that, as stated, the doctrine depends, at least to some extent, upon the detection of ‘kindred objects’ in the charities to which the shares of residue are given; in this respect the charities must in some degree be *eiusdem generis*.

Having discussed cases such as *Re Satterthwaite*, he further pointed out that these cases were all cases of gifts to bodies which did not exist:

The court is far less ready to find such an intention where the gift is to a body which existed at the date of the will but ceased to exist before the testator died, or . . . where the gift is for a purpose which, though possible and practicable at the date of the will, has ceased to be so before the testator’s death.

In other words, the cases were at least assisted by the fact that they also fell within the principle in *Re Harwood*.

The case before Megarry V-C concerned a gift to a purpose which had become impossible since the date of the will and furthermore the ‘association’ could only be with one other gift, which he felt was insufficient to show a general intent (it will be remembered that there were some nine different gifts in *Re Satterthwaite*, all to animal welfare purposes). Accordingly, in *Re Spence*, the gift having failed, it could not be applied cy-près:

I do not say that a general charitable intention or a genus cannot be extracted from a gift of residue equally between two: but I do say that larger numbers are likely to assist in conveying to the court a sufficient conviction both of the genus and of the generality of the charitable intention.

In conclusion, it may be repeated that each case is to be assessed on its own facts and the court will take account of all the evidence, including the circumstances in which the will was made, in determining whether the testator had the necessary general charitable intention. The cases discussed above indicate that among the relevant factors are whether the intended donee actually existed and whether the rest of the will shows general intent, as, for instance, by the presence of other charitable gifts.

In case of either initial or subsequent failure s14(8) of the 1993 Act as amended provides:

(2) Where any property given for charitable purposes is applicable cy-près, the court or the Commission may make a scheme providing for the property to be applied—

(a) for such charitable purposes, and

(b) (if the scheme provides for the property to be transferred to another charity) by or on trust for such other charity,

as it considers appropriate, having regard to the matters set out in subsection (3).
(3) The matters are—
(a) the spirit of the original gift,
(b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and
(c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

The ‘relevant charity’ means the charity by or on behalf of which the property is to be applied under the scheme.

Anonymous donations
The Charities Act 1993 provides for general charitable intent to be presumed, and hence application cy-près, in certain categories of charitable gift. Section 14 states:

(1) Property given for specific charitable purposes which fail shall be applicable cy-près as if given for charitable purposes generally where it belongs –
(a) to a donor who after –
(i) the prescribed advertisements and inquiries have been published and made, and
(ii) the prescribed period beginning with the publication of those advertisements has expired, cannot be identified or cannot be found; or
(b) to a donor who has executed a disclaimer in the prescribed form of his right to have the property returned.

The Commission is to prescribe the form of the advertisement and inquiries to be made. Section 14 continues:

(3) For the purposes of this section property shall be conclusively presumed (without any advertisement or inquiry) to belong to donors who cannot be identified, in so far as it consists –
(a) of the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another; or
(b) of the proceeds of any lottery, competition, entertainment, sale or similar money raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.

(4) The court may by order direct that property not falling within subsection (3) above shall for the purposes of this section be treated (without any advertisement or inquiry) as belonging to donors who cannot be identified, where it appears to the court either –
(a) that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or
(b) that it would be unreasonable, having regard to the nature, circumstances and amounts of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned.

The 2006 Charities Act adds a provision allowing a donor in certain circumstances to request the return of his donation.

Very small charities
The Charities Act 1985 provided a simpler alternative to cy-près in the case of small charities. This provision has been considerably widened and the relevant rules are now contained in ss 74 and 75 of the 1993 Act, as amended.
Section 74 provides that, where a charity has a gross income of less than £10,000 and does not hold any land on charitable trusts, the trustees, by a two-thirds majority, may resolve to transfer the charity’s property to another charity, or divide it among other charities (provided they have received written confirmation from the trustees of the other charity or charities that they are willing to accept the property). This power is exercisable only where the trustees are satisfied that the transfer is expedient in the furtherance of the transferor’s charities purposes and are satisfied that the purposes of the transferee charity are substantially similar to those of the transferor charity.

Alternatively, they may resolve to modify the charity by replacing all or any of its purposes with other charitable purposes, provided again that the trustees are satisfied that it is expedient in the interests of the charity for the purposes to be replaced, and that as far as is practicable the new purposes consist of or include purposes that are similar in character to those that are to be replaced. The watchwords are, therefore, a lack of effective application of resources, and the requirement of new charities or purposes as close as possible to the old ones. In addition, under this provision, the trustees may, by a two-thirds majority, amend their administrative powers and procedures.

Having made their resolution, the trustees must give public notice of it, and must also inform the Charity Commission, which may also demand further particulars and receive representations from interested persons. The resolution may then be implemented, if the Commission concurs in it within three months.

Sections 75, 75A and 75B also provide that charities may in certain circumstances spend their capital. This applies to small charities with an income of less than £1,000 and a permanent endowment of less than £10,000 or in the case of larger charities where the capital is to be expended on a particular purpose.

Neither of these sections applies to exempt charities or to charitable companies.

**Fund-raising and public collections**

Parts II and III of the Charities Act 1992, which came into force on 1 March 1995, seek to regulate various forms of fund-raising and collection by and on behalf of charities. Professional fund-raisers, which is to say those who are in the business of fund-raising or who solicit money for reward, in particular may only act on behalf of a charity if they do so in accordance with an agreement in the form prescribed in the Charitable Institutions (Fund-raising) Regulations 1994 (SI 1994/3024). These Regulations also require such fund-raisers to make their books available to the charity, and to transmit any money collected to the charity in prescribed form (usually within 28 days of collection).

Acting without such an agreement or falsely representing that money is being raised under such an agreement is a summary offence and may be prevented by injunction. The professional fund-raiser must indicate the institutions on whose behalf the money is being raised, and any payment received of £50 or more is subject to a right to cancel within seven days.

Also regulated is anyone not a professional fund-raiser, but who runs a business which participates in a promotional scheme in which it is represented that money will thereby be applied to philanthropic purposes. In particular, such a person will be required to indicate what proportion of the profit made under the scheme will be donated to the purpose.

Public charitable collections may not be conducted without either a local authority permit, to which conditions may be attached, or alternatively, an order of the Charity Commission.

Further proposed reforms under the Charities Act 2006 are not yet in force.
Summary

While the 2006 Charities Act seeks to strengthen the monitoring of charities particularly, perhaps, to ensure public benefit, the actual definition of public benefit is not changed, nor have the purposes which in reality are being recognised as charitable. Nothing is removed from the meaning of charitable purpose, since all those things which are recognised under existing law are specifically preserved. Some minor anomalies of definition have been removed, and it remains to be seen whether new purposes more cogent to the modern world can now be added more easily.

This chapter examines the definition of charity and charitable purpose and considers the advantages of charitable status, particularly as an exception to the normal rule against purpose trusts. It looks in detail at the requirement of public benefit and the recent changes in this area, as well as the other requirement that the purpose must be exclusively charitable. It outlines the bodies which have responsibility for the management and supervision of charities, focusing in particular on the role of the Charity Commission. Finally it looks at the possibilities for applying charitable funds to alternative charitable purposes, when the original purpose have failed or have become unsuitable, under schemes for application cy-pres and other mechanisms.

Further reading

The recent reforms
J Edwardes, ’Twelve heads are better than four’ (2004) 154 (7137) NLJ 1076
J Warburton, ’Charity members: duties and responsibilities’ [2006] Conv 330

Charities generally
A Dunn, ’Demanding service or servicing demand? Charities, regulation and the policy process’ [2008] MLR 247–270
N P Gravells, ’Public purpose trusts’ [1970] 40 MLR 397
T G Watkin, ’Charity: the purport of “purpose” ’ [1978] Conv 27

Public benefit
A Holt, ’Reassessing “public benefit” ’ [2008] SJ Vol. 152 No. 4 8, 10
C Rustomji, ’Serving the public’ [2007] NLJ Vol. 157 No. 7300 Supp (Charities Appeals Supplement) 26, 28
M Harding, ’Trusts for religious purposes and the question of public benefit’ [2008] MLR 159–182
N Hancox, ’An education in charity’ [2008] NLJ Vol. 158 No. 7305 113
Charities and tax
A Thomson, 'Taxation of charity income and gains' (2005) 778 Tax J 15

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