Charity - reference by Attorney-General under Charities Act 1993 as amended - Questions referred answered Charity - application for judicial review of Guidance issued by Charity Commission - application granted in principle - relief to be determined at further hearing

[2011] UKUT 421 (TCC)

TCC-JR/03/2010

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN

THE INDEPENDENT SCHOOLS COUNCIL

Claimant

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Defendant

- and -

THE NATIONAL COUNCIL FOR VOLUNTARY ORGANISATIONS

First Intervener

- and -

CONOR GEARTY, AURIOL STEVENS, ANNE MOUNTFIELD, HENRIETTA DOMBEY, RON GLATTER, MARGARET LLOYD, CLIO WHITTAKER and JULIA ECCLESHARE

(ON BEHALF OF THE EDUCATION REVIEW GROUP)

Second Interveners

FTC/99/2010

IN THE MATTER OF A REFERENCE PURSUANT TO SCHEDULE 1D OF THE CHARITIES ACT 1993

BETWEEN

HER MAJESTY'S ATTORNEY GENERAL

Referrer

- and -

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES

(2) THE INDEPENDENT SCHOOLS COUNCIL

Respondents

THE TRIBUNAL: The Chamber President, the Hon Mr Justice Warren

Judge Alison McKenna

Judge Elizabeth Ovey

Heard in public at the Royal Courts of Justice, London, between 17 and 24 May 2011

William Henderson and Mark Mullen of counsel, instructed by the Treasury Solicitor for HM Attorney General

Robert Pearce QC of counsel, instructed by the Legal Department for the Charity Commission

Nigel Giffin QC and Matthew Smith of counsel, instructed by Farrer & Co for the Independent Schools Council

Francesca Quint of counsel, instructed by Wrigleys for the National Council for Voluntary Organisations

David Lawson of counsel, instructed by Bindmans for the Education Review Group

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A. Introduction

The proceedings

1. We have before us two separate but closely related sets of proceedings. They both concern the effect of the public benefit requirement contained in the Charities Act 2006 ("the **2006 Act**") on independent schools which charge fees.

2. The first set of proceedings ("the **JR Application**") is an application for judicial review seeking an order quashing parts of certain guidance issued by the Charity Commission. The JR Application was commenced by the Independent Schools Council ("the **ISC**") in the Administrative Court. On 7 October 2010, Sales J gave the ISC permission to bring the JR Application. At the same time, he transferred the JR Application to the Tax and Chancery Chamber of the Upper Tribunal pursuant to section 31A of the Senior Courts Act 1981.

3. The guidance we have referred to comprises "*Charities and Public Benefit – the Charity Commission's General Guidance on Public Benefit"* issued in January 2008, and "*Public Benefit and Fee-Charging"* and "*The Advancement*

of Education for the Public Benefit", both issued in December 2008 (together "the **Guidance**"). The Claim Form alleged that the Guidance included errors of law in respect of the public benefit requirement (which we examine at length in this Decision) as applied to charities which charged fees for their charitable activities and in particular as applied to independent schools.

4. The second set of proceedings ("the **Reference**") is a reference by the Attorney General pursuant to section 2A(4)(b) of and paragraph 2(1)(a) of schedule 1D to the Charities Act 1993 ("the **1993 Act**"), as amended by the 2006 Act. Under those provisions, the Attorney General may "refer" certain questions of charity law to the Tribunal for a determination. "Charity law" is defined for these purposes in paragraph 7 of Schedule 1D to the Act as "*any enactment contained in, or made under, this Act or the Charities Act 2006… and any rule of law which relates to charities"*. "The Tribunal" originally meant the Charity Tribunal as constituted under the 2006 Act. That Tribunal was abolished and its functions were transferred jointly to the First-tier and Upper Tribunal by the Transfer of Functions of the Charity Tribunal Order 2009, S.I. 2009 No. 1834.

5. On 28 September 2010, the Attorney General made the Reference to the General Regulatory Chamber of the First-tier Tribunal, charity matters being allocated to that Chamber. The Reference consists of a series of specific questions about the operation of charity law in relation to a hypothetical independent school. The questions are reproduced at Annexe A to this decision.

6. The Reference was transferred to the Tax and Chancery Chamber of the Upper Tribunal on 30 November 2010 pursuant to rule 19(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, with the concurrence of the Acting Chamber President of the General Regulatory Chamber and the President of the Tax and Chancery Chamber.

7. Since then, the JR Application and the Reference have been case-managed together and came before us to be dealt with in the course of a single hearing.

The parties and the interveners

8. The Claimant in the JR Application, the ISC, a non-charitable company limited by guarantee, is an umbrella organisation for approximately 1,270 schools, of which approximately 980 are charities. The evidence before us shows that the independent schools sector educates about 424,000 children at the present time.

9. The Defendant to the JR Application is the Charity Commission. There are two interveners in the JR Application, the National Council for Voluntary Organisations ("the **NCVO**") and the Education Review Group ("the **ERG**"). The NCVO is a registered charity and a company limited by guarantee. It is an umbrella body the objects of which are, among other matters, to promote and organise co-operation between representatives of the voluntary sector. The ERG is an unincorporated association of individuals concerned in one way or another in the field of education which contributed to the consultation on public benefit carried out by the Charity Commission prior to the publication of the Guidance. It appears through a number of its members, namely Conor Gearty, Auriol Stevens, Anne Mountfield, Henrietta Dombey, Ron Glatter, Margaret Lloyd, Clio Whittaker and Julia Eccleshare. The NCVO and the ERG have both intervened in the JR Application pursuant to CPR part 54.17.

10. There were no parties to the Reference other than the Attorney General when he made it. The Charity Commission and the ISC were later joined as parties pursuant to paragraph 2(3)(a) and (b)(iii) respectively of Schedule 1D to the 1993 Act. Neither the NCVO nor the ERG is a party to the Reference. However, Rule 33 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that, with the permission of the Upper Tribunal, a person who is not a party may make representations at a hearing which that person is entitled to attend. Directions were given permitting the NCVO and the ERG to submit evidence and make representations.

Representation and submissions

11. The parties and interveners are represented as follows: William Henderson and Mark Mullen appear for the Attorney General (who was neutral on the various issues we had to consider); Robert Pearce QC appears for the Charity Commission; Nigel Giffin QC and Matthew Smith appear for the ISC; Francesca Quint appears for the NCVO; and David Lawson appears for the ERG.

12. We shall not lengthen this decision by attempting to record, even in summary form, all the submissions addressed to us, helpful though they have been. Instead, we set out particular submissions as we deal with the issues raised. We have, however, had regard to all the submissions made to us.

The central issues

13. As foreshadowed in paragraph 1, at the heart of both the JR Application and the Reference lies the public benefit requirement as it applies to independent schools. The central issues concern constitutional matters and operational matters. The first of those raises issues about what the governing instrument of a school (where such an instrument exists at all) needs to provide in order for the school to be capable of being a charity; the second raises issues about what a school actually needs to do to be seen as operating for the public benefit. Before we start on what will, inevitably, be a lengthy review of the diverse, and often irreconcilable, case law, there are two preliminary observations which we must make.

14. The first is that the words "charity" and "charitable" have become terms of art. Where a trust or corporation is a "charity" in that sense, certain legal consequences follow. For instance, a charitable trust, unlike a private trust, can have perpetual duration; it is not, in legal jargon, subject to the rule against perpetuities; it is entitled to a number of favourable tax reliefs; and, of course, it is subject to regulation by the Charity Commission or other regulators and, possibly, intervention by the Attorney General. Charitable status also confers reputational benefits, with a consequential greater ability to raise funds. Historically, there were other important aspects of charitable status which are

not of relevance in modern times and which we do not need to go into. The legal concept of charity has developed incrementally, and not altogether consistently, since the time of Elizabeth I, when Parliament passed the seminal Charitable Uses Act 1601. The meaning which the law and lawyers give to "charity" does not correspond entirely with the meaning of the word as ordinarily understood. It is important to remember that, in the proceedings before us, we are concerned with the legal concept of charity and not with the ordinary meaning of the word, although it is no doubt the case that ordinary concepts must inform the legal meaning, a meaning which is not frozen at some time in the past.

15. The second, which is perhaps a particular aspect of the first, is that the law has developed differently in relation to different "heads" of charitable endeavour. Care must be taken in applying the law established in one area to another area, particularly when the same words are used to describe similar, but not identical, concepts. For this reason, what we say in this Decision about the public benefit requirement is confined to the context of educational charities; we have not sought to deal with the public benefit requirement across all the heads of charity, although we have borne in mind, as requested by the NCVO, that our analysis of the principles and the case law may have wider implications.

The background to the 2006 Act

16. The 2006 Act arose from a review of the charity and not-for-profit sectors conducted by the Prime Minister's Strategy Unit in 2001-2 and a public consultation on proposed legislation. A previous Bill (which had been considered in depth by a Parliamentary Scrutiny Committee) failed to be enacted prior to the General Election in 2005 and a substantially un-amended Bill was re-introduced to the new Parliament. Apart from the introduction of the power for the Attorney General to make a reference (on which no points arise), we are concerned in the present proceedings only with the provisions which relate to the definition of charity and the public benefit test referred to in that definition.

17. We do not propose to examine the Strategy Unit's review or the consultation and responses to it. Nor do we propose to look at the Parliamentary debates. All of those matters are of great interest and we have, indeed, been referred to parts of some of them, in particular by the NCVO. But none of them is admissible in construing the 2006 Act; in particular, there is nothing in the debates which comes anywhere near the criteria for admissibility established by *Pepper (Inspector of Taxes)* v. *Hart* [1993] A.C. 593. In any case, having looked at the material to which we have been referred, we would not gain any assistance from it in deciding precisely what was intended by the direction in section 3(2) of the 2006 Act that there is to be no presumption of public benefit, which is the relevant point of statutory construction. Our principal difficulty is rather with the content of the public benefit requirement, which is a matter to be determined by an analysis of the case law.

18. However, what these materials do show is that, in the context of private education, there were deeply held views, indeed entrenched positions, on each side of the debate about the place of private education in the society of England and Wales in the 21st century. We see the resulting legislation as something of a compromise, capable of meaning different things depending on the point of view of the reader. It is our function to decide what, as a matter of proper statutory interpretation, the 2006 Act does mean, a task which we must approach without any predisposition to any particular political view-point.

The 2006 Act itself

19. Section 1(1) defines "charity" as "an institution which (a) is established for charitable purposes only [as to which see section 2] and (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities." Section 1(3) provides that a reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (commonly known and referred to as "the **Statute of Elizabeth**") or the preamble to it ("the **Preamble**") is to be construed as a reference to a charity as defined by subsection (1).

20. The 2006 Act uses the word "institution" in a wide sense; it includes (*inter alia* – see section 78(5) of the 2006 Act) unincorporated associations, trusts

and corporations. We shall use the word "institution" throughout this Decision to include all such bodies, whether we are considering aspects of the 2006 Act or matters concerning charity law generally.

21. Under section 2(1), "a charitable purpose" is one which falls within subsection (2) and is "for the public benefit" (as to which see section 3). Subsection (2) lists a number of descriptions of purposes in paragraphs (a) to (m) which, broadly, reflect purposes which have, in the past, been established as charitable. We come to this in more detail later.

22. Section 3 deals with the "public benefit" test referred to in section 2(1)(b) as part of the definition of a charitable purpose. It provides as follows:

> "(1) This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
>
> (2) In determining whether that requirement 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.
>
> (3) 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.
>
> (4) Subsection (3) applies subject to subsection (2)."

23. In addressing the issues which we have to confront, an important task for us is to identify how the term "public benefit" was understood prior to the commencement of sections 1 to 3 of the 2006 Act. In that context, it must be remembered that the concept of what is and is not for the public benefit (as seen by society generally, and as reflected in judicial recognition of the views of society) changes over time. As we will see, changing social perceptions have, in the past, resulted in changes in what is seen as for the benefit of society and, accordingly, of what is properly to be accorded charitable status.

24. We also need to address the operational activities of schools prior to the commencement of the relevant provisions of the 2006 Act. We detect from some of the material before us, and from our own knowledge, a view in some quarters that prior to the 2006 Act, an independent school charging full fees and providing a conventional programme of education, which was not simply

a profit-making private institution, was *ipso facto* a charity regardless of whether it provided bursaries for some students who would not otherwise be able to afford to attend the school and regardless of whether it provided other facilities beneficial to the community. We need to test that view to see whether it was in fact necessary for a school to provide some bursaries or some facilities for the benefit of the community in order to be acting properly in accordance with its charitable objects. And we need, of course, to see what difference, if any, the 2006 Act has made to the previous position.

25. The only other provision of the 2006 Act which we need to mention, for completeness, is section 4 which places a duty on the Charity Commission to issue guidance in pursuance of its public benefit objective. That objective (see subsection (2)) is to promote awareness and understanding of the operation of the "public benefit" requirement in sections 2(1)(b) and 3(1). It was pursuant to that duty that the Guidance was issued. Charity trustees are to "have regard to any such guidance when exercising any powers or duties to which it is relevant": see subsection (6). Section 4 came into force on 27 February 2007.

The Guidance

26. The Guidance focuses on two stated principles of public benefit, with a number of sub-principles. These are:

> "Principle 1: There must be an identifiable benefit or benefits
>
> 1a It must be clear what those benefits are
>
> 1b The benefits must be related to the aims
>
> 1c Benefits must be balanced against any detriment or harm
>
> Principle 2: Benefit must be to the public or a section of the public
>
> 2a The beneficiaries must be appropriate to the aims
>
> 2b Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted
>
> - by geographical or other restrictions; or
> - by ability to pay any fees charged
>
> 2c People in poverty must not be excluded from the opportunity to benefit

2d Any private benefits must be incidental".

27. Following publication of the Guidance, the Charity Commission commenced a non-statutory programme of "assessments" which tested certain charities against the benchmark of the Guidance. The programme included assessments of five independent schools, the results of which were each published in July 2009. The Charity Commission also published its *Emerging Findings* from the assessment reports in 2009 and 2011. It was accepted by the parties that neither the assessment reports nor the *Emerging Findings* publications fall within the section 4 duty to issue Guidance, although ISC argued that they should be viewed as providing further evidence of the Charity Commission's approach to the public benefit test.

The charitable sector and private education

28. ISC has provided us with evidence (which has not been challenged and the detail of which is not, in any case, important) that, as of January 2009, 424,808 children were attending 983 charitable schools within the ISC umbrella in England and Wales. This figure represents about 5% of the school population. ISC also presented evidence of research it had commissioned in December 2009 which showed that 14% of the respondents (1,000 adults surveyed) had attended an independent school for part of their education and that 22% of respondents had received some paid-for tuition in addition to their regular school education.

29. The ERG produced evidence to us the purpose of which was to demonstrate that private schools have significant "dis-benefits" to society in terms, for instance, of removing able pupils from state schools and presenting barriers to social mobility. The ISC's response to that was that, first, it is by no means clear that the state sector would have the capacity to educate an additional 440,000 pupils were all independent schools (including non-charitable providers) to cease operating; and secondly, that if the 1,000 adults involved in the ISC's survey were representative of the population as a whole, the figure of 14% would equate to some 7 million adults who have attended an independent school for some part of their education. The ISC argued that this

is clearly not a numerically negligible group. It also suggested that there is more movement of pupils between the state and independent sectors than is often supposed. We have no detail at all about that value assertion: we do not know what degree of movement is said to be "often supposed" nor what "more movement" means in terms of numbers.

30. The ISC produced evidence that the overall average school fee at an ISC school is £12,558 per annum. The ERG suggested that the percentage of households able to afford such fees must be around 7% because this is the percentage of children educated in the private sector. We comment that that would be true only if all households which could afford to educate their children in the private sector do so. We doubt very much that this is the case. The ISC maintained that it is difficult to assess the proportion of the population that can afford these fees because surveys have shown that parents resort to a range of ways of doing so, including borrowing and third-party assistance. Of the fee-paying households they surveyed, 25% had an income below £60,000 and 10% had an income below £40,000.

31. The ERG's evidence was that fee levels vary widely as between independent schools but that fee levels have risen well above inflation in recent years. The ISC's evidence was that although independent education was not, in many cases, in fact provided at cost (because of the need to budget for reserves and surpluses) its research indicated that the operating surpluses of independent schools have remained stable in the bracket of 6.5 – 7.5% over the years 2005-2009 and that fee increases have generally correlated not only with increased running costs but also with rises in Government spending on state education over this period. The ISC further pointed out that inflation may be measured in a number of ways.

32. The ERG's evidence to the Tribunal was that many independent schools are making provision which goes beyond what is necessary to meet any "charitable need" for education and were providing "gold-plated" education at a cost which is unaffordable for the vast majority. The ISC's evidence was that, as only a small fraction of independent schools have access to a substantial endowment, extravagant capital expenditure would generally have

to be met by an exponential increase in fee levels, which has been shown generally not to be the case. The ISC also pointed to data showing the underlying trend of growth in the independent school sector. In summary, the ISC maintained that the increase in costs of independent education overwhelmingly reflected the costs of operation, that there was no evidence of disproportionate capital investment by the sector and that proportionately more parents are choosing to educate their children in the independent sector.

33. The ISC's evidence was that in 2009-10, independent schools provided £255.5 million worth of provision by way of means-tested fee remission, thereby supporting the education of 36,750 children. The ERG took issue with the means of calculation of this figure. The figure was said by the ISC to be close to the number of children assisted by the Government-funded Assisted Places Scheme (abolished in 1998). The ISC told the Tribunal that the average bursary provision in its schools equated to 3.6% of that school's fee income. The ISC's research also indicated that 4 out of 5 of its schools undertook some form of partnership activity with the maintained sector, of which over 40% were academic in nature. Other activities focused on drama, music and sport.

34. Finally, we note the very limited evidence there is of the fiscal advantages derived by independent schools from their charitable status. The ISC's evidence to the Parliamentary Committee on the 2006 Act was that its schools then derived some £88 million of fiscal advantages per year from their charitable status. This included the value of rates relief, exemption from tax on investment income, tax relief on gift aid for donors and relief from corporation tax. Charitable schools do not obtain a VAT advantage, since education is an exempt supply, and the irrecoverable VAT paid was estimated at £170 million. The ISC's evidence was that the benefits provided to the state by the activities of its schools far outweighed the fiscal advantages received by ISC schools as a result of their charitable status because of the cost which would otherwise be incurred of educating some 440,000 extra children in the maintained sector. Those figures have not been subjected to further examination and the extent of the fiscal advantages enjoyed by independent schools has had no bearing on this Decision.

35. We give that very brief summary of some of the evidence in order to give a flavour of the background against which our decisions are to be made. It is clear, we think, that we can safely take it that the independent sector is significant in size; and also clear that a large majority of families could not afford to meet the fees of sending any child to an independent school. Although there certainly are instances of what the ERG has called "gold-plating", we cannot take it that every independent school is extravagant in its provision of facilities. We also consider that we can safely conclude that the independent sector as a whole provides significant fee remission and that there is a great deal of partnership activity (of some kind) with the maintained sector.

36. But we cannot, on the materials before us, begin to determine whether the figures for fee remission arrived at by the ISC are correct or whether the ERG is right to take issue with the methodology used by the ISC in reaching its conclusions. It would not, in any case, help us in resolving the issues which we have to decide to know the precise figures unless it were to be argued that the figure is in effect *de minimis* and to be ignored (which is not the case). Further, it is not the level of provision across the sector as a whole which is relevant. Each school must be addressed separately to see whether it is operating properly and in accordance with its obligations as a charity, assuming it is a charity.

Some terminology

37. Given the very wide range of potential charitable purposes, it is obvious that some charities have purposes which have the primary effect of conferring direct benefits on certain individuals, while other charities have purposes which confer benefits on the public, whether individually or collectively, much more indirectly. An educational charity such as a school is a clear example of the first class of charity, while a charity for the advancement of animal welfare is a clear example of the second class. A trust for maintaining a bridge is somewhere in between: it is of direct benefit to those who use it but of indirect benefit to the relevant community. Mr Pearce has put forward a

terminology which we have found helpful in illuminating the subject and we adopt it in this judgment. It distinguishes the following three types of benefit:

a. direct benefits: benefits to persons whose needs it is a purpose of the charity to relieve which are received by such persons as recipients of the main service which the charity provides;

b. indirect benefits: benefits to persons whose needs it is a purpose of the charity to relieve which are received by such persons otherwise than as recipients of the main service which the charity provides;

c. wider benefits: benefits other than direct and indirect benefits which are received by the community at large from the activities of the charity.

38. We recognise the cases do not use a consistent terminology to distinguish public benefit of different degrees. For instance, the term "indirect benefit" is sometimes used to include both b. and c. in Mr Pearce's classification.

39. We have also found it helpful to distinguish between different groups of people who may benefit to some extent from the carrying out of a charity's purpose, again where the charity is an educational charity such as a school. From time to time it is necessary to distinguish between these groups and, when it is, we use the following terminology:

a. potential beneficiary: a person in the group of children whose need for education it is a purpose of the charity to relieve. (We also use this term in the context of other charities to describe the group whose particular need it is a purpose of the relevant charity to relieve);

b. beneficiary: a person who actually receives the main educational service (or other service, if applicable) provided by the charity.

It is of course implicit in our definitions of "indirect benefits" and "wider benefits" that potential beneficiaries may receive indirect benefits without becoming beneficiaries in the sense explained above, and that the public generally may receive wider benefits.

40. Finally, we use the words "rich" and "poor" when discussing the authorities. It is a well-established principle of charity law, as will be seen in our analysis of the cases, that "poor" does not mean destitute even in the context of a trust for the relief of poverty. Broadly speaking, and in the present context, a poor person is a person who cannot reasonably afford to meet a particular need by purchasing at the full cost price the service which it is the charity's purpose to provide. (The meaning of "poor" may vary across the different heads of charity.) Conversely, "rich" does not mean extremely wealthy but rather a person who can afford to meet a particular need by purchasing at the full cost price the service which it is the charity's purpose to provide, although many people could not afford to do so. However, we are well aware that in practice many families make considerable sacrifices to meet school fees and can in that sense "afford" the fees; but such families could not reasonably be described as rich in most contexts. We return to this issue in paragraph 179 and the immediately following paragraphs.

B. Public benefit and the 2006 Act

The issues

41. It is now possible to identify a number of issues the resolution of which will assist us to determine the JR Application and to answer the questions raised in the Reference. To a large extent the issues are matters of statutory construction. We would have preferred to consider the 2006 Act in detail as the next part of this Decision. But those matters of statutory construction can only be resolved after an examination of certain aspects of the pre-existing law, so we must embark upon that task first. The issues are:

    a. What was the meaning of "public benefit" as understood under pre-existing law? This is important because section 3(3) incorporates that understanding into the meaning of those words in the 2006 Act.

    b. What presumptions (if any) were made under pre-existing law about purposes being for the public benefit? This is important since section 3(2) only has effect in relation to such presumptions.

c. To what extent do the material provisions of the 2006 Act reflect the pre-existing law? Is there any change at all other than that it is not to be presumed that any purpose is for the public benefit?

d. In the light of the answers to those questions, what effect does section 3(2) have?

Public benefit before the 2006 Act: issue a.

42. And so we come to consider the concept of public benefit prior to the 2006 Act. The law relating to the legal concept of charity has developed over several centuries. The starting point, for us at least, is the Preamble, an extract of which is set out in Annexe B to this Decision, which contains the long but not exhaustive list of purposes which has been so influential in shaping the legal understanding of charity in England and Wales. It refers to gifts for such purposes as having been made with "charitable intent" but does not expressly specify a public benefit requirement. Rather, public benefit - or benefit to the community or a section of the community as it was often put - was from early times inherent in the concept of charity and thus of what fell within the Statute. But, as we shall see, case law in more recent times has highlighted the importance of that element so that it is now articulated as a separately identified requirement of public benefit. A merely philanthropic purpose, or purpose for the benefit of a private class, would lack this element of public benefit and would therefore not qualify as charitable.

43. We have just said that a public element was inherent in the concept of charity even though not expressed in the Statute and the Preamble. We do not think that there can be any real doubt about that. For a comparatively recent statement of the general requirement, itself referring to one of the old cases, *Jones* v. *Williams* (1767) Amb. 651, it is only necessary to refer to *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297. The relevant trust was to apply income in providing for, or to assist in providing for, the education of children of employees or former employees of certain companies. The House of Lords accepted without question that the nature of the purpose, being the advancement of education, was beneficial. The issue was whether the employment nexus linking the direct beneficiaries of the trust (or their parents)

was such as to render it private in nature rather than public, on the ground that the class of beneficiaries did not constitute a sufficient section of the public. The trust was held not to be charitable. In his speech, Lord Simonds said this at p 305:

> "It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits. In the recent case of *Gilmour* v. *Coats* this principle was reasserted. It is easy to state and has been stated in a variety of ways, the earliest statement that I find being in *Jones* v. *Williams*, in which Lord Hardwicke, L.C., is briefly reported as follows: 'Definition of charity: a gift to a general public use, which extends to the poor as well as to the rich ...'. We are apt now to classify [all charities] by reference to Lord Macnaghten's division in *Commissioners for the Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class, "other purposes beneficial to the community". This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal. In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it."

That last sentence is, alas, as true for us today in determining the issues before us as it was in 1950 in determining the issues in *Oppenheim*.

44. The courts have adopted an incremental and somewhat *ad hoc* approach in relation to what benefits the community or a section of the community. There has never been an attempt comprehensively to define what is, or is not, of public benefit. It is possible, however, to discern from the cases two related aspects of public benefit. The first aspect is that the nature of the purpose itself must be such as to be a benefit to the community: this is public benefit in the first sense. In that sense, the advancement of education, referred to in the Preamble under the guise of "schools of learning, free schools and scholars in universities", has the necessary element of benefit to the community (although that needs to be qualified as we will see). The second aspect is that those who may benefit from the carrying out of the purpose must be sufficiently

numerous, and identified in such manner as, to constitute what is described in the authorities as "a section of the public": this is public benefit in the second sense. The decision in *Oppenheim* illustrates these two aspects, which we will refer to as public benefit in "the first sense" and "the second sense". The advancement of education, as such, was of a nature which was beneficial to the community (and so of public benefit in the first sense); but the practical restriction of the benefits to children of employees of certain employers was in effect to render the trust a private trust, because it was not for the benefit of a sufficient section of the public. It was therefore not charitable.

45. One result of this *ad hoc* development is that what satisfies the public benefit requirement may differ markedly between different types of allegedly charitable purposes. This is why caution must be exercised in applying authorities decided in one area of charity to another area. Lord Simonds makes the point in *Gilmour* v. *Coats* [1949] A.C. 426 at 448-9:

> "It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has built up not logically but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty. To argue by a method of syllogism or analogy from the category of education to that of religion ignores this historical process of the law."

46. Another result of this *ad hoc* development is that the authorities do not provide a comprehensive statement of the elements of the public benefit requirement but rather a series of examples of when the public benefit requirement is or is not satisfied. A distinction is not always drawn – and often did not need to be drawn – between the two senses of public benefit. Where there was a doubt about the charitable status of a particular purpose in the context of a particular gift or trust, it was only necessary for the court to address public benefit in the sense which was relevant and it was often not necessary to acknowledge the distinction. However, the distinction was appreciated by Lord Simonds in

Williams' Trustees v. *Inland Revenue Commissioners* [1947] A.C. 447. He said this at 457:

> "It is not expressly stated in the preamble to the statute, but it was established in the Court of Chancery, and, so far as I am aware, the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble. The rule is thus stated by Lord Wrenbury in *Verge* v. *Somerville*: 'To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public – whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may for instance be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.' It is, I think, obvious that this rule, necessary as it is, must often be difficult of application and so the courts have found. Fortunately perhaps, though Lord Wrenbury put it first, the question does not arise at all, if the purpose of the gift whether for the benefit of a class of inhabitants or of a fluctuating body of private individuals is not itself charitable."

47. Two things can be said about that. First, it appears that Lord Wrenbury in *Verge* v. *Somerville* [1924] A.C. 496, saw the question whether a gift is charitable as involving an inquiry whether it is public or private – that is to say whether or not it is for the benefit of the community or an appreciably important class of the community. The focus here is on public benefit in the second sense. Secondly, Lord Simonds referred to the inquiry envisaged by Lord Wrenbury as not arising at all if the purpose of the gift is not itself charitable and this was so whether the gift was for the benefit of a class of inhabitants or of a fluctuating class of private individuals. He must, we think, have had in mind the nature of the gift when postulating that the "purpose of the gift is not itself charitable". In other words he is looking at the purpose of the gift divorced from the class of beneficiaries and considering whether a gift of that sort is capable of being charitable assuming that it is for the benefit of a sufficient section of the community. The focus there is on public benefit in the first sense.

48. A third result of the *ad hoc* development is that the relationship between the public benefit requirement as it came to be understood immediately before the 2006 Act and the much earlier requirement that a gift could only be charitable if it fell within, or within the spirit of, the Preamble is not entirely clear. For present purposes, however, we think that the relationship is sufficiently clarified by the following propositions:

a. a gift which did not fall within, or within the spirit of, the Preamble would not be regarded as charitable even if the nature of the purpose was such as clearly to be beneficial to the community. It is trite law that not all purposes beneficial to the community are charitable.

b. a gift which fell within the express words of the Preamble might nevertheless fail to be charitable if the nature of the purpose was not such as to be beneficial to the community and so fell outside the spirit of the Preamble. Even a trust for the advancement of education in the form of a school would not have been charitable regardless of the form of education offered simply because it provided for a sufficient section of the community. In the well-known example, a trust to train pickpockets would not be charitable; and that, we think, would be because such a trust would not be for the advancement of education within the scope or spirit of the Preamble.

49. We derive some support for our view from the speech of Lord Simonds in *Gilmour* v. *Coats* at pp 449-50. He doubted the generality of the proposition that a gift for the advancement of education is necessarily charitable, identifying at least two limitations directed at public benefit in the first sense.

a. The first was implicit in the decision of Russell J. in *In re Hummeltenberg* [1923] 1 Ch. 237. One reason for holding the gift in that case ("for training and developing suitable persons, male and female, as mediums") not to be charitable was that the Judge was not satisfied that that the gift would or might be operative for the public benefit. As he said, "There is no evidence worthy of the name – nothing but vague expressions of opinions and belief, directed in the main to alleged powers of diagnosis and healing attributed to some

mediums" which was the basis on which the gift was said to have the requisite benefit. This absence of "public benefit" was not related to the second aspect of the public benefit requirement (whether the benefit was directed to the public or a sufficient section of it); it was related only to the first aspect (whether the nature of the gift was such as to be a benefit to the community).

b. The second limitation was explained by an (unlikely) example where the gift was made on condition that the beneficiaries should lead a cloistered life and communicate to no-one and leave no record of the fruits of their study.

50. It is impossible not to share Lord Simonds' doubts that the gifts in those examples would be charitable. And the reason they would not have been charitable was that they did not have the necessary element of public benefit. He did not spell out whether this was because such gifts did not fall within, or within the spirit of, the Preamble or whether it was because of an additional requirement of public benefit (identified and developed as a result of case-law) separate from the requirement that the gift must fall within, or within the spirit of, the Preamble, but that does not matter for present purposes. In either case, it was the absence of public benefit which was fatal.

51. The development of a separately identified public benefit requirement seems to stem from the decision of the House of Lords in *Pemsel*. Prior to that case, there was not much explicit reference in the authorities to public benefit in the first sense, no doubt because public benefit in that sense was part and parcel of what it was to be a charity. But after *Pemsel's* case, the requirement for public benefit became more clearly articulated so that, as matters stood immediately prior to the 2006 Act, the two senses of public benefit were seen as separate elements, as we have shown. So although express use of the words "public benefit" or similar descriptions was a comparatively recent innovation, the concept of the first sense was as old as charity itself (or at least as old as the Statute). Accordingly, even if the gifts in the examples given by Lord Simonds would have failed to be charitable because they did not fall within

the Preamble, they failed to do so because they were not for the public benefit as that term was understood immediately before the 2006 Act.

52. We therefore do not consider that a trust for the advancement of education is necessarily for the public benefit simply because it is such a trust, even if it is directed to a sufficiently wide section of the community. The terms of a particular trust have to be considered on a case-by-case basis although, as we will see when considering the alleged presumption of public benefit, that is not as radical a result as it may seem.

53. In summary, we conclude that, in the state of the authorities immediately prior to the 2006 Act, public benefit "as that term was understood for the purposes of the law relating to charities…" included both the aspects which we have identified at paragraph 44 above: a purpose had to be for the public benefit in both the first and second sense if it was to qualify as a charitable purpose. The purpose under consideration therefore had to be of a nature such as to be of benefit to the community although how far that was part and parcel of the requirement that the purpose fell within, or within the spirit of, the Preamble or was a separate requirement was not clear; in either case, we consider that it was part of the "public benefit" within the meaning of section 3(3). And it also had to be directed at the public (or community, to use the language of several cases) or a sufficient section of it.

The presumption of public benefit: issue b.

54. Having identified how "public benefit" was approached prior to the 2006 Act, we now turn to consider what presumptions were made in respect of any aspects of it. We have been referred to a large number of authorities all of which we have considered in preparing this Decision. It has been a helpful exercise in formulating our views, but we do not need to refer to all of them nor to address in detail all of the ones to which we do refer.

55. A convenient starting point is *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jun. 522, which is generally recognised as containing the first attempt at a systematic classification of charitable purposes. It concerned a testamentary gift to the Bishop of Durham which he sought to uphold against a challenge by

the testatrix' next of kin. The issues before the court included the question whether the gift, which was "for such objects of benevolence and liberality" as the Bishop should most approve, was a valid charitable bequest. Sir Samuel Romilly for the next of kin said in argument at 532:

> "There are four objects, within one of which all charity, to be administered in this Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; &c.: 2ndly, the advancement of learning: 3dly, the advancement of religion; and 4thly, which is the most difficult, the advancement of objects of general public utility."

56. In similar vein, in *Pemsel's* case, Lord Macnaghten said at 583:

> " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

57. Reference was made to *Morice* in argument in *Pemsel*, although not in any of the speeches, and Lord Macnaghten no doubt had the *Morice* classification in mind. Indeed he seems effectively to have adopted it but with the difference that the fourth category replaces "the advancement of objects of general public utility" with "trusts for other purposes beneficial to the community".

58. Lord Macnaghten's formulation might be seen as implying by the use of the expression "other purposes beneficial to the community, not falling under any of the preceding heads" in relation to the fourth head that trusts for the relief of poverty, the advancement of education and the advancement of religion will in general be trusts for purposes beneficial to the community and that therefore a particular educational trust may be presumed to be charitable. We do not consider that that point can be taken very far. It must be remembered that the issue in *Pemsel's* case was whether Scottish law, which required all charitable trusts to have an element of relief of poverty in their purposes, applied in Scotland to a tax statute applicable throughout the United Kingdom. The House of Lords decided that the words "charitable purposes" in the tax legislation were to be construed according to the legal and technical meaning

given to them by English law. Accordingly, a trust to apply income for the general purposes of maintaining, supporting and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church was held to be charitable.

59. Lord Macnaghten's speech was some 18 pages long. In the course of it, he examined how far the legal technical meaning under English law corresponded with the popular meaning of the word "charity", and it was as part of that examination that he expounded his well-known classification. It took up less than a full page of his speech.

60. The classification is set out in paragraph 56 above. As can be seen, Lord Macnaghten does not address at all the need for public benefit other than in the description of the fourth category. But nor does he suggest, we observe, that all trusts for the advancement of any of the first three purposes are necessarily charitable. That is not surprising given that he was attempting only a classification of the types of purpose which can be charitable and not a definition of what it is to be charitable in fact. As to the fourth category, by recognising its existence he is clearly saying that the first three categories do not cover the entire ground of charity and that there is a residual class of charity. Any charity within that residual class must have the characteristic of being for the benefit of the community. But just as the possession of that characteristic is not enough for a trust to be a charity, as we have noted in paragraph 48, we see no reason to think that Lord Macnaghten considered that any trust having characteristics which brought it within any of the first three categories was necessarily charitable either.

61. We have dealt in some detail with what Lord Macnaghten said because it might be suggested on the basis of what he said that there was a presumption that purposes relating to the relief of poverty, the advancement of education or the advancement of religion had a quality of being beneficial to the community which was sufficient to make them charitable, while an institution seeking to bring a purpose of another kind into the charitable fold had positively to show that the purpose was sufficiently beneficial to the community for it to be recognised as charitable. It will be apparent from what

we have said in the preceding paragraph that we do not agree with that suggestion.

62. It seems that it is not until the decision of the House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31 that it is possible to detect any judicial statements which might be construed as referring to a "presumption" of public benefit, and even in that case the word "presumption" itself was not used. The issue was whether or not the National Anti-Vivisection Society was established "for charitable purposes only" for the purposes of the Income Tax Act 1918. Lord Wright considered at pp 41 to 42 of his speech the submissions of Sir Samuel Romilly in *Morice*, the speech of Lord Macnaghten in *Pemsel's* case and the speech of Lord Parker in *Bowman* v. *Secular Society Ltd* [1917] A.C. 406, after which he said this:

> "….And trusts for the advancement of learning or education may fail to secure a place as charities, if it is seen that the learning or education is not of public value. The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be *prima facie* assumed unless the contrary appears."

63. It is apparent from that passage that Lord Wright was here concerned with what we have described as public benefit in the first sense. His reference to an educational trust as being "not of public value" demonstrates that. Whether he was also concerned with the second aspect we rather doubt - but nothing turns on it since, as we will see, the courts have never (so far as we are aware) actually determined whether a trust is for the benefit of the community or a sufficient section of the community by reference to any assumption.

64. Lord Simonds also had something of relevance to say. At p 65 – 66 he addressed the need to balance the benefits and injurious effects on society of the purpose of the Society (an issue we will consider in a different context later). In the course of doing so, he said this:

> "…. It is to me a strange and bewildering idea that the court must look so far and no farther, must see a charitable purpose in the intention of the society to benefit animals and thus elevate the moral character of men but must shut its eyes to the injurious

> results to the whole human and animal creation. I will readily concede that, if the purpose is within one of the heads of charity forming the first three classes in the classification which Lord Macnaghten borrowed from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham*, the court will easily conclude that it is a charitable purpose. But even here to give the purpose the name of 'religious' or 'education' is not to conclude the matter. It may yet not be charitable, if the religious purpose is illegal or the educational purpose is contrary to public policy. Still there remains the overriding question: Is it *pro bono publico*? It would be another strange mis-reading of Lord Macnaghten's speech in *Pemsel's* case (one was pointed out in *In re Macduff*) to suggest that he intended anything to the contrary. I would rather say that, when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and, therefore, charitable, unless the contrary is shown, and further that that the court will not be astute in such a case to defeat on doubtful evidence the avowed benevolent intention of a donor. But, my Lords, the next step is one that I cannot take. Where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object. If and so far as there is any judicial decision to the contrary, it must, in my opinion, be regarded as inconsistent with principle and be overruled. This proposition is clearly stated by Russell J. in *In re Hummeltenberg*. 'In my opinion,' he said, 'the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.' "

65. The effect of the *National Anti-Vivisection Society* case, so far as material for present purposes, was summarised by Sir Nicolas Browne-Wilkinson V.-C. in *In re Hetherington* [1990] Ch. 1 at 12D as follows:

> "A trust for the advancement of education, the relief of poverty or the advancement of religion is *prima facie* charitable and assumed to be for the public benefit: *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31, 42 and 65. This assumption of public benefit can be rebutted by showing that in fact the particular trust in question cannot operate so as to confer a legally recognised benefit on the public, as in *Gilmour* v. *Coates* [1949] A.C. 426."

66. The Vice-Chancellor was no doubt right to say that an assumption of public benefit can be rebutted in the way which he suggests. He does not say, and we

do not think that it would be right to say, that it can only be rebutted where the trust cannot operate so as to confer a legally recognised benefit on the public. Indeed, the position seems to us to be the reverse, namely that if the trust is for purposes both charitable and non-charitable, the trust is not a charity at all. But in this context, it must be remembered that as a matter of construction, a particular trust may be construed, contrary to its apparent literal meaning, as restricted to purposes which are recognised as charitable, as in *Re Hetherington* itself.

67. It is important to read Lord Wright's dictum that a trust within the first three of Lord Macnaghten's categories is *prima facie* for the benefit of the community in context. He was looking at the categories as concepts and saying that, when a particular purpose within a category comes to be examined, benefit to the community can *prima facie* be assumed unless the contrary appears. He does not, at least expressly, say that there is a presumption which can be rebutted. Nor does he say that evidence is necessary to displace the assumption. That is significant because if a challenge is made to the charitable status, a judge may be persuaded by argument or from his own consideration of the purpose of the trust that the *prima facie* position is in fact displaced. Thus in *Hummeltenberg* itself, it clearly appeared to Russell J. from an examination of the purposes of the gift that it was <u>not</u> to be assumed that the gift was for the public benefit, although there was an educational purpose. Accordingly, in the absence of evidence to support the gift, he was not satisfied that it had the requisite element of public benefit. We do not see the approach of Russell J. as in any way qualified by what Lord Wright said. We think that Lord Wright's approach was simply a recognition of how a judge would deal practically with a particular case before him. He would start with a predisposition that an educational gift was for the benefit of the community; but he would look at the terms of the trust critically and if it appeared to him that the trust might not have the requisite element, his predisposition would be displaced so that evidence would be needed to establish public benefit. But if there was nothing to cause the judge to doubt his predisposition, he would be satisfied that the public element was present. This would not, however, be because of a presumption as that word is

ordinarily understood; rather, it would be because the terms of the trust would speak for themselves, enabling the judge to conclude, as a matter of fact, that the purpose was for the public benefit.

68. In effect, Lord Wright was not saying anything different from Lord Simonds. The latter does not speak of an assumption; instead he said that "the court will easily conclude" that the purpose is a charitable purpose. This means, we think, that he saw matters this way: the Court will form its own view on the evidence before it whether the trust is for the public benefit and will do so, not by way of assumption, but by way of decision. It will no doubt take account of other decided cases; and it will take judicial notice of facts where appropriate. This is far from a "presumption" in the usual sense.

69. As we have said already, nobody suggests in the present case that the provision of education to students of school age and according to conventional curricula routinely taught in schools across the land is not capable of being for the public benefit in the first sense of public benefit: accordingly, if a school were to provide such education free of charge and had an entirely open admissions policy, there can be no doubt that its purpose would in fact be for the public benefit. It is hard to see how anyone could sensibly suggest otherwise.

70. But suppose, for the sake of argument, that someone wished to argue that such education was not for the public benefit at all, perhaps because of some deeply held religious or other belief. The starting point of the judge would surely be that the provision of standard education is for the public benefit. That would not be because of a presumption of public benefit; rather, it would be because the evidence before the judge is sufficient, in the absence of any contrary evidence, to establish such benefit. Either that, or it is self-evident that the purpose displays the requisite public benefit since, if such a trust is not charitable, it is difficult to see what educational trust could ever be held to be for the public benefit in the absence of actual evidence about the benefits of education: there are surely some matters of which the court can take judicial notice, one of which must be the proposition that mainstream education of that sort is for the public benefit. In that context, we will not be the first to note the

observations of the Goodman Committee that "education….is widely regarded as one of the main foundations on which civilised life depends".

71. As to public benefit in the second sense, we doubt that Lord Wright or Lord Simonds in *National Anti-Vivisection* Society had this in mind at all when saying that benefit to the community could, *prima facie*, be assumed. So far as we are aware, the courts have never made any assumption about whether a purpose is directed to the public or a sufficient section of the public. The present context is not, in any case, an area where there is really any room for presumption. The class of persons to benefit would be known (that is certainly so in the present case since the debate turns around the class of children who, or whose parents or benefactors, can afford to pay fees) and the court would then decide, not presume, whether the class identified formed a sufficient section of the community for the purpose to qualify as a charitable purpose. There is nothing which we wish to add to that save to refer to what we say about the effect of decided cases in paragraph 89 below.

The 2006 Act: issue c.

72. Since the commencement of the 2006 Act, the question of charitable status has been governed by sections 1 to 3 which we have already mentioned briefly and which we now address in more detail. Those sections provide an exhaustive code and supersede the pre-existing law, save to the extent that the pre-existing "public benefit" requirement continues. Subject to the effect of section 3(2) precluding the making of any presumption about public benefit, it is not suggested before us that the 2006 Act has effected any relevant change to what a charity is.

73. Section 1 of the 2006 Act, the substance of which is set out in paragraph 19 above, refers to an institution "established" for charitable purposes only. We will consider later in this Decision the way in which that constitutional requirement relates to the operational activities of the institution, a question which we put aside for the moment noting only at this stage that the 2006 Act is, or appears to be, dealing with, and only with, purposes and not with activities.

Section 2(2) – the categories

74. Section 2(2) of the 2006 Act lists, in paragraphs (a) to (m), what are termed "descriptions of purposes". The first three paragraphs of the list are "(a) the prevention or relief of poverty (b) the advancement of education [and] (c) the advancement of religion". These reflect the first three categories of charity described by Lord Macnaghten in the classification we have discussed. Paragraphs (d) to (l) reflect purposes which have been established (or accepted by the Charity Commission) as charitable under the fourth of Lord Macnaghten's categories.

75. The purposes which fall within paragraph (m) are, as set out in section 2(4):

    a. any purposes not within paragraphs (a) to (l) but recognised as charitable purposes under existing charity law (or under section 1 of the Recreational Charities Act 1958, with which we are not concerned).

    b. any purposes that may reasonably be regarded as analogous to or within the spirit of any purposes falling within those paragraphs or paragraph a above.

    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 paragraph (m) itself.

76. The expression "existing charity law" is defined in subsection (8) but only for the purposes of section 2 itself. It means charity law as in force immediately before the day on which section 2 came into force (27 February 2007).

77. This residual category reflects Lord Macnaghten's fourth category in *Pemsel's* case. It is clearly designed to reflect also the way in which charity law has developed in extending incrementally by building analogy upon analogy, the legal concept of charity, a process described by Lord Wilberforce in *Scottish Burial Reform and Cremation Society Ltd* v. *Glasgow City Corporation* [1968] A.C. 138, a case to which we will return later.

78. Thus it can be seen that the categories in section 2(2) now closely reflect the purposes which were capable of being charitable under the pre-2006 Act law.

79. It is, however, inherent in section 2(1) that a purpose might fall within section 2(2) but nevertheless fail to be a charitable purpose. This is so where a potentially charitable purpose fails to be a charitable purpose because it is a private rather than a public purpose, such as the educational purpose in *Oppenheim*. But it would also be so where the reason is a failure to satisfy the first sense of public benefit as in *Hummeltenberg* and the example given by Lord Simonds in *Gilmour* v. *Coats* of cloistered research. So just as a purpose might, in the past, have been of a nature capable of falling within the Preamble but failed to do so because it was not for the public benefit in the first sense, so too such a purpose can now fall within section 2(2) but fail to be charitable for the same reason.

Section 3(3) and the public benefit

80. Section 3(3) provides that in Part 1 of the 2006 Act any reference to "public benefit" is a reference to the public benefit "as that term is understood" under charity law. Charity law does not, as we have said in paragraph 44 above, provide a definition of the "public benefit" but simply provides examples of particular purposes in particular contexts which have been held to be charitable.

81. There are, it is true, established heads of charity, of which the main ones go back to the Statute. Thus, advancement of education is an established head of charity but not all educational trusts are charitable whether because of their nature (as in the example given by Lord Simonds in *Gilmour* v. *Coats*) or because they are not directed to a sufficient section of the community. But there is no touchstone by reference to which it can be decided whether the particular purpose under consideration in the particular context is for the public benefit. Matters have to be addressed on a case by case basis paying regard of course to the decided cases.

82. We emphasise here that the 2006 Act is concerned with establishing whether a particular institution is a charity. Thus:

a. The starting point is to identify the purpose (or purposes if there is more than one) of the institution. This will be a particular purpose in the context of the constitution of the institution. Let us call this "the Particular Purpose". The Particular Purpose is the "purpose" referred to in the opening words of section 2(1) in the phrase "….is a purpose which".

b. The Particular Purpose is a charitable purpose if (a) it falls within section 2(2) and (b) is for the public benefit.

c. The Particular Purpose falls within section 2(2) if it falls within any of the categories listed in section 2(2).

d. The Particular Purpose is for the public benefit if it falls within section 3(3). The question then is whether the Particular Purpose itself is for the public benefit, the answer to which is obtained by ascertaining what the position would have been prior to the 2006 Act (subject to the effect of section 3(2) concerning presumptions). The question is not whether the categories in section 2(2) are inherently or necessarily for the public benefit: the focus is on the particular purpose of a particular institution. The relevance of section 2(2) is that it presents a hurdle: the purpose must fall within one of the categories and if it does not the question of public benefit is not relevant.

Section 3(2) – no presumption of public benefit: issue d.

83. What then of section 3(2) and the direction that it is not to be presumed that a purpose of a particular description is for the public benefit? In the light of our analysis and in the context of the facts of the present case, it is not strictly necessary to address this aspect at any length. Put shortly, even if it is not to be presumed that an educational purpose is necessarily for the public benefit, the sort of educational purposes with which we are concerned certainly are for the public benefit in the first sense: see paragraphs 63 to 70 above. The only issue in relation to public benefit is then whether the schools with which we are concerned provide a benefit directed to a sufficiently wide section of the community (the second sense). There was, under the pre-existing law, no

presumption at all in relation to the second sense. And, even if there was, we cannot see – and no-one has suggested – any scope for the application of any presumption in the context of deciding whether the fee-paying section of the community is a sufficient section for this purpose.

84. Nonetheless, we consider that we should say something if only in deference to the arguments which we have heard. Thus, continuing with the analysis (and numbering) of paragraph 82:

e. Section 3(2) provides that in determining whether the public benefit test is fulfilled in relation to the Particular Purpose it is not to be presumed "that a purpose of a particular description is for the public benefit". Those words do not focus on, or at least not only on, the Particular Purpose: if that had been the intention, it would more naturally have been provided that it was not to be presumed "that that purpose is for the public benefit".

f. Nor do those words focus on, or at least only on, the categories set out in section 2(2) so that the only effect would be to preclude a presumption that any category itself is to be presumed to describe exclusively charitable purposes. There is no need for such a provision since the Act itself recognises, as we have explained, that those categories contain purposes which may not, in the particular context under consideration, be charitable. In any case, it is difficult to see what the purpose of the provision interpreted in that way would achieve. Although there would be no presumption that, for instance, the advancement of religion as an abstract concept satisfied the public benefit test (if it did, any religious purpose would necessarily be a charitable purpose) that interpretation would not preclude a presumption that the advancement of a particular religion or type of religion was charitable. Thus, the absence of a presumption at the high level would not preclude a presumption that the advancement of Christianity or Islam was charitable; nor would it preclude a presumption that the advancement of the Church of England was

charitable whilst denying the presumption to extreme fundamentalist Christian sects.

g. In our view, the focus of section 3(2) is different. It is designed to prevent any presumption which would result in any particular purpose (such as the Particular Purpose we have referred to) being recognised as charitable without it needing to be established that the Particular Purpose, in the context of the particular institution concerned, is for the public benefit. Returning to the example of religion, not only is there to be no presumption that religion generally is for the public benefit (the particular description within section 3(2) then being religious purposes) but there is no presumption at any more specific level and thus no presumption that Christianity or Islam are for the public benefit and no presumption that the Church of England is for the public benefit.

h. That is not to say that evidence needs to be brought in every case about the public benefit which a particular purpose achieves in the context of the particular institution concerned, as will be seen when we address the context of education.

85. In that context, our above analysis shows that there is to be no presumption made that any particular type of education is for the public benefit: there is to be no presumption that education according to the curriculum commonly adopted across schools (whether in the public or independent sector) is for the public benefit and there is to be no presumption even that specialist education for physically or mentally disabled children at no cost to them or their parents is for the public benefit.

86. Putting section 3 in context, just as section 2(2) reflects the pre-existing established heads of charity (including Lord Macnaghten's residual fourth class), the statutory public benefit test in section 3(3) now reflects the conditions which had to be satisfied in order to establish the charitable status of a particular purpose in a particular context. We use the word conditions because, as we have indicated at paragraph 51 above, the effect of what would now be a decision that public benefit in the first sense is not shown may in the

past have been achieved by a decision that the case did not fall within the Preamble. But even if that was so as recently as at the time of *Gilmour* v. *Coats* in 1949, we have little doubt that, were the same examples to have come before the Court immediately before the 2006 Act, they would have been held to be non-charitable because they failed to be for the public benefit in the first sense. On that footing, the conditions of the past relating to that aspect of public benefit (satisfied where the purpose fell within, or within the spirit of, the Preamble) were transformed into the requirement to show a separate element of public benefit and so fall within section 3(3).

Application: some general points

87. Accordingly, if a new educational trust came before the Courts for the first time today (*ie* now that the relevant provisions of the 2006 Act are in force), it would need to meet both aspects of the public benefit test. We will come to the impact of section 3(2) on existing case law later: see paragraph 89 below.

88. To say that the status of independent schools was a matter of considerable controversy is perhaps to state the obvious; and no doubt many people thought that the legislation which emerged from the debate reflected their own viewpoint. Certainly, it was believed in many quarters, although the belief was by no means universal, that what was described as the abolition of the presumption by section 3(2) would have a significant effect in relation to charitable independent schools, since each school would have to justify its charitable status by reference to the public benefit which it provides in a way which had not hitherto been required. This view features, for example, in the witness evidence filed by the NCVO. The very purpose of the Guidance – under attack in the judicial review proceedings – was to give guidance on what was necessary to satisfy the public benefit requirement in what was perceived to be a changed situation. The irony of our analysis, however, is that the 2006 Act itself really makes little, if any, difference to the legal position of the independent schools sector. But what the 2006 Act has done is to bring into focus what it is that the pre-existing law already required, and what the law now requires by way of the provision of benefit and to whom it must be

provided. So far as the Guidance is concerned, the absence of any presumption is, we think, really beside the point.

The impact of the presumption on decided cases and existing trusts

89. There remains the question what impact, if any, the express imposition of the public benefit test and the provisions relating to the presumption have on the standing of decided cases and existing trusts. The 2006 Act contains no relevant transitional provisions (although section 4(1) of the Charities Act 1993 does provide that, for all purposes other than rectification of the register, an institution is conclusively presumed to be or to have been a charity at any time when it is or was on the register of charities). It seems to us that, interesting as that question is, it does not arise in the present case. As we shall show, the objects of the schools with which we are concerned are for the public benefit in the first sense. The real issue about public benefit in the present proceedings relates to the second sense. The Tribunal must decide as a matter of fact whether the class with which we are concerned – those able to afford to pay school fees – is a sufficient section of the community when it comes to public benefit in that sense. There is no authority which binds us in this regard. Nonetheless, we think it is helpful to express some views about the principles concerned.

90. The status of any particular institution must depend on its own constitution and the context in which it operates. Even so, if institution A, formed after the 2006 Act, is held by the Tribunal or court to be charitable after a challenge to its claimed status (for instance by the Charity Commission), then institution B, with a constitution in materially identical terms and operating in a context in which no material differences bearing on its status exist, is surely entitled to charitable status too. It would be strange if institution B had to prove that it had purposes which were for the public benefit when that had already been established by institution A. If, nonetheless, there was a challenge to institution B's charitable status, the Tribunal or court would, *prima facie*, be bound to accept its charitable status. This would not be because of any presumption but because of the precedent effect of the decision in relation to institution A. We use the words "*prima facie*" because, as we have said, each

case turns on its own facts. If the Charity Commission were able to produce new evidence not before the decision-making body in the first case concerning institution A, the new decision-making body considering the status of institution B would be bound to take that into account; and on the basis of it, might be persuaded that the conclusion in the earlier case should not be followed. But in the absence of evidence of that sort, the earlier decision would be a precedent binding on inferior courts and tribunals and to be departed from by a court or tribunal of the same level only if considered to be clearly wrong.

91. That approach applies to decisions made prior to the 2006 Act as it does to cases such as the example we have just given. Thus if institution A, in the first case in the example, seeks to rely on the decision in an earlier, pre-2006 Act case in support of its status as a charity, it would be necessary to consider (a) what the earlier case decided and (b) whether there were any distinctions between that and the position of institution A.

92. It would also be necessary to consider whether the earlier case had specifically addressed the public benefit in either of the two senses. If the decision in the earlier case turned on a presumption (within the meaning of section 3(2)) that the purpose in that case was for the public benefit, the decision could not be relied on by institution A because that is precisely what section 3(2) precludes. The precedent effect, of any, of the earlier decision is abrogated. If the earlier decision did not turn on a presumption, but it was nonetheless assumed that the object was for the public benefit, or the issue was not debated at all, the decision would not give rise to a binding precedent in respect of that issue. This is because, as matter of general law, a decision of a court does not give rise to a legally binding precedent where a point of law has been assumed or not debated even where that point of law is a necessary component of the decision: see *per* Sir Nicolas Browne-Wilkinson V.-C. in *In re Hetherington decd.* [1990] Ch. 1 at 10G, subsequently approved by the Court of Appeal in *R. (Kadhim)* v. *Brent London Borough Council Housing Benefit Review Board* [2001] Q.B. 955.

93. This is all as true in relation to an existing registered charity as it is in relation to an institution seeking registration for the first time. We can see no difference in principle in the application of section 3(2) to institutions existing prior to the 2006 Act and those formed after its commencement.

C. Public benefit in the first sense

Conclusions

94. The position in the present case is therefore as follows: First, no-one suggests that mainstream education of the sort identified in paragraph 69 is not for the public benefit in the first sense, if provided by a free school open to all. The purpose of providing such education is therefore for the public benefit in the first sense even if that purpose, in a particular case, is not charitable because there is no public benefit in the second sense. Secondly, even if that were not accepted, the court can properly conclude, not by way of presumption but as a finding of fact, that such education is for the public benefit in the first sense.

95. As a matter of fact, all of the schools with which we are concerned provide the sort of mainstream education to which we have referred and it could not be maintained that, if the relevant school provided such education free of charge and had an open access policy, it would not be a charity.

96. The question is then whether the public benefit in the first sense which the provision of education gives is outweighed by dis-benefits arising from the charging of fees. This brings us to the ERG's attack on the whole system of private education and its allegedly socially divisive effects and detrimental consequences for social mobility. It cannot, we think, be for the Charity Commission or for us or the higher courts to carry out what is an essentially political exercise to determine whether and if so what, if any, dis-benefits there are of the private schools sector generally and then to balance the benefits and to form a view about public benefit. If the Tribunal had to carry out that exercise to determine whether a particular institution whose charitable status was challenged was in fact a charity, it would not be involved in a hearing over a few days. Instead it would have to be engaged in something more akin to a public inquiry. Unless we were compelled by authority to

reach the conclusion that such a balancing exercise should be carried out, we would certainly not reach that conclusion. The only relevant authority (at least the only one known to us) on this aspect is *National Anti-Vivisection Society*.

97. Before we see what that case has to say on this issue, we address the argument that attacks on private education generally are beside the point. This issue, it is said, is not whether the independent sector generally is a "good thing" but whether the purposes of a particular school are for the public benefit. On this approach, the allegedly divisive result of private education is not to be laid at the door of any particular school. We reject that argument as an answer to any suggested need to carry out a balancing exercise. The purposes of a particular school are not to be assessed in abstract or indeed in isolation from society as a whole. If the school is but one of many which, collectively, bring harm to society, that school cannot deny responsibility for its part in the harm. It would, nonetheless, be necessary to ascertain whether the particular school was carrying out its objects in a way which did in fact contribute to that suggested harm. The need for that sort of enquiry can only reinforce the reluctance which we have to accept that it is the function of the Tribunal to embark on the balancing exercise in the first place.

98. The decision of the majority in the House of Lords in *National Anti-Vivisection Society* shows clearly that, in some circumstances, the court (and now the Tribunal) has to carry out precisely the sort of balancing exercise we are now considering. In that case, in connection with a claim for exemption from income tax in relation to investment income, the Special Commissioners found as facts:

a. in the light of evidence given by witnesses for the Crown, that experiments on living animals had produced much medical and scientific knowledge and had enabled many valuable cures to be discovered which had saved much suffering both for human beings and animals;

b. in the absence of any express evidence of public benefit in the direction of the advancement of morals and education as a result of the Society's efforts to abolish vivisection, that even if some such benefit

was to be assumed, that benefit would be greatly outweighed by the detriment which would follow if the Society achieved its object and that, on balance, the Society's object was gravely injurious to the public benefit.

99. The Special Commissioners nevertheless felt themselves constrained by authority to accept that the Society was a charity and to allow the exemption. In the House of Lords, the Society argued that trusts for the benefit and protection of animals (thus including the objects of the Society) were beneficial to the community because they produced moral benefit and that the court could not weigh the moral benefit of the Society's object against the material or physical benefits derived from vivisection. It was not for the court to weigh moral benefits or to examine a conflict between one ethical outlook and another. Nor was it for the court, having decided that a purpose would produce a benefit to the community, to treat that purpose as not charitable because of consequential disadvantages. Even if there were proof that physical benefits would be lost, that would not destroy the moral benefit of the Society's purpose. The Attorney General, by contrast, argued that the whole terms and effect of the particular trust have to be considered and if its object involves consequences which, when duly weighed, are found injurious to the community, the trust cannot be charitable. The court must look at all the considerations, material and moral, and reach a conclusion on the whole matter. There is no watertight division between material benefits and moral benefits.

100. The majority of the House of Lords clearly adopted the Attorney General's approach rather than the approach of counsel for the Society. We do not wish to cite extensively from the speeches, but we include the following extract from the speech of Lord Wright at 57:

> "There is not, so far as I can see, any difficulty in weighing the relative value of what is called the material benefits of vivisection against the moral benefit which is alleged or assumed as possibly following from the success of the appellant's project. In any case the position must be judged as a whole. It is arbitrary and unreal to attempt to dissect the problem into what is said to be direct and what is said to be merely consequential. The whole complex of

> resulting circumstances of whatever kind must be foreseen or imagined in order to estimate whether the change advocated would or would not be beneficial to the community."

101. We have already cited a passage from the speech of Lord Simonds at paragraph 65 above. What he said immediately before the quoted passages is also relevant in the present context:

> "... what room is there for the doctrine which has found favour with the learned Master of the Rolls and has been so vigorously supported at the bar of the House, that the court may disregard the evils that will ensue from the achievement by the society of its ends? It is to me a strange and bewildering idea….."

And later, at 74, we find this:

> "A purpose regarded in one age as charitable may in another be regarded differently... A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the court but on different evidence held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established, can ever fail. If by a change in social habits and needs, or, it may be, by a change in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in education charities to the Minister of Education and ask that a cy-près scheme may be established."

102. Lord Porter, in his dissenting speech, expressed his view this way at 59:

> "I find it difficult to accept the view that, once an object has been held to be included in the class of charities, it is then for the court to hear the evidence of witnesses on the one side and on the other as to whether it is in fact beneficial. I can imagine the severest contest between two sets of witnesses in the case of a gift for a religious purpose ... Yet if the argument be that the tribunal is to make up its mind on the evidence called before it, I cannot see where it can stop short of determining the matter on the ordinary principles upon which courts act in deciding upon a conflict of evidence, nor can I see any method of determining what preponderance of weight is to incline the scale sufficiently to one side or the other."

103. The majority, of course, rejected that approach which appears, in any case, to be founded on the view that a purpose falling within one of Lord Macnaghten's classes is automatically charitable. But as *Hummeltenberg* shows, not even a purpose within the second head of charity was necessarily charitable. Lord Porter therefore seems to begin at a questionable starting point, although his dissent does point out some of the difficulties which could arise and it is particularly important to bear in mind what he says about determining "the preponderance of weight" in the balance. Notwithstanding the difficulties which could arise in other cases, the House of Lords carried out the balancing exercise which we have described. We say balancing act although on the facts there seemed to be no real competition: one side of the balance was firmly stuck on the ground, the object being described by Lord Simonds as "greatly to the public disadvantage".

104. The objects of the Society could only have fallen within the fourth head of Lord Macnaghten's classification. It might be thought that the position is different in relation to one of the first three heads. However, we do not think that that can be so as a matter of principle. We can see no difference, analytically, between one of the first three heads and a later head of charity which has been established by case-law. Thus trusts for the advancement of animal welfare had been established as a head of charity prior to *National Anti-Vivisection Society*. But this did not mean that all trusts for the advancement of animal welfare were necessarily charitable as that case shows. Similarly, education was a recognised head of charity but that did not prevent Russell J. from reaching the conclusion which he did in *Hummeltenberg*.

105. However, we think that a clear case will have to be made out to show that an object which would ordinarily be charitable is not charitable because of the consequences which it has for society. That, indeed, chimes with what Lord Simonds had to say about the objects of an established charity becoming non-charitable if it appears that a purpose once thought beneficial had become truly detrimental to the community. Developments in understanding and science must be reflected in what is to be seen as charitable. But if a clear case is

made out, the institution concerned is not, or is no longer, charitable. As we see it, the court must be able to take into account the detrimental effects of implementation of an object (in the present case, an educational object) in a particular way even when that object implemented in other ways would clearly be charitable.

106. The court, we conclude, has to balance the benefit and disadvantage in all cases where detriment is alleged and is supported by evidence. But great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated. There is, we think, a considerable burden on those seeking to change the *status quo*.

107. Even where a clear disadvantage can be demonstrated, it may not be easy, or indeed, possible, for the court (and now the Tribunal) to balance the benefits and disadvantages. Still more will that be the case where the suggested disadvantages (and indeed the benefits) depend on value judgments influenced by social and political agendas. That cannot, we think, have been the sort of case within the contemplation of the House of Lords in *National Anti-Vivisection Society* and, if it had been, we think that the majority might have expressed themselves rather differently. We do not doubt the result in that case. Nor do we suggest that it was other than entirely appropriate to take into account the disadvantages from the point of view of the public benefit of the successful achievement of the Society's objects so that, when that was done, the answer was clear.

108. That leads us to say something about the material put before us by the ERG. One thing is clear: it is that the material comes nowhere near establishing clearly the "dis-benefits" which it identifies – in particular impairing diversity and social mobility. Rather, what we have are the views of certain educationalists, no doubt experts in their fields, drawing on research in support of their conclusions. This material only begins to scratch the surface of what it would be necessary to dig into at depth in order to see what conclusions can properly be drawn. The material indicates the battle-lines which would be drawn if an actual challenge were made to the charitable status of a particular

institution. There will be disputes not only about the factual conclusions to be drawn from research, but also about the implications for policy which can properly be drawn from those conclusions. Different, and to some extent contradictory, conclusions will no doubt be drawn and implications made. Some will argue that social mobility is impaired; others will argue that the independent schools sector promotes it. That is not a matter for us to decide in these proceedings nor, we suggest, for any Tribunal in the case of any particular institution.

109. The skeleton argument filed on behalf of the ERG is a powerful submission. But it is a manifesto as much as anything, reflecting the strongly held beliefs of the members of the ERG. It raises, if we may say so, issues which should be of concern to all members of society. But those are issues which require political resolution. It cannot be right, we think, that the Tribunal should have to grapple with issues of that kind, which are not really capable of judicial, rather than political, resolution.

110. It follows from this analysis that we do not see issues arising which concern the burden of proof or shifting evidential burdens which have, to some extent, been debated. It is for the alleged charity to establish its status. The judge or Tribunal will assess all the circumstances and decide whether or not the purposes in question are for the public benefit in both senses. It is highly unlikely that a judge or Tribunal will ever have to decide an issue on the burden of proof. It is certainly not something which we need to do in the present proceedings in relation to public benefit in the first sense.

One final point

111. We wish to make the following point about the inter-relationship between the two senses of public benefit in the context of education. Educational trusts of an ordinary sort are seen as being for the public benefit in the first sense because of the value to society of having an educated population. It is no more and no less of benefit to the community in the case of a rich person than a poor person. Thus the trust in *Oppenheim* is properly to be seen as for the benefit of the community in the first sense; but it failed to be a charitable trust because it was a private trust lacking the necessary element of public benefit

in the second sense. Accordingly, if an educational institution such as we are concerned with fails to be for the public benefit because it is limited, either constitutionally or in practice, to providing benefits to the rich, this will be so because, and only because, it fails to be for the benefit of a sufficient section of the public.

112. We thus locate the need to include the poor within the public benefit requirement in its second sense. This need could, however, be seen as an element of what it is to be charitable separate from public benefit in both the first and second senses. Thus a purpose (*eg* education) could be seen as capable of being charitable (and thus fulfilling the public benefit in the first sense) and as for a sufficient beneficiary class (*eg* everyone except the poor) so as to be public rather than private, and yet it would not be a charitable purpose because the poor are excluded. Interesting as the point may be, we do not need to resolve it, although we do remark that, viewed in the context of the public benefit requirement in the second sense, a class which excludes the poor is rather different from a class based on a nexus such as that found in *Oppenheim* and *Educational Grants Association Ltd.*

113. Subject to that last point, we therefore reach the conclusion that the schools with which we are concerned do have purposes which are for the public benefit in the first sense. This is because (a) the nature of the education which they provide is for the public benefit (see the reasoning leading up to the conclusion in paragraph 95 above) and (b) the material put before us by the ERG does not displace that conclusion (see paragraphs 96 to 110 above).

D. Public benefit in the second sense

Analysis of authorities

114. It follows from our analysis and discussion so far that, in the present case, the answers to the ultimate questions (whether the Guidance is accurate and the answers to the questions raised in the Reference) turn on our answers to these questions:

a. Is the class of beneficiaries who can afford fees a sufficient section of the community in the case of the hypothetical school addressed in

Question A2 of the Reference? Question A2 asks whether charity law operates

> "so as to cause an institution established for the sole purpose of the advancement of the education of children whose families can afford to pay fees representing the cost of the provision of their education not to be established for a charitable purpose."

b. If not, what is the status of a school which is open, according to its constitution, to all but is in practice restricted to those who can afford to pay full fees? Does such a school fall within section 1 as an institution "established for charitable purposes only"?

c. If the answer to b. is that the school is not entitled to charitable status, can it take steps to achieve such status by changing the way in which it operates *eg* by providing bursaries for poor students?

d. If the answer to b. is that the school is nonetheless a charity, is it operating in accordance with its charitable objectives and if not, what must it do in order to comply with its obligations to operate in accordance with those objectives?

115. In answering these questions, it is necessary to consider some further authorities which are variously concerned with the effect of the payment of fees and with what is a sufficient section of the community.

116. But before we do that, we wish to say something about identification of the objects of an institution. The starting point must, of course, be the governing instrument which falls to be construed according to the ordinary canons of construction, about which we need say nothing. In the context of objects which are potentially charitable, the court will often lean in favour of reading into general words (as was done in *Hetherington*) an implication that the object is qualified by words such as "so far as charitable". That will be the inevitable consequence where the relevant document makes it clear that the institution is intended to be a charity. In accordance with well established principle, the motives and intentions of the founders of the institution are otherwise irrelevant to the exercise of construction. In the present case, we

assume (and take it as common ground) that there would be no dispute about the charitable status of the relevant schools were it not for the restriction on access which flows from the requirement to pay fees. There is no other issue, once the points made by the ERG about "dis-benefit" are put aside.

117. We come then to the authorities. We have already sufficiently looked at *Jones* v. *Williams* in paragraph 43. Mention was made in argument of *Attorney-General* v. *Earl of Clarendon* (1810) 34 E.R. 190, but we do not derive assistance from it. There a school, Harrow School, had been founded to provide both free education to some pupils and a fee-paying education to others. The matter came before the court because of what was perceived as an improper shift away from the former to the latter. But there remained poor parishioners at the school and it was not suggested that the poor were excluded or that its purposes had ceased to be charitable (whether or not they were being properly carried into effect). The case was really about the regulation of the school and not its charitable status.

118. In *Attorney-General* v. *Earl of Lonsdale* (1827) 1 Sim. 105, property was given to found a school of learning for the education of gentlemen's sons. It was argued that such a school could not be a charity, but the report does not state on what basis that submission was made. Sir John Leach V-C dealt with the argument as follows at 109:

> "The institution of a school for the sons of gentlemen is not, in popular language, a charity; but in the view of the statute of Elizabeth, all schools of learning are so to be considered; and on that ground no objection can be made to the trusts of the deed of 1697."

It cannot, however, be deduced from this statement that the Vice-Chancellor would have regarded as charitable a school with the purpose set out in question A2 of the Reference. As Mr Pearce points out, a gentleman may be poor. It cannot be assumed that it was exclusively the wealth of gentlemen, rather than their social status, which meant that a school for their sons would not be a charity in popular language (whatever may have been the popular usage in 1827, which is by no means clear). Further, it appears that it was not intended that fees sufficient to cover the costs of the education provided were

to be charged, at least to all the prospective pupils, since the settlor "had resolved to settle a competent revenue, whereby and out of which" the masters might have proper salaries for their labour and maintenance and the school might be continued. In our view the case does no more than illustrate the proposition subsequently confirmed by *Pemsel* and not in issue in these proceedings that it is not necessary for all the beneficiaries of an institution which is not a trust for the relief of poverty themselves to be poor.

119. *Attorney-General* v. *Earl of Stamford* (1843) 1 Ph. 737, another education case, concerned Manchester Grammar School. The proceedings were originally heard by Lord Cottenham L.C., who directed that, in the light of the school's constitution, boarders, who paid both for their board and for their education, were not objects of the charity (*ie* they were not potential beneficiaries) and so were not in future to be entitled to any share in the benefits produced by the funds of the charity. The case was subsequently reheard by Lord Lyndhurst L.C., who differed from Lord Cottenham on the law, pointing out that the court had recently sanctioned the taking of boarders, which therefore could not be said from that date to be inconsistent with the regulations governing the school, and that by the terms of the statutes the school was open to any male child and so the boarders were indeed objects of the charity. In so far as earlier boarders were concerned, they did not lose their status as potential beneficiaries by making payment for their board, bearing in mind that the regulations contained a power of amendment which was to be taken to have been exercised in their favour. Lord Lyndhurst went on to refer to the Master the question whether there should be any restrictions or limitations on the terms on which boarders should be taken, in the light of inconclusive evidence suggesting that boarders might have received a disproportionate number of exhibitions.

120. On Lord Lyndhurst's view, then, no matter what the motive which led to the foundation of Manchester Grammar School, both rich and poor children were potentially objects of the charity, and he was alert to the need to protect the poor children from any possible partiality towards the richer boarders. The case sheds little light on the question whether an educational institution the purposes of which exclude the poor can be charitable although it does suggest

that there ought to be some limit on the number of fee-paying boarders who could be taken into the school.

121. *Attorney-General* v. *Earl of Devon* (1846) 15 Sim. 193 and *Attorney-General* v. *Bishop of Worcester* (1851) 9 Hare 328, have been referred to but do not assist greatly. We mention them because they are interesting reading in the attitude they display to the social conditions of the day. They illustrate the need for caution in approaching decisions based on an understanding of social and class structure and what promotes the welfare of society as a whole and of classes within it which may be very different from current understandings. They do, however, show that account could be taken of the impact which the taking of fee-paying boarders might have on the quality of the school-masters (that is to say in attracting a higher quality because of the ability of the school to pay higher salaries) for the benefit of the poorer students too. This is an aspect reflected in the decision in the *Manchester School Case* (1866-677) L.R. 2 Ch. App. 497 which we do not need to refer to further.

122. A close reading of these cases shows a somewhat greater readiness on the part of the judges to act on the basis of their individual opinions than might be thought appropriate today. In none of the cases, however, was it suggested that the institution in question was not a charity, nor was it argued that any of the institutions could be run on the basis of excluding free pupils from eligibility for admission. Indeed, that would have been inconsistent with the terms of the foundation of the various schools.

123. *Goodman* v. *Mayor of Saltash* (1882) L.R. 7 App. Cas. 633 turned, so far as relevant, on whether the appellants in the House of Lords, who were inhabitants of ancient tenements in the borough of Saltash, were a sufficient section of the public to establish, using modern language, public benefit in the second sense in relation to a right to take oysters from the River Tamar during certain periods of the year. A trust for the benefit of such a class was held to be charitable. In relation to the general principle Lord Selborne L.C. said at 642:

> "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust".

124. The difficulty with the case for our purposes is the lack of any clear explanation of who were "the free inhabitants of ancient tenements": *ie,* the beneficiaries of the trust. The House of Lords seems to have proceeded on the footing that they were originally probably people who had some share in the privileges and rights given to a town with a borough charter and certainly, as pointed out by Lord Fitzgerald, it seems that they would not have been villeins, with the lack of freedom involved in that status under mediaeval law. It is therefore probably fair to say that the beneficiaries were not among the poorest members of the community. However, Lord Selborne referred in support of his conclusion to *Jones* v. *Williams*, the case which is the foundation stone of the Charity Commission's argument that poor people must not be excluded. Lord Blackburn also referred to there being many cases "to the effect that a trust for public purposes, not confined to the poor, may be considered charitable". If anything, therefore, the case follows the *Jones* v. *Williams* line. In our view, it is not safe to draw any further inferences about the relative wealth or poverty of the members of the beneficiary class in this case.

125. Next, chronologically, comes *Pemsel's* case which we have already dealt with at some length. We only add this further citation from the speech of Lord Macnaghten at p 583, referring to his fourth head of charity:

> "The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

126. That suggests that in Lord Macnaghten's opinion, any charity must be capable, at least, of benefiting the poor as well as the rich (whatever he meant by "rich" and "poor"). His statement does, however, leave open the possibility that the benefits to the poor might be indirect only, and further does not make clear in what sense the word "indirectly" is used: specifically, whether indirect benefits to the poor might be limited to what we have called wider benefits.

127. The next case is *In re Macduff* [1896] Ch. 451. The relevant question before the Court of Appeal was whether a gift for "one or more purposes, charitable, philanthropic or [blank]" was a gift for charitable purposes. Although the Court of Appeal decided that the blank was to be ignored, it decided that since there existed philanthropic purposes which were not charitable, the gift was not exclusively for charitable purposes. All three judges considered the contrast between "philanthropic" and "charitable". Particularly relevant to the issues which confront us are these passages:

> "... we can suggest purposes which might be philanthropic and not charitable – purposes indicating goodwill to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptation of the word – that is to say, in the wide, loose sense of indicating goodwill towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor." (*per* Lindley L.J. at 464)

> "I think I could suggest many objects which would come within the word 'philanthropic', and to which the trustees would be entitled to apply the money, which are not charitable.....; there is an illustration which has occurred to me which seems not to be inapplicable to this case, and it is this – a gift, for instance, to landowners affected by agricultural depression and whose incomes are reduced to the amount of 300*l*. a year. It appears to me that that is an object which clearly would be philanthropic, but at the same time would not be charitable." (*per* Lopes L.J. at 469)

128. In his skeleton argument for the Charity Commission, Mr Pearce described the closing phrase of Lindley L.J.'s judgment as *obiter*. Mr Giffin for the ISC agreed with that. In our view, however, when the case is read as a whole, it appears that, at the least, all three members of the court were saying that a trust for a purpose confined to those above a certain income level, that level being such that those above it could not fairly be regarded as poor for the purposes of charity law as applied to the relevant purpose, would not be charitable given that limitation, whether or not it might be held non-charitable for any other reason. The Attorney General's argument, assuming that the words "charitable" and "philanthropic" were to be read disjunctively (as the

Court of Appeal did read them), was that the popular meaning of "philanthropic" was "beneficial to the community at large", so that philanthropic purposes fell within Lord Macnaghten's classification in *Pemsel*. It was an essential step in the court's reasoning that not all philanthropic purposes were charitable and each member of the court gave as an example, in one form or another, a purpose which excluded poor people from benefit. Lindley L.J.'s judgment makes clear that the reasoning was not dependent on the philanthropic purpose being one for financial assistance which could not qualify as the relief of poverty, since he gives his illustration in the context of a charitable purpose for the benefit of both rich and poor. Further, *Pemsel* was clearly in the court's mind, given the reliance placed on it by the Attorney General. The judgments were not reserved (see the opening of Lindley L.J.'s judgment), which may account for the use of some slightly informal expressions. Nevertheless, there is no suggestion in any of the judgments that the effect of excluding the poor from an otherwise charitable purpose depends upon whether or not the exclusion is objectively reasonable (an explanation suggested by Mr Giffin), and indeed the exclusion in the circumstances envisaged by Lopes L.J. could be regarded as perfectly reasonable. The same goes for the example given by Rigby L.J. but we do not want to lengthen this Decision even more by referring to that in detail.

129. We return to educational purposes with the next case, *R.* v. *Commissioners for Special Purposes of the Income Tax, ex parte University College of North Wales* (1909) 5 T.C. 408. The case concerned exemption from income tax. Without carrying out a detailed examination of the facts, it should be noted that the objects of the College, as far as appears from the report, made no reference either way to the ability of students to pay fees. It was thus *prima facie* open to both rich and poor. Further, it is tolerably clear that the Court of Appeal contemplated that there would be both rich and poor students.

130. It was argued by the Attorney General in that case that, contrary to the position in relation to religious charities established by *Pemsel's* case, "in considering whether an educational purpose is charitable, the poverty or otherwise of the persons entitled to receive the education must be taken into

account". As to that, the Master of the Rolls, Sir Herbert Cozens-Hardy, said this at 414:

> "The attempt has been made by the Attorney-General and the Solicitor-General to suggest that the Respondents here are not within the meaning of the rules of those decisions [the second of which was *Pemsel's* case], because according to the objects of the college and according to the terms of the Charter, the education is not for the poor, but might extend to the rich, and might extend to professional or commercial education as well as to higher education. I entirely decline to limit the doctrine that a trust for the advancement of education is not charitable unless there be the element of poverty in it also. There is no foundation for it in authority, nor is there any foundation for it in reason."

131. It is clear, we consider, that the Master of the Rolls was, in that passage, addressing himself to the same question as had been answered in *Pemsel's* case, namely, whether a benefit could be provided to an individual only if he was poor. The same answer was given, namely, that it is possible to benefit the rich as well as the poor. In referring to "a trust" as having "an element of poverty" he was, we consider, doing no more than refuting the Attorney General's argument that it was necessary for all beneficiaries to be poor. We certainly do not consider that he can be read as saying that an educational trust which actually excludes the poor is capable of being charitable (although nor does he say it is incapable of being so).

132. Next in time comes *In re Clarke* [1923] 2 Ch. 407 which we refer to because it is a case showing that an object of charity does not have to be poor in the sense of destitute. It concerned a gift for the provision:

> "for persons of moderate means such as clerks governesses and others who may not be able or eligible to benefit under the National Health Insurance Act Old Age Pensions or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution."

133. Romer J. rejected the argument that the gift was invalid because the persons to be benefited were not poor but of moderate means and were to make some

contribution, following previous decisions to the effect that a poor person did not have to be destitute; the word "poor", as it is understood in charity law, could cover those whom the testator had intended to benefit and subsidise. In the case before him, the testator presumably meant by those of "moderate means" those who needed some contribution from his bounty to be able to afford the operation or treatment required.

134. The next case, *Verge* v. *Somerville* [1924] A.C. 496, a decision of the Privy Council, involved a consideration of *Goodman* v. *Mayor of Saltash* and *In re Macduff*. The decision confirmed, if confirmation were needed, that there is no requirement that all beneficiaries or potential beneficiaries of a charitable purpose should be poor unless the charitable purpose is itself the relief of poverty. The decision expressly put to one side the question of the charitable nature of a purpose which excluded the poor.

135. It is a useful example, however, of a class which was regarded as a sufficient section of the community, the relevant class being men from New South Wales who served in the war and were returned or to be returned to their native land, in the context of a testamentary gift to "the trustees for the time being of the 'Repatriation Fund' or similar fund for the benefit of the New South Wales returned soldiers".

136. *In re Compton* [1945] 1 Ch. 234 concerned a gift for the education of children who were the lawful descendants of three named persons. The question thus arose whether a class of potential beneficiaries of an educational trust which was defined by reference to a family connection could constitute a sufficient section of the public for the purposes of the second aspect of the public benefit test, in the same way as a trust for the relief of poverty of such a class would have been seen as charitable. (As an aside, we must make clear that we intend to say nothing about trusts for the relief of poverty since the 2006 Act, a matter which is already the subject of other proceedings before the Tribunal.)

137. The leading judgment was given by Lord Greene M.R. On the subject of public benefit, he said this:

> "No definition of what is meant by a section of the public has, so far as I am aware, been laid down, and I certainly do not propose to be the first to make the attempt to define it. In the case of many charitable gifts it is possible to identify the individuals who are to benefit, or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus, if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are A.B., C.D. and E.F. but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were the individuals A.B., C.D. and E.F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to establish their status, have to assert and prove, not that they themselves are A.B., C.D. and E.F., but that they stand in some specified relationship to the individuals A.B., C.D. and E.F., such as that of children or employees. In such a case, too, a purely personal element enters into and is an essential part of the qualification, which is defined by reference to something, i.e., a personal relationship to individuals or an individual which is in its essence non-public."

138. *In re Compton* was approved in *Oppenheim*, a decision which we have already considered in paragraph 43 above. After the passage from the speech of Lord Simonds which we have cited, at the end of which he lamented the difficulty in determining what is sufficient to satisfy the test, he gave examples at each end of the scale. Thus:

> "a trust established by a father for the education of his son is not a charity. The public element, as I will call it, is not supplied by the fact that from that son's education all may benefit. At the other end of the scale the establishment of a college or university is beyond doubt a charity. 'Schools of learning and free schools and scholars of universities' are the very words of the preamble to the Statute of Elizabeth……The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of

> a class of persons at large. Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual ..." (at 306)

139. We do not take from that reference to institutions the conclusion that an ordinary sort of educational institution is necessarily charitable even where it is limited to a particular class of persons. That is not the sort of case which Lord Simonds had in mind when giving the example which he did, an example designed to contrast with the purely private trust of his first example.

140. Lord Normand recognised the same difficulty (see at 309-10):

> "……..I am, however, satisfied that the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. That seems to me to follow from the principle that the trust purposes must be directed to the benefit of the community or a section of the community ... The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined. It is on the difficulty of defining the attribute or qualification which differentiates a section of the public from an aggregate of persons which is not a section of the public that all attempts to define the public element in charitable trusts have foundered."

141. Taking *Compton* and *Oppenheim* together, it is clear that a personal nexus of the sort considered by which beneficiaries may be identified will prevent the class being a section of the public. However, it does not follow from that, and it was not decided by those cases, that where there is no private nexus the class is a sufficient section of the public. Those cases do no more than set out one test by reference to which a purpose may be excluded from the ranks of charitable purposes and do not preclude the possibility of a case where the link

is impersonal and the class of potential beneficiaries is not numerically negligible, but the public benefit test is still not satisfied.

142. We now come to *The Abbey Malvern Wells Ltd.* v. *Ministry of Housing and Local Government* [1951] 1 Ch. 728, on which Mr Giffin placed considerable reliance. The company's objects included the carrying on of an established school and more generally were to establish and carry on schools with the object of providing a liberal education for girls and sound religious training. It was argued on behalf of the Ministry that the school was not a charity for a number of reasons, one of which was that its purposes were not charitable because "an educational establishment is not charitable unless tuition is free or at reduced fees". To that argument, the company responded by saying that it was a startling proposition that "a school which charges full fees" was thereby not a charity: counsel for the company contended that that might have been the law in earlier times but if so, had long ceased to be so, a proposition for which he referred to *Attorney-General* v. *Earl of Lonsdale.*

143. In dealing with counsel for the Ministry's argument, Danckwerts J. said at 737:

> "The other attack made by Mr. Buckley upon the charitable nature of the trust deed was of a more general nature and was, in my view, rather a startling proposition. The proposition, put shortly, was this: that an educational trust or an educational purpose is not charitable, unless it be for the promotion of education for persons who pay less than the full value of the services which they receive. That seems to me a proposition which might at one time have been acceptable to the courts, but it is several centuries out of date. The Statute of Elizabeth, which of course is regarded as the foundation of most charitable principles considered by the courts, refers to the maintenance of schools of learning, free schools and scholars of universities, and also refers to the education of orphans, and at the beginning of the eighteenth century it was held that a school must be a free school if it is to be within the statute. That view had been definitely abandoned by the nineteenth century, as is made clear by the observation of Leach, V.-C., in *Attorney-General* v. *Earl of Lonsdale*, where he said: 'The institution of a school for the sons of gentlemen is not, in popular language, a charity; but in view of the Statute of Elizabeth, all schools for learning are so to be considered'; which indicates that all schools of learning are to be considered charities, unless they exist purely as profit-making

> ventures such as certain preparatory schools, and those institutions known sometimes as "cramming establishments".
>
> Therefore, it seems to me that as the whole purpose of this deed was to secure the education of girls at the Abbey School on a non-profit-making basis, the trusts are plainly of a charitable nature and that the requirements of [the Act] are so far satisfied."

144. We have explained in paragraph 118 above why, in our view, the *Lonsdale* case is not to be read as deciding that the express exclusion of the poor from a school does not mean that the school cannot be a charity. It is relied on by Dankwerts J. to support the proposition that that view (*ie* that a school had to be a free school if it was to be a charity) had definitely been abandoned by the nineteenth century. It does not support the proposition that all schools of learning are charities unless they are profit-making ventures. In any case, on our reading of it, *The Abbey, Malvern Wells* presents, as did the *Lonsdale* case, the difficulty that the court was not concerned in any way with exclusion of the poor. The argument for the Ministry seems to have been that all tuition had to be free or at reduced fees, rather than that some tuition had to be free or at reduced fees; certainly that must have been how Danckwerts J. understood the submission, in the light of his reference to the trust being for (rather than making provision for or including among its purposes) the promotion of education for persons who pay less than full value. Moreover, it is unclear from the report whether in fact every pupil was in fact charged full fees. We accept that Danckwerts J. may have taken the view that the charging of substantial fees in practice and at least as a general rule did not mean that the school did not have a charitable purpose, but we do not accept that the case can be regarded as a decision on the issue of the express exclusion of the poor.

145. We come next to *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572. It is not necessary to set out the terms of the trusts in any detail, but broadly they included social and recreational purposes for persons resident in the boroughs of West Ham and Leyton who were members, or who the leaders for the time being of the Stratford Newtown Methodist Mission thought were likely to become members, of the Methodist Church. The case highlights the issue that what constitutes a sufficient section of the public cannot be

considered separately from the particular nature of the charitable purpose. Thus we find Lord Simonds saying this at 592:

> "I think that ... the difficulty has sometimes been increased by failing to observe the distinction, at which I hinted earlier in this opinion, between a form of relief extended to the whole community yet by its very nature advantageous only to the few and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it. Of the former type repatriated New South Wales soldiers would serve as a clear example. To me it would not seem arguable that they did not form an adequate class of the community for the purpose of the particular charity that was being established. It was with this type of case that Lord Wrenbury was dealing [in *Verge* v. *Somerville*], and his words are apt to deal with it. Somewhat different considerations arise if the form, which the purporting charity takes, is something of general utility which is nevertheless made available not to the whole public but only to a selected body of the public – an important class of the public it may be. For example, a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however numerous and important: it is then clearly not a charity. It is not of general public utility: for it does not serve the public purpose which its nature qualifies it to serve."

146. That is helpful as far as it goes. But it is not, and does not purport to be, a guide to how, in the case of a particular charity or a particular class, it is to be decided on which side of the line the purpose falls. All we have from the authorities which we have so far considered is the test by reference to personal nexus which tells us some circumstances in which an educational institution is <u>not</u> a charity.

147. *Baddeley* was cited to, but not referred to by, the Privy Council in *Davies* v. *Perpetual Trustee Company (Ltd.)* [1959] A.C. 439. The relevant testamentary gift was:

> "to the Presbyterians the descendants of those settled in the Colony hailing from or born in the North of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures."

The Privy Council treated the trust as *prima facie* charitable, as being for the advancement of education and the advancement of religion, but, after considering *Verge* v. *Somerville* and *Oppenheim*, concluded that the trust was not for the benefit of the community or a sufficient section of the community, although the case was not an easy one (the Board "had not found it easy to decide on which side of the line falls the trust…"). That conclusion was based on two matters: first, there had to be a personal connection to certain persons living at the date of death of the testator, those persons not themselves being a sufficient section of the community; secondly, the qualifications were "in some respects wholly irrelevant to the educational object which the testator had in mind". This second reason of course supports the view that there must be some link between any qualifying characteristic and the educational need which it is an object of the trust to relieve.

148. *Inland Revenue Commissioners* v. *Educational Grants Association Ltd.* [1967] 1 Ch 993 was referred to at length in argument before us. The defendant association was established for the following objects:

> "(A) To advance education in such ways as shall from time to time be thought fit and in particular by making grants to or for the benefit of and for the education of all such persons as shall be considered likely to benefit from education at a preparatory, public or other independent school, including boarding-schools, and at technical colleges and at any university ...
>
> (B) To create and administer and to assist in the creation and administration of scholarships, exhibitions, bursaries and prizes ... and to act as trustees or managers of any property endowment, bequest or gift for educational purposes".

149. We do not need to go into the facts in detail. The following brief summary taken from the case stated by the Commissioners is enough. The association was promoted by a director of Metal Box Ltd., its council of management were all connected with Metal Box and met at Metal Box's premises. Its income consisted primarily of money paid under a deed of covenant by Metal Box and a letter was circulated to senior employees of Metal Box inviting applications for grants. The promoting director had never intended to give the

association wide publicity; at an early stage he had indicated to the managing director of Metal Box "the sort of income the association would require". The letters to senior staff had indicated that the number of grants which could be made was likely to be small and so the letter was not to be widely discussed. The publicity outside Metal Box was from personal relationships and talks the promoting director had with people in the education world and with directors of other companies.

150. The objects were, on their face at least, directed to the public at large. It was no doubt for that reason that the Revenue accepted that the objects were charitable, but refused tax exemption in relation to part of the income on the footing that that part (between 76% and 85%) was not in fact applied for charitable purposes as would be required to obtain exemption. The issue, on that basis, was whether the income in question had been applied "for charitable purposes only" as required by the relevant tax legislation. There was some debate about whether the concession by the Revenue was correct but nothing turns on that for present purposes.

151. Lord Denning, after pointing out what he saw as the illogicality of the decided cases, was of the view that the court was compelled by *Oppenheim* to hold that the application for the Metal Box children was not an application for charitable purposes. He declined, however, to accept that the payments to the Metal Box children were *ultra vires*, apparently on the basis that the Revenue concession that the association was established for charitable purposes only might not have been correct.

152. Harman L.J., after discussing the definition of charity and expressing his view that the memorandum of association was ambiguous, said this at 1012-3, reflecting what Salmon L.J. had said in argument:

> "Taking all the facts which the commissioners state, I cannot help being driven to the conclusion that the application of this money was directed and guided into the dependants of the Metal Box employees. If that be so, I do not think it is a charity. However large the class may be, one may not have a charity from an educational point of view if the nexus between the objects is one single person, one single company or one single family. The section of the public may be extremely small. The employees in

> the case of *Oppenheim* were extremely large. There are no doubt a large number here. But it does not matter about size: it is the connecting link between them."

153. Salmon L.J. pointed out that on the basis of *Oppenheim* the association would not have been charitable if established for the benefit of Metal Box children and continued at 1014:

> "If a trust established for the purpose of making grants for the education of children of employees or former employees of Metal Box would not be established for charitable purposes only, it seems to me to follow, as the night follows the day, that annual payments applied for the purpose of educating the children of employees or former employees of the company are not applied for charitable purposes only. I do not mean that any child of a Metal Box employee is necessarily excluded from the ambit of this beneficence. If it had been shown, for example, that by chance a few such children had been amongst the members of the general public to have benefited from the grants, I should not have thought that this was in any way breaching the requirement that the annual payments must be applied for charitable purposes only. The trouble in this case is that when one looks at all the facts which have been recited by my Lords and which I need not repeat, one is driven to the same inescapable conclusion as was the judge, namely, that 75 per cent to 85 per cent of the annual payments were in fact not applied for the benefit of a sector of the public but for the benefit of children of employees or former employees of Metal Box as such."

154. The *Educational Grants Association* case is not an entirely easy decision to analyse. The position appears to be this:

a. The objects of the association according to its memorandum of association were wholly charitable. It therefore had to operate, and expend its income only, for the public benefit. Of course, once a child had been properly selected as an actual beneficiary (which was almost certainly the case in relation to non Metal Box children) the payment of that child's school fees would count as an application for the public benefit notwithstanding that the direct beneficiary of the payment would be the child or parent.

b. The selection of beneficiaries by reference to their connection with Metal Box could not be justified in the fulfilment of the charitable objective. As Salmon L.J. put it at 1015:

> "[To decide in favour of the appellants] would involve the absurdity of holding that what the trust is in fact doing is being done for charitable purposes only, although if the trust had been established to do that very thing, it would not have been established for charitable purposes only."

c. On the basis that the association was a charity and that the application of income was not for charitable purposes only, it follows that the directors were acting beyond their powers. Lord Denning was not prepared to reach the conclusion that the directors were in fact acting beyond their powers only because he did not accept that the memorandum did not allow them to act in the way which they did. But if it did allow them to do so, then the association was not, after all, a charity; in which case we suppose that tax exemption ought not to have been allowed even in relation to the income which the Revenue had accepted as being applied for charitable purposes only.

d. It is not possible to treat the association as partly charitable and partly non-charitable. An institution is either a charity or it is not. That was clear before the 2006 Act; since the Act an argument to the contrary is impossible given that the institution must be established for charitable purposes only.

155. *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow Corporation* [1968] A.C. 138 (referred to, it seems long ago now, in paragraph 77 above) is the first modern case cited to us from a United Kingdom jurisdiction in which express reference has been made to the effect of charging by a charity for its services. The objects of the Society in that case were:

> "(a) To promote reform in the present methods of burial in Scotland, both as regards the expense involved and the dangerous effects on the public health.
>
> (b) To promote inexpensive and at the same time sanitary methods of disposal of the dead, which shall best tend to

render the remains innocuous; and, in particular, to promote the method known as cremation.

(c) To publish information on all matters tending to promote burial reform or cremation, in the form of books, circulars, reports or transactions."

156. Lords Reid, Upjohn and Wilberforce all expressly stated that an object which was otherwise charitable did not cease to be so if beneficiaries were required to make payments for what they received. Lord Wilberforce dealt with the point in the most detail, saying at 156:

> "The company makes charges for its services to enable it, in the words of the joint agreed minute, to fulfil effectively the objects for which it was formed. These charges, though apparently modest, are not shown to be higher or lower than those levied for other burial services. In my opinion, the fact that cremation is provided for a fee rather than gratuitously does not affect the charitable character of the company's activity, for that does not consist in the fact of providing financial relief but in the provision of services. That the charging for services for the achievement of a purpose which is in itself shown to be charitable does not destroy the charitable element was clearly, and, in my opinion, rightly, decided in *Inland Revenue Commissioners* v. *Falkirk Temperance Cafe Trust* (1927) SC 261; 11TC 353) as well as in English authorities."

157. The statements about charging must be treated with some circumspection. It does not appear that any argument was addressed about the effect, if any, of charging on charitable status. The case is one in which the potential beneficiaries were essentially the public at large, who might benefit in many ways having nothing to do with paying for cremation; there is no question of excluding the poor. Finally, there is no basis on which it could be said that the fees actually charged were such as to constitute high fees in the sense that expression is used in the Guidance in relation to education. A section of the public might find it difficult to meet the charges, but there is no reason to suppose that the vast majority of the population would find themselves excluded any more from these than from any other burial services. Nonetheless, Lord Wilberforce does observe that the company's activity was not provision of financial relief but provision of services.

158. This brings us to a case which is at the heart of the Charity Commission's Guidance, but the effect of which is disputed, *In re Resch's Will Trusts* [1969] 1 A.C. 514, a decision of the Privy Council. It concerned, so far as material, a gift to the Sisters of Charity for the general purposes of St. Vincent's Hospital. A particular difficulty was that there was no governing document setting out the purposes of St. Vincent's Hospital, so they had to be gathered from evidence as to how the hospital was conducted in fact. It was contended that the gift failed because its benefit did not extend to the community as a whole or a section of the community, not excluding the poor, and reliance was placed on *In re Macduff* and *Jones* v. *Williams*. It was said that the intention and practice was that the benefits of the hospital were available only to those sick persons who were in relatively affluent circumstances. The poor were excluded and in any event those who benefited were a fluctuating body of individuals whose eligibility depended on financial capacity or the existence in their favour of a private insurance contract. Interestingly, counsel for the hospital trustees apparently accepted that charges which were so substantial that they were prohibitive except for the well-to-do and thus excluded the poor would destroy the charitable nature of a gift (see at 527B), while contending that the fact that the charges might be difficult for the poor to find was not sufficient to amount to such an exclusion. He argued further that medical benefits funds, to which there was a government incentive to contribute and which would provide some accessibility to the hospital, were "part of the system" and relevant to be considered in deciding whether or not the poor were excluded (see at 528E).

159. Lord Wilberforce began by setting out what the purposes of the hospital were as they emerged from the facts established. We summarise his statement of the facts which starts at 538G:

a. The hospital, in New South Wales, was established and had since 1909 been conducted by the Sisters of Charity. The Sisters also conducted in 1909 and still conducted the adjacent St. Vincent's Hospital which was a public hospital within the Public Hospitals Act, 1929-59.

b. The reason for the establishment of the private hospital was to relieve the pressing demand of the public for admission to the general hospital which was quite inadequate to meet the demand upon it.

c. Another reason was that there were many persons who needed hospital nursing and attention who were not willing to enter a public hospital but were willing and desirous of having hospital accommodation with more privacy and comfort than would be possible in the general hospital.

d. The establishment of an adjacent private hospital would enable the honorary medical staff in the general hospital to admit for treatment under their care in the private hospital patients who were reluctant to enter the general hospital and were able and willing to pay reasonable and proper fees for admission and treatment in a private hospital.

e. The private hospital had 82 beds as compared with over 500 in the general hospital.

f. The daily charges made by St. Vincent's Private Hospital were comparable with those made at other similar institutions, one of which was St. Luke's Hospital (the subject of an earlier decision in New South Wales referred to below). In 1963 they ranged from £31 10s. to £44 9s. 0d. per week.

g. From time to time patients had been treated free of charge or at reduced fees in the private hospital.

h. There were in force in New South Wales a number of hospital benefit schemes under which, according to the scale of contribution chosen to be made by a member, benefits were payable in respect of treatment in approved hospitals – which would include St. Vincent's Private Hospital.

i. There was a subsidy payable by the Commonwealth of Australia of up to $2.00 per day for each day of hospital treatment in an approved hospital of a member of a scheme. As an example of the scale of

benefit obtainable for a specific contribution, for a payment from 11s. to 14s. per week (which covered a wife and any children under 16) a person could obtain hospital benefits from £21 to £33 12s. 0d. a week towards hospital charges. Such benefits were payable for 12 weeks in any 12 months.

j. St. Vincent's Private Hospital had on no occasion in the past been, and was not at the time of the litigation, conducted as a profit-making enterprise as if it were a commercial venture. It was, however, the case that on a cash accounting basis, and without allowing for certain overheads or depreciation which would be chargeable if the hospital were run commercially, fairly substantial surpluses had from time to time been made.

k. There was evidence that the close proximity and association between the public hospital and the private hospital had advantages from the medical aspect. The calibre of the medical staff at the public hospital was influenced by the existence of the private hospital facilities, and correspondingly patients in the private hospital benefited from the existence of special facilities at the general hospital to which they could be taken if necessary.

l. Although the private hospital had no formal constitution and was not governed according to a set of rules, it was shown to have existed for over 50 years and to have been managed consistently and continuously for definite purposes. Those purposes were essentially the provision of a certain type of medical and nursing care and treatment for which there was a need and which the general hospital did not give. It had been part and parcel of these purposes to provide such care and treatment at the lowest cost at which this could practically be done.

160. Turning to the public benefit argument, Lord Wilberforce cleared the ground by disposing of any suggestion that a trust for the relief of the sick could be valid only if it were limited to the poor sick. He then moved on to the narrower argument that the gift failed because the poor were excluded from benefit. He referred to *Jones* v. *Williams* and *In re Macduff* and then the case

of *Taylor* v. *Taylor* 10 C.L.R. 218. In that last case Griffith C.J. had similarly doubted very much whether a gift to an institution for the exclusive benefit of well-to-do persons who could pay for their treatment could be supported; he also thought that a private hospital for the insane would be charitable "unless perhaps the poor were excluded from benefit". Lord Wilberforce continued at 543G:

> "Their Lordships accept the correctness of what has been said in those cases, but they must be rightly understood. It would be a wrong conclusion from them to state that a trust for the provision of medical facilities would necessarily fail to be charitable merely because by reason of expense they could only be made use of by persons of some means. To provide, in response to public need, medical treatment otherwise inaccessible but in its nature expensive, without any profit motive, might well be charitable: on the other hand to limit admission to a nursing home to the rich would not be so. The test is essentially one of public benefit, and indirect as well as direct benefit enters into the account. In the present case, the element of public benefit is strongly present. It is not disputed that a need exists to provide accommodation and medical treatment in conditions of greater privacy and relaxation than would be possible in a general hospital and as a supplement to the facilities of a general hospital. This is what the private hospital does and it does so at, approximately, cost price. The service is needed by all, not only by the well-to-do. So far as its nature permits it is open to all: the charges are not low, but the evidence shows that it cannot be said that the poor are excluded: such exclusion as there is, is of some of the poor – namely, those who have (a) not contributed sufficiently to a medical benefit scheme or (b) need to stay longer in the hospital than their benefit will cover or (c) cannot get a reduction of or exemption from the charges. The general benefit to the community of such facilities results from the relief to the beds and medical staff of the general hospital, the availability of a particular type of nursing and treatment which supplements that provided by the general hospital and the benefit to the standard of medical care in the general hospital which arises from the juxtaposition of the two institutions."

161. After the passage we have quoted, Lord Wilberforce mentioned another case concerning a similar hospital, also in New South Wales, St. Luke's Hospital. This had been the subject of judicial decision in *Perpetual Trustee Co. (Ltd.)* v. *St. Luke's Hospital* (1939) 39 S.R. (N.S.W.) 408. The case established in his view that a hospital is not excluded from the category of charitable institutions simply because it accepts no patients who do not pay fees. One

should not, however, conclude from that that a hospital which charges full fees for all of its patients (and is required to do so by its constitution) is charitable. Indeed, the actual decision turned on these factors identified by the judge at p 421: (i) the institution was a hospital (and thus *prima facie* charitable) (ii) it was not carried on for private gain and was largely assisted by private subscription (iii) importantly for present purposes that it did not exclude poor people (iv) it accommodated a number of patients paying less than full cost whose number was "not less than is consistent with the ability of the hospital efficiently to carry out its objects….."., in other words, the element of subsidy was as high as could be achieved if the hospital was to operate efficiently.

162. We do not find it easy to derive clear principles from *Re Resch*. On the one hand, *Jones* v. *Williams*, *In re Macduff*, and *Taylor* v. *Taylor* are accepted as correct in their statements that a trust which excluded the poor from benefit would not be charitable. On the other hand, it appears to be permissible to levy charges so that the benefits could only be enjoyed by persons of "some means". What Lord Wilberforce meant by "some means" is not entirely clear: we take the expression to mean those of moderate means, as in *Re Clarke,* or of means sufficient to pay moderate charges. We do not think it can be read in the sense of "substantial means". Our reading of those cases and of *Re Resch* itself is that, when the judges speak of excluding the poor, the principal (if not exclusive) focus is on exclusion as a matter of the constitution of the institution or trust concerned and, possibly, as a matter of the policies adopted by the institution or trust. But it does not follow from the fact that charges are made that the trust is not charitable or, we would add, if charitable is operating other than for the public benefit. Lord Wilberforce uses the words "would necessarily fail" where the facilities are available only to persons of some means (whether or not the fees cover the full cost or are subsidised but not to such an extent as to remove the need for "some means"). He draws the distinction between the provision of medical treatment in response to a public need on the one hand and the limitation of admission to a private nursing home to the rich.

163. The test, as he says, is one of public benefit, in which context indirect as well as direct benefit is to be taken into account: that includes wider benefits as we

have described them. It is very important, we consider, to remember that the enquiry, whether one is looking at the constitution of an institution or at its activities, is about the public benefit. The result of the enquiry is not to be concluded *a priori* simply because the institution levies charges even if the result is that the facilities are available only to persons of "some means". The answers may be different in the cases of, for instance, a hospital charging modest fees for minor operations (even if those fees meet the whole cost) and a school charging very large fees for boarding education. On the facts of *Re Resch*, the element of public benefit was seen by Lord Wilberforce as "strongly present", through the benefits which he identifies in the passage quoted. It is, however, important to note that the service was open to all and that the poor were not in fact excluded.

164. In relation to the observation that the poor were not excluded, Mr Giffin remarks that Lord Wilberforce does not say that the poor were able to benefit to any specified extent or even to a reasonable extent; and that there is no factual finding or discussion of what is meant by a reasonable extent and how the hospital meets that requirement. It seems to us clear, however, that in Lord Wilberforce's view the benefits of the services provided by the hospital were to some degree directly available to the poor, in which class he clearly included persons who were nonetheless able to pay because they held a medical benefits insurance contract, and we do not think he can fairly be supposed to have thought that the degree of availability to the poor was negligible.

165. In this connection, we note that the judge at first instance concluded that more than half the patients were accommodated at less than actual cost although of course we note also that that conclusion was said to be without basis. The fact that such a conclusion was drawn does, however, suggest that some element of subsidy was by no means rare. This chimes with what was said in the *St. Luke's Hospital* case. It is reasonable to conclude that a merely token provision for those who could not pay full charges would not be sufficient to satisfy the public benefit requirement if otherwise it was not satisfied.

166. *Joseph Rowntree Memorial Trust Housing Association Ltd.* v. *Attorney-General* [1983] 1 Ch. 159, is another case which requires careful examination and is relied on by both sides of the argument. The plaintiffs were a charitable housing association and the trustees of a charitable housing trust. They wished to build small self-contained dwellings for sale to elderly people on long leases in consideration of a capital payment. They designed five schemes to provide accommodation suited to the particular disabilities and requirements of the elderly. Applicants were required to have attained the age of 65 if male or 60 if female, to be able to pay the service charge, to lead an independent life and to be in need of the type of accommodation provided. The question was whether the schemes were charitable in law and so might be carried out by the plaintiffs. It is to be noted that the plaintiffs and the Attorney General argued against the Charity Commissioners.

167. Peter Gibson J. summarised the Charity Commissioners' objections, set out in their Report for 1980, as follows at 171C:

> "I hope I summarise the objections of the Charity Commissioners fairly as being the following: (1) the schemes provide for the aged only by way of bargain on a contractual basis rather than by way of bounty. (2) The benefits provided are not capable of being withdrawn at any time if the beneficiary subsequently ceases to qualify. (3) The schemes are for the benefit of private individuals, not for a charitable class. (4) The schemes are a commercial enterprise capable of producing profit for the beneficiary."

168. We do not need to consider the reasons why the judge rejected objections (2) and (4): nothing similar arises in the present proceedings. He also rejected objection (1), in effect adopting the Attorney General's submission that the sort of contractual benefit which excludes a charitable trust is a benefit as of right, as might be the benefit provided under the rules of a mutual society (where the member's eligibility for the benefit, as well as the benefit itself, is acquired by contract). He referred to a number of authorities, including *Re Resch* and *Abbey Malvern Wells Ltd.*, where beneficiaries only receive benefits by way of bargain, remarking that it is "crucial….that the services

provided by the gift are not provided for the private profit of the individuals providing the services".

169. Finally, the judge rejected objection (3), saying simply that the schemes were "for the benefit of a charitable class, that is to say the aged having certain needs requiring relief therefrom". He focused his other comments on the objection to a perhaps obvious point, *viz* the fact that particular individuals within the class would be the ones to whom the benefit was given did not make the purpose a purpose of benefiting a class of private individuals.

170. Nowhere in his reasons for rejecting the objections does the judge say anything about the effect which the financial commitment required from a resident might have on restricting the class of potential beneficiaries and whether the class, so restricted, was a sufficient section of the public in the context of the purposes concerned to satisfy the requirement of public benefit. This is perhaps surprising given the third objection and the obviousness of the point which the judge actually addressed. But, as noted, he was referred to *Re Resch* as to which Mr Edward Nugee QC submitted that it made no difference to the result whether, in cases of this kind (where payment is made), medical fees or school fees or rent cover part or the whole the cost of providing the medical care, education or the housing, asserting that in *Re Resch* the fees covered the whole cost. That submission was not, of course, directed at the sort of case where the poor were excluded from benefit and, that sort of case apart, was correct.

171. Having rejected the objections, the judge addressed each of the five schemes, and held each of them to be charitable. Each of them involved the sale of small self-contained dwellings to elderly people on long leases in consideration of a capital sum. It was a condition of eligibility under all the five schemes that the potential beneficiary should have a need which could be relieved by the accommodation and that he or she should find it difficult or impossible otherwise to meet that need. The evidence showed a particular need of elderly owner-occupiers who did not qualify at all or qualified with low priority for local authority special accommodation and for whom the private sector did not, at the time, make adequate provision. It was also a

condition of each scheme, except scheme 3, that the tenant should be of modest means, that is to say, according to the evidence, "such that if permitted to participate in the scheme his remaining financial resources (whether in terms of capital or income) may be expected not substantially, if at all, to exceed the amount required for the reasonable needs of himself and any dependant of his".

172. It was, however, inherent in each of the schemes that the leaseholders had to have sufficient means to purchase the dwelling, either at the full price or at the discounted price specified in the relevant scheme. And in relation to scheme 3, it was not even a requirement that he should be of modest means in that sense, although it was open to such persons. The judge can have seen no inconsistency between that ability – which was in fact a qualifying requirement – to pay and the charitable purposes of each of the schemes.

173. It is possible to reconcile this case with the proposition that a trust which excludes the poor is not charitable, and with *Re Resch*, but only if being of the "modest means" described above equates with being "poor" in the sense contemplated in the authorities which mention exclusion of the poor. In our view, it is possible and correct to do so. It would be wrong to treat "poor" in that sense as necessarily meaning the same as it does in the context of a trust for the relief of poverty. But even in that context, it has long been established that "poor" does not mean destitute, as in cases such as *Re Clarke*. In our view, however, a more flexible approach has to be taken to what level of resource it would be necessary to require of potential beneficiaries in order to disqualify the trust from charitable status. There can have been no doubt in *Joseph Rowntree* that the element of public benefit was strongly present (to use Lord Wilberforce's words). The schemes each provided for a real need which was not adequately met by either local authorities or the private sector. In the context of the provision of that sort of benefit we think that, in principle, it is right to see the particular charging structure as within the scope of a charitable objective. We only remark that, if that had not been so, the plaintiffs would not have been able to implement the scheme, as to do so would go beyond their own charitable objectives.

174. But matters must not be pushed too far. *Joseph Rowntree* is not authority for the proposition that an institution is a charity if it offers at full price a service which is already provided on the open market and the cost of the service provided by the charity is such that the poor cannot afford to avail themselves of it, however beneficial to the community the provision of the service may be. It lends no support to the proposition that an institution with purposes available only to the rich can be charitable.

175. Since the point has been raised in argument, we should mention the impact, if any, of the fiscal privileges enjoyed by charities in determining whether a particular institution is charitable. This question remains open as a matter of decision. Lords Cross and Simon, in *Dingle* v. *Turner* [1972] A.C. 601, were clearly of the view that fiscal privileges should be taken into account, but Viscount Dilhorne, Lord MacDermott and Lord Hodson were doubtful about that, although Lord MacDermott thought that the existence of fiscal privileges might be material on the question whether what is alleged to be a charity is sufficiently altruistic in nature to qualify as such.

176. We share the doubts expressed but we do not need to resolve the issue. This is because we are not concerned with the question whether a particular purpose is a charitable purpose: the advancement of education clearly is capable of being a charitable purpose. We are concerned with whether the rich (by which we mean those able to afford the school fees) are a sufficient section of the community. Even if Lord Cross was correct to say that the fiscal advantages were influential in the decisions in *Compton* and *Oppenheim* because the trusts would then "enjoy an undeserved fiscal immunity", there must have been an assumption that such an immunity would, indeed, be undeserved. We cannot make such an assumption in relation to the schools with which we are concerned. Rather, tax relief for such schools is another matter of a huge divergence of opinion of a political nature which it is for Parliament, not for us, to determine. However, the fact that fiscal privileges are given underlines the need for genuine public benefit: that is, the degree of altruism to which Lord MacDermott referred.

Conclusions

177. We conclude from our examination of the authorities that the hypothetical school addressed in Question A2 of the Reference (*ie* where the sole object of the school is the advancement of the education of children whose families can afford to pay fees representing the cost of the provision of their education) does not have purposes which provide that element of public benefit necessary to qualify as a charity. Such a school has purposes which therefore fail to satisfy the public benefit test under the 2006 Act. (As we note later, such a school is in practice unlikely to exist.) Our conclusion in this regard would be all the stronger if the hypothetical school were to charge fees which were significantly in excess of the cost of education in order to build resources for appropriate further development of the school's facilities.

178. This conclusion is based on the proposition that a trust which excludes the poor from benefit cannot be a charity. There is no case which decides that point, but we consider it is right as a matter of principle, given the underlying concept of charity from early times. It is a conclusion which accords with the many expressions of view to that effect in the cases which we have reviewed, dating back to *Jones* v. *Williams* and including in particular *Macduff, Taylor* v. *Taylor* and *Re Resch.*

179. It is implicit in that conclusion that the schools described in Question A2 do exclude the poor; in other words, that where the families themselves can afford fees, they cannot be described as poor. As we have seen, "poor" certainly does not mean destitute even in the case of trusts for the relief of poverty. It can cover persons of modest means in certain cases (see *Clarke*) and persons of "some means" in others. Our analysis of *Joseph Rowntree* suggests that even persons who might be seen as quite well-off (sufficiently well-off to purchase the leases concerned) can be seen as "poor" in the context of the test of exclusion of the poor in a trust which is not for the relief of poverty; and it follows that an institution may be a charity even though it charges, without any element of subsidy at all, for its services where the cost is nevertheless within the ability of the not very well off to meet.

180. But wherever the line is to be drawn, we do not consider as "poor" people who are able themselves to pay the very substantial fees charged by the actual schools with which we are concerned, which is the sort of level of fee we are assuming is charged by the hypothetical school envisaged by Question A2. In particular, we consider that persons who can afford the £12,000 p.a. fees which form the basis of Question B of the reference are not "poor" in the context of a requirement (as we have found) that a charity should not exclude the "poor" altogether.

181. It is also implicit in our conclusion that it is correct to look beyond the beneficiary concerned to see if the poor are excluded. We would expect that very few of the children who attend private schools have their own resources to pay the requisite fees. It cannot, we think, be right to focus on the children themselves in addressing this issue. Although the students themselves are the direct beneficiaries of the education, they benefit, in the case of a Question A2 school, only because their families can afford to pay. Just as in *Educational Grants Association Ltd*. it was right to look beyond the children to their parents and so on to Metal Box in ascertaining whether there was public benefit, so too, in relation to Question 2, it is right to look beyond the students to their parents or other family members paying the fees, to see whether the provision of benefit by the school is to a poor person.

182. It is one thing to treat a student and his family as the relevant entity for assessing whether the student is poor. It would be another thing to afford the same treatment to a student who had managed to acquire funding from a third party source. How that funding is to be brought into account in assessing whether the student is "poor" will, in our view, depend on the source.

183. At one end of the scale, funding from an employer is received by the student as a purely private benefit which, we think, ought generally to be brought into account. The school could not rely on educating such students as providing a benefit to the "poor".

184. At the other end of the scale, funding from a grant-making educational charity to a child in a family which is poor by any standard is a benefit received by the student not as a private benefit but as a result of the implementation by the

grant-making body of purposes which are for the public benefit. It seems to us that the school ought to be able to treat the education of that student as the provision of direct benefit to a person who is "poor". Of course, from the school's point of view, it makes no difference to its finances whether the fees come from the family, a third party or a charity. But that is not the point; the point is whether the school is educating poor people and, in terms of the access to schools, which is a most important consideration from the perspective of the public, a poor person in receipt of a grant is nonetheless poor. The contrary view could produce startling results. Some schools have large endowments out of which they are able to provide significant numbers of substantial scholarships, thus enabling them to open up their access to persons who could not otherwise afford to attend the school, including "poor" students. In some cases, endowments might be held in charities legally separate from the school itself, but this is not necessarily the case. It cannot be right, we consider, that the school is unable to rely on its own provision of education to poor students receiving scholarships from such endowments as a direct benefit to persons who are "poor" in the context of its own trusts and duties.

185. There may be cases where it is not so easy to determine whether a student is receiving third party assistance in a way which impacts on whether he is "poor" in the context of the institution providing him with education. Such cases will have to be dealt with as they arise.

186. As noted above, it is highly unlikely, we think, that there is in fact any school which does, as a matter of its constitution, restrict access to those whose families can afford to pay fees. We have addressed that issue, however, because that is what is asked in Question A2.

E. Application in this case

Purpose for which the school is established

187. We now turn to consider a school which, as a matter of its constitution, can admit students whatever their ability to pay, but as a matter of fact (whether because of a policy of accepting only fee-paying students or because of some

financial imperative) does not do so. The first question which then arises is whether such a school is established for charitable purposes only. It was clear, we think, under the law prior to the 2006 Act, that whether a trust or institution which had a written constitution was a charity was to be ascertained by reference to that constitution. It was not permissible to look at the subsequent activities of the institution to ascertain its status. Lord Denning took a different view in *Educational Grants Association Ltd.,* adopting the approach which he stated was applied in the case of contracts. That approach has been shown to be wrong, so that the foundation for his view in relation to charities has been removed. We are sure that the approach of Harman L.J. was correct.

188. We do not consider that the position under the 2006 Act is any different: the question whether an institution is "established" for charitable purposes only is to be answered by deciding, as a matter of construction, whether its purposes (a) fall within one of the description of purposes listed in section 2(2) and (b) satisfy the public benefit test. The ordinary meaning, and we would suggest generally the most natural meaning, of the word "established" is directed to what it is that the institution was set up to do, not to how it would achieve its objects or whether its subsequent activities are in accordance with what it was set up to do. Further, section 2(2) itself more naturally reflects that ordinary meaning than an interpretation which looks at activities. It lists descriptions of purposes, not categories of activity. Moreover, the public benefit as it was understood prior to the 2006 Act was also directed to what the relevant trust or institution was set up to do, not on how it operated. The incorporation of the previously understood meaning of "public benefit" into the 2006 Act is another indicator that "established" is to be interpreted as we have stated.

189. Where a school is, by its constitution, open to all, we consider that, generally speaking, it is established for charitable purposes only. That such a school is charitable may be made clear expressly by its constitution, for instance by stating that its purposes may only be effected "in a way which is for the public benefit" or some such words. But even in the absence of such words, it will often be implicit that such a school will carry out its express purposes in a way which is for the public benefit. We say "generally speaking" and "often

implicit" because we would not want it to be thought that we exclude the possibility of exceptions. For instance, if, in the case of a new school being founded today, a draftsman were to be foolish enough to leave room for doubt by not making matters explicit, it might be apparent from all the surrounding circumstances that the school could never hope to operate without charging full fees for all students. That could well be enough to show that the school would never be able to operate for the public benefit, so that it would be wrong to imply a term that it should do so. The question is, in the end, one of construction in the way which we have explained at paragraph 116 above.

190. In the case of a school which was founded prior to the 2006 Act, whether in earlier centuries or more recently, and which had established its charitable status and become registered as a charity prior to the 2006 Act, it is an almost inevitable conclusion that it was implicit, if not express, that the school would operate in a way which was for the public benefit. If that were not so, it is impossible to see how such a school which was a registered charity prior to the 2006 Act was in fact a charity at all. This is because such a school, even one providing a large element of public benefit (for instance by provision of many generous scholarships for the poor), might be able to apply its funds in a non-charitable way as a matter of its constitution, in which case it would not have been established for charitable purposes only and should not have been registered in the first place.

191. The status of an existing registered charity and the duties of the trustees have not been changed by the 2006 Act. As to status, either it was entitled to be registered before the 2006 Act or it was not. If it was, its purposes must have been for the public benefit as that term was then understood and, since we are dealing with schools where there is no presumption made under the pre-2006 Act law for the reasons we have given, it thus fulfils the public benefit test under the 2006 Act. Accordingly, whether such a school is a charity within the meaning of the 2006 Act does not now turn on the way in which it operates any more than it did before. Its status as a charity depends on what it was established to do not on what it does.

192. We make the obvious point here, because it is a point which must not be lost sight of, that each purpose of the institution has to be a charitable purpose if the institution as a whole is to be a charity; and this was so as much before the 2006 Act as it is now. Thus if an institution with an educational purpose which, standing by itself, was charitable also has another purpose which, standing by itself, is clearly not a charitable purpose, the institution is not a charity. Moreover, the public benefit requirement must be satisfied with respect to each purpose of an institution claiming to be a charity; the test is not applied to the overall effect of carrying out the institution's purposes. It is not, therefore, possible for a school which has an educational purpose to support its charitable status by reference to activities other than education which it might carry out under its constitution. This is relevant in the context of the provision by a school of benefits other than the education of students at the school. We will come to that in the context of public benefit when considering the actual activities of a school.

193. We have in the preceding paragraphs looked at the position of an institution with a written constitution. Where there is no written constitution, or an incomplete one, it will be necessary to establish its purposes by looking at the entirety of the evidence. Thus in *Re Resch*, it was necessary to establish the purposes of St. Vincent's Private Hospital by reference to the evidence, including evidence of how the hospital charged and what benefits, direct or indirect, it provided to the community. In other words, it was necessary to see how the hospital actually operated to establish its purposes. In the proceedings before us, it may be that not all of the schools we are concerned with have written constitutions. It will then be necessary to look at all the circumstances to determine what the purposes of the school are and how they have been implemented in the past.

194. As to duties, a charity had to operate, even before the 2006 Act, in accordance with its objects and subject to the constraints of charity law: it thus had to operate in a way which was for the public benefit. If it did not do so, the charity trustees could be brought to account and compelled to act in accordance with their objects in a way which was for the public benefit. In that context, if an institution ceases to be able ever to carry out its objects in a

manner which would be for the public benefit, there may arise an obligation for its trustees to apply for a cy-près scheme and ultimately there might be issues as to how its assets should be dealt with. That scenario applies equally after the 2006 Act. We say nothing about that aspect. But we mention this possibility because it will be a matter of fact and degree in any case to determine whether a merely temporary inability on the part of any particular charity to operate for the public benefit is fatal or not. The issue will be whether the original character of the institution has been "blotted out" (to use the words of Pollock B in the context of an eleemosynary purpose in *Cawse* v. *Nottingham Lunatic Hospital Committee* [1891] 1 Q.B. 585 at 591).

195. Just as all of the circumstances must be taken into account in deciding whether an institution without a written constitution is established for charitable purposes only, so too all of the circumstances must be taken into account in deciding whether an institution with a written constitution is carrying out its purposes in a way which is for the public benefit. But the enquiry is different. In the case of an existing charity, the enquiry is whether the activities overall are for the public benefit. In the case of a school which is a charity and is operating in accordance with the public interest, the provision of education to all of its students, including those who pay full fees, is carried out as part of this public benefit requirement. There is thus this contrast: in the case of a school which is not a charity, none of its education is for the public benefit in the sense required by charity law; in the case of a school which is a charity, the education of fee-paying students is nonetheless in fulfilment of the public benefit requirement even if its activities when viewed as a whole do not satisfy that requirement.

Activities of the school

196. It is in this context of activities that indirect benefits and wider benefits (as described in paragraph 37 above) fall to be taken into account as part of the public benefit requirement. Many, and probably most although not all, schools of the type with which we are concerned provide benefits other than education to those who pay full fees. Those benefits include some or all of the following:

a. provision of scholarships and bursaries;

b. arrangements under which students from local state schools can attend classes in subjects not otherwise readily available to them;

c. sharing of teachers or teaching facilities with local state schools;

d. making available (whether on the internet or otherwise) teaching materials used in the school;

e. making available to students of local state schools other facilities such as playing fields, sports halls, swimming pools or sports grounds;

f. making those last facilities available to the community as a whole.

197. Category a. is a direct benefit. Categories b. to e. will be direct or indirect benefits, depending on the precise constitution of the school.. They might also be wider benefits.

198. Category f. is not a direct benefit or an indirect benefit or even a wider benefit in the sense in which we are using those terms. We assume, of course, that it is proper for the school to provide these facilities in the proper exercise of its powers: if it is not, it should not be providing the facilities in the first place. In order to be a proper use of its assets, the school would have to find one of two powers pursuant to which it could provide these facilities:

a. The first would be an express power separate from the educational purposes to do so. It would be unusual, we think, for a school to have power to make such provision as an express primary purpose (although where that is the case, the object may fall within paragraphs (d) and/or (g) of section 2(2) of the 2006 Act).

b. The second would be an ancillary power (perhaps a general power to do anything to promote the main objects or, less likely, an express power – not itself standing as a main object – to do so). The exercise of an ancillary power must be for the promotion of the main object to which it ancillary. The trustees or directors of a school would need to

be satisfied that in making this provision of facilities available to the local community they were acting in furtherance of their main objects. It will depend on the facts of each case whether they can do so. For instance, it may be that the marginal cost of the provision is small and justifiable to promote the good name of the school both in the community and to the parents and potential parents of students, parents who might well approve of the involvement of the school in local affairs. It would then not be difficult to justify the use of school facilities for a non-educational purpose. In contrast, if on the facts of a particular case, such provision is costly and the "public relations" benefits seen as small, the provision of such facilities might be hard to justify. It would involve expenditure of funds held for the purposes of education for other purposes without in any way promoting the educational functions.

199. In neither of these cases, however, is the provision of these facilities by the school the provision of education. In the first case, it is the direct fulfilment of a non-educational primary purpose which cannot make the educational purpose charitable if it would not otherwise be. In the second case, the ancillary activity (properly) carried on by the school is not a purpose or object of the school at all. The purpose of the school is education not the provision of these facilities to the community.

200. It is obvious, we think, that a school could not assert that it was established for charitable purposes only by reference to the possibility that it might make provision of the sort described in paragraph f. We do not consider that it would even be a factor which could be taken into account, since it does not go to whether education is being provided for the public benefit; it only shows that the ancillary activity may promote the provision of education. We consider that that was the case even before the 2006 Act. But even if there is a doubt about that, the position after the Act, is tolerably clear. Section 1 requires the charity to be established for charitable purposes only. It is therefore necessary to identify each purpose which is said to be charitable. A purpose is a charitable purpose only if it fulfils the public benefit test. The public benefit test is concerned with whether the relevant purpose (education

in the context of the present proceedings) is a charitable purpose, a question which is not affected by the ways in which that purpose might be promoted in contrast with being implemented. It all comes back to the proposition which we consider to be correct, namely, that ancillary activities of this sort are not part of the purpose to which they are ancillary.

201. When it comes to considering whether a school which is a charity is operating for the public benefit in accordance with its charitable purposes, the primary focus must be on the direct benefits which it provides. Scholarships or other forms of direct assistance to students are therefore important. Account can certainly be taken of other direct benefits such as those described in paragraphs b. and c. Account can be taken of the benefits described in paragraph d. since they are clearly available to the whole community; however, it must be very doubtful whether much weight can be attached to a benefit which must be comparatively easy to provide at little cost and the effect of which seems to us, on the evidence we have, very uncertain.

202. The benefits described in paragraph e. present more difficulty. It is not usually part of the objects of a school to provide classrooms, science laboratories, sports halls and swimming pools. The first and second of those are, however, certainly necessary in order to provide education. Were the school to allow the local state school to use the facilities to teach their own students in, we do not doubt that would be a fulfilment of the school's own charitable object for the advancement of education (in this case of the state school children). The case might be thought less clear in relation to sports halls and swimming pools which some people might see as providing recreational rather than educational facilities; but in the context of contemporary education and what is to be desired in schools generally, whether in the state or private sector, we consider it right to see them in the same way as classrooms and laboratories. In this context, see *Re Mariette* [1915] 2 Ch. 284 and *IRC* v. *McMullen* [1981] A.C. 1. In the result, therefore, we consider that the benefits described in paragraph e. are to be taken into account in deciding whether a school which is a charity is operating for the public benefit.

203. We do not, however, consider that benefits of the sort described in paragraph f. can be taken into account. The fact that an ancillary activity may be a good thing for the school is not enough. The ancillary activity is not itself being carried out in fulfilment of the charitable purpose, namely the advancement of education. If one asks how it is said that the provision of playing fields and sports facilities to the local community is for the advancement of education, the answer is clearly that it is not. The most that can be said is that the making of such provision by the school promotes its own educational activities and even then only in the most of indirect ways. In those circumstances, benefits of this sort cannot be brought into account.

204. It is different where a benefit to the community is a consequence of the implementation of an object of the school. Thus, it may be part of a school's citizenship education programme that students involve themselves in a variety of ways of great benefit to the local community. We do not need to give examples. We see no reason why such benefits should not be taken into account, although the weight to be attached to them may be slight. In our view, it is permissible to take into account the indirect or wider benefits which arise (whether benefits to individuals within the scope of the main purpose or the community generally) as a result of the particular way in which the educational object is carried out by a particular school.

205. These conclusions reflect, we think, the approach adopted in very different circumstances in *Re Resch*. In that case it was also possible to take into account certain indirect or wider benefits to the community, namely the relief to the beds and medical staff of the general hospital, the availability of a certain type of nursing care and treatment supplementing that provided by the general hospital and the benefit to the standard of care in the general hospital resulting from the juxtaposition of the two hospitals. It might indeed be said, on the basis of the first of those matters, that the provision of private education is a considerable benefit to the community, in that each school takes students out of the state sector who would otherwise have to be educated at the expense of the State. Across the whole independent sector, that amounts to some hundreds of thousands of students.

206. There is obviously something in that point, although it must not be taken too far. It is not a factor which, even if relevant, could possibly justify affording charitable status to a school falling within Question A2 of the Reference. We are therefore concerned with how, if at all, this factor would impact on the way in which a school must operate in order to be doing so for the public benefit. This comes down to whether this saving to the State justifies a lesser provision of public benefit than might otherwise be expected.

207. We think this factor would be likely to make very little, if any, difference. First, we anticipate that, even ignoring this factor, many schools would have no difficulty acting in a way consistent with their duties to act for the public benefit. For such a school, this factor does not provide much justification for requiring less of it than would otherwise be the case. Secondly, we have no idea how many schools would find it impossible or very difficult, ignoring the benefit to the State, to operate in a way which was for the public benefit. Nor do we have any idea of the number of schools within that class which would with comparative ease be able to operate in a way which was for the (lesser) public benefit if that factor could be taken into account. Accordingly, the suggested benefit to the State is highly speculative and the implicit suggestion that local authorities simply could not cope is not established.

208. We turn next to what it is that a school actually has to do, out of the range of possibilities we have mentioned – and there may well be others – if it is to operate for the public benefit. As a preliminary, we need to address a matter which has caused us some concern both during the hearing and while preparing this Decision. It arises this way. In the case of the schools with which we are concerned, we have already decided that a school which is required by its governing instrument to admit only those whose families are able to afford fees is one which excludes the poor and is not therefore for the public benefit. It might therefore be asked why the provision of a number of scholarships to poor students could ever be enough to protect its charitable status. By analogy with *Oppenheim* and *Educational Grants Association Ltd.*, it might be argued as follows:

a. a school for the rich is not charitable because the trust for that class, excluding the poor as it does, is not for the public benefit (just as the beneficiaries in *Oppenheim* were not a sufficient section of the community);

b. a charitable trust which in fact selects beneficiaries by reference to their membership of such a class would not be operating for the public benefit (just as in *Educational Grants Association Ltd* the beneficiaries were selected from a class which was too narrow and the income applied to them was not applied for charitable purposes only); and

c. the provision of scholarships to some poor students does not turn the non-charitable application of funds to the rich into a charitable application for the benefit of the public. In other words, it is not possible to turn a non-charitable operation of the school into a charitable one by providing some benefits which are for the public benefit.

209. Propositions (a) and (b) do have considerable force in a different context. Consider an educational grant-making institution rather than a school. Clearly, such an institution would not be a charity if its constitution required it to provide grants only to a class which excluded the poor *eg* to reimburse school fees of those well able to afford them. But suppose that its constitution allows grants to be made to all, regardless of means, so that it can as easily provide a grant to the poor as to the rich. Suppose that, in a way similar to *Educational Grants Association Ltd.*, it gives, say, 10% of its income to the poor but gives 90% to reimburse those same school fees. It would be an almost inevitable conclusion on those facts that the selection of those to receive the 90% was being carried out not for the public benefit but for the benefit of a class which excludes the poor. It would not be a proper implementation of the institution's charitable objects.

210. But the schools with which we are concerned are in a very different position. Those schools cannot as easily admit one person as another. Who a school is able to admit depends on the financial state of the school, the size of its endowment and the way in which those running the school choose to prioritise

expenditure (*eg* on providing scholarships or keeping class sizes down by employing more staff) and the facilities which it provides. It is necessary for all of the schools to charge fees. They do not, it seems to us, choose the majority of their students because of a preference for students who have as a characteristic an ability to pay fees; they do so because they cannot afford not to choose such students. And, of course, the charging of fees does not, as we have seen, *per se* preclude charitable status.

211. These practical constraints on free selection mean that the position of schools is very different from the position of the association in *Educational Grants Association Ltd.* Indeed, the class of those able to pay fees is different in nature from the type of private class considered in *Oppenheim* and *Educational Grants Association Ltd.* There is no nexus at all; there is simply a shared characteristic which necessarily excludes the poor. Thus those cases do not really lend any support to the argument set out in paragraph 208 which we are now addressing. The reasoning of the House of Lords in *Oppenheim* and of the Court of Appeal in *Educational Grants Association Ltd.* does not take us to the conclusion at paragraph c. of the argument.

212. In any case, propositions derived from those two cases must be treated with caution in the context of a very different sort of categorisation of classes. Lord MacDermott gave a powerful dissenting speech in *Oppenheim* and Lord Cross has delivered trenchant criticism of the majority and in support of Lord MacDermott: see *Dingle v. Turner* at 623-4.

213. Having dealt with the concern identified in paragraph 208 above, we return to what a school has to do if it is to operate for the public benefit. The concern here is, we think, about what schools are <u>not</u> doing rather than what they actually do (putting aside the complaints of the ERG about gold-plating). Nobody has suggested that fee-paying schools are not entitled to charitable status provided that they do enough to promote access whether by way of scholarships, bursaries or other provision, but paying regard to the need to charge fees to operate at all. Nobody complains that the schools are educating fee-paying students; the concern is that they must be seen to be doing enough for those who cannot afford fees.

214. This is an important distinction, because it locates the failure to act in the public benefit as being the making of inadequate provision for access by and benefits for certain sub-classes of the potential beneficiary class, the whole class being the student community at large. It may be the case that if a school which fails to meet the public benefit requirement had instead made more provision for poor students that would have meant that there was room for fewer fee-paying students, so some fee-paying students may be said to receive their education at the price of the school's failure to operate in accordance with its charitable objects. But it does not follow from that that the provision of education for the vast majority of fee-paying students is in any way beyond the school's charitable objects. In other words, even a fee-paying student would be receiving benefits not as a member of some inappropriate class but as a member of the general body of potential beneficiaries. With that is to be contrasted a case such as *Educational Grants Association Ltd* where the breach of duty was to select the beneficiaries by reference to inadmissible criteria from which it followed, according to Pennycuick J. at first instance, that the application of income was *ultra vires* the directors. Indeed, although we have just described the inadequate provision for the "poor" as a failure to act for the public benefit, in a sense even that is not entirely accurate. Since provision of education to fee-paying students by a school with charitable status is, of itself, for the public benefit, a school making more than *de minimis* or token provision, could say that the entirety of its activities were for the public benefit. But for reasons given in the next paragraph, we do not consider that to be correct. Accordingly, when we refer to a school failing to act for the public benefit, we mean that it is making inadequate provision other than the provision of education to fee-paying students.

215. In relation to that, there is one point of principle which we can and should resolve. There are two mutually exclusive possibilities for assessing whether the public benefit requirement is satisfied.

a. The first is that the test is satisfied if the school provides some benefit for the poor which is more than a *de minimis* benefit, or a token benefit for the school to be able to point at in order, as it were, to cock a snook at the Charity Commission. The justification for this approach would

be that it is the *de facto* exclusion of the poor which prevents there being the necessary element of public benefit so that once some benefit is provided for the "poor" however small – provided that it is more than *de minimis* or a token benefit – all of the school's activities, including education of fee-paying students can be taken into account as part of the public benefit provided.

b. The second approach is to apply a more fact-sensitive assessment. It is to look at what a trustee, acting in the interests of the community as a whole, would do in all the circumstance of the particular school under consideration and to ask what provision should be made once the threshold of benefit going beyond the *de minimis* or token level had been met.

216. We consider that the second approach is correct. Each case must depend on its own facts. It is an approach which is not, we readily acknowledge, without difficulty of application and, of its nature, it makes it very difficult to lay down guidelines. Reflecting what Lord MacDermott and Lord Cross have said in the context of the different, but related, problem of what constitutes a sufficient section of the public, it is necessary to look at the facts of each case and to treat the matter as one of degree: the process is one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single conclusive test.

217. The very nature of this approach means that it is not possible to be prescriptive about the nature of the benefits which a school must provide to the poor nor the extent of them. It is for the charity trustees of the school concerned to address and assess how their obligations might best be fulfilled in the context of their own particular circumstances. We have indicated some of the benefits which they might consider in paragraph 196 above. Not all of the benefits which the school provides to those other than students paying full fees need to be for the poor. We see no reason why the provision of scholarships or bursaries to students who can pay some, but not all, of the fees should not be seen as for the public benefit. Provided that the operation of the school is seen overall as being for the public benefit, with an appropriate level of benefit for

the poor, a subsidy to the not-so-well-off is to be taken account of in the public benefit. It is certainly our view that in the right circumstances, remission of fees for an existing student who has become unable to meet any of the fees due to changed circumstances, should be seen as being not only for the public benefit but as a benefit provided to a person who has become "poor".

218. We have focused on the payment of fees and the provision of benefits. But those are not the only questions which trustees need to consider. They need to consider the question of access more generally and how to treat all their potential beneficiaries fairly. This is not to say that trustees cannot properly make policy decisions which have the effect of ruling out of consideration large numbers of potential beneficiaries. But such policy decisions must be rational and justifiable in the promotion of the public interest. They certainly cannot be capricious.

219. Quite apart from questions of impediment to access by reason of financial means, any school will need to consider whether the provision of some of its facilities can really be justified as either part of or properly ancillary to the advancement of education. This is the "gold-plating" aspect referred to by the ERG. We have to say that some of the activities and facilities revealed in the promotional material produced to us in the case of two schools might well seem astonishing to those who are not familiar with such matters. We recognise that the extent of the activities and facilities provided in any particular school will depend upon the school's historic endowment as well as the fees currently charged. In our view, however, where facilities at what we might call the luxury end of education are in fact provided, it will be even more incumbent on the school to demonstrate a real level of public benefit. This is not to impose different standards on different schools; it is simply that where such luxury provision is made, a stringent examination of how it is provided and how the public benefit is satisfied is appropriate.

220. This is all a matter of judgment for the trustees. There will be no one right answer. There will be one or more minimum benefits below which no reasonable trustees would go but subject to that, the level of provision and the method of its provision is properly a matter for them and not for the Charity

Commission or the court. We deliberately avoid using the word "reasonable". In a similar context, see Sir Nicolas Browne-Wilkinson V.-C. in *Imperial Group Pension Trust Ltd* v. *Imperial Tobacco* [1999] 1 W.L.R. 589 when he effectively created the obligation of good faith owed by employers to beneficiaries in the context of their activities in relation to a pension scheme. It is not for the Charity Commission or the Tribunal or the court to impose on trustees of a school their own idea of what is, and what is not, reasonable. The courts have never done that in the context of their supervision of trustees of private trusts and the same should apply to charities. There is nothing in the 2006 Act (including the duty to issue the Guidance) which changes that position. But trustees are under the ultimate control of the courts. There is always a range of actions which they can take in a given situation. There is, of course, a limit outside which they must not step. But the identification of that limit is not based on a test of reasonableness. We recognise that this does not provide any sort of black-letter test by which the Charity Commission or trustees of schools can know which side of the line the school falls. But this is not to create a novel sort of difficulty but to recognise that constraints on the behaviour of classes of person can often involve concepts which are easy to state but difficult to apply in practice, as is seen so often in cases of alleged breach of trust or in the application of the *Imperial Tobacco* duty.

221. Mr Giffin and Mr Smith make a number of submissions in a helpful, and short, note which they have prepared. These submissions include the submissions that the public benefit requirement:

a. does not mean that the trustees must seek to conduct the school in a manner which ensures that its pupils or other beneficiaries include the poor (as opposed to giving consideration to what should be done in relation to those who cannot afford the fees); and

b. does not mean that there is any legal requirement to act in a way which the Charity Commission or anyone else would consider "reasonable" or "appropriate" (by which we understand them to mean something which the Commission or anyone else would consider as the most

sensible way to act) rather than in accordance with their own considered assessment in the circumstances pertaining to their charity.

222. From our analysis, it can be seen that we disagree with a. The actual exclusion of the poor, other than temporarily, is not permitted. It is not enough that they are merely objects of the trustees' discretion. In all cases, there must be a benefit for the poor which is not *de minimis* or merely token. What further benefit needs to be provided turns on the result of the second submission.

223. As to paragraph b., that is, we consider, correct.

The Judicial Review

224. The concerns of the ISC which have led to the JR Application are essentially two-fold. First, it is concerned that the Guidance is erroneous and over-prescriptive and should not become a means whereby the Charity Commission usurps the function which is properly in the domain of the trustees of determining how the purposes of the charity should be furthered. The second is that the requirements of the law should be clear, not least so that they may be properly understood by the many volunteers who act as trustees for many charities. As to the second of those, we are sad that it is simply not possible to provide that clarity in the context of schools. There is no clear line which identifies what it is that trustees have to do. We have explained the principles as best we can and must leave to others the difficult task of applying them.

225. As to the first, we have set out the Charity Commission's principles as expressed in the Guidance at paragraph 26 above. The challenge in the JR Application is principally to paragraphs 2b and 2c. To repeat, those paragraphs provide:

> "2b Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted
>
> i. by geographical or other restrictions; or
>
> ii. by ability to pay any fees charged

2c People in poverty must not be excluded from the opportunity to benefit."

226. Those principles are amplified by other provisions: see F-10 and F-11 of the Guidance under the heading *Public Benefit* and C1 and C3 under the heading *Fee Charging*. We set out those paragraphs (page references are to pages of the Guidance) adding our own numbering for ease of reference in square brackets:

Public Benefit paragraph F-10

[1] "an organisation that excluded people from the opportunity to benefit because of their inability to pay any fees charged would not have aims that are for the public benefit" (page 23)

[2] "people who are unable to pay must be able to benefit in some material way related to the charity's aims" (page 23)

[3] "where people are unable to benefit from a charity because they cannot afford to pay the fees charged for its services, there must be other material ways or opportunities, related to the aims, available to them to benefit" (page 24)

[4] "wider, more remote, benefits to the public generally cannot be used to 'off-set' any lack of benefits to a sufficient 'section of the public' " (page 26)

[5] "it would not be sufficient therefore if the only benefits available to people who are unable to pay the fees are wider benefits such as those which, it can be argued, the public in general receives where a service provided by a charity relieves public funds"

Public Benefit paragraph F11 – principle 2c

[6] "people in poverty must not be excluded from the opportunity to benefit" (page 26) and all of the following text

Fee Charging C1 (page 9)

[7] "where a charity charges high fees that many people could not afford, the trustees must ensure that the benefits are not unreasonably restricted by a person's ability to pay and that people in poverty are not excluded from the opportunity to benefit"

[8] "the charity's trustees must therefore demonstrate that there is sufficient opportunity for people who cannot afford those fees to benefit in a material way that is related to the charity's aim"

Fee Charging C3 (page 12)

> [9] "Fee-charging charities must ensure that there are sufficient opportunities to benefit for people who cannot afford the fees."

227. Mr Giffin submits that those paragraphs, as well as certain passages in *Education* (page 19) which cross-refer to *Public Benefit*, are infected by legal error. His submissions were, of course, premised on the correctness of the ISC's approach to what the public benefit requirement actually does require. We must address the position on the basis of what we consider it requires, which is somewhat different from Mr Giffin's approach.

228. As to [1], this is to confuse aims with activities. At least, we read this paragraph of the Guidance as directed at what an institution does (*ie* in practice affords no opportunity to benefit) rather than at a constitutional prohibition. But, as we have explained, a charitable organisation which in practice excludes poor people remains a charity; what it has to do is make some provision for the poor to pass the *de minimis* hurdle: it must provide more than a token benefit. On that basis, [1] is wrong. If we are wrong to read it in the way which we do, so that it is directed at a constitutional, purpose, issue, it is ambiguous and confusing and should be clarified.

229. We take [2], [3], [8] and [9] together. As to [2] and [3], it is pretty obscure what these are saying. We think they are all to be read as stating that there is a practical requirement (and not simply an obligation to consider whether) to benefit in a material way some people who cannot afford to pay. The problem here is that a person who cannot afford to pay, say 50% of the fees but can pay the other 50% is a person who cannot afford to pay the full fee and falls within the definition of "people who cannot afford the fees" on page 11 of *Fee Charging*. So, read literally, it would be enough to provide benefits to such persons – to the exclusion of the "poor" in the Charity Commission's sense of that word, as explained on page 26 of *Public Benefit* and page 5 of *Fee Charging* – for instance by providing a 50% bursary. And if that is right in relation to 50%, why not 90%? We cannot believe, in the light of Mr Pearce's submissions, that this was what was intended. But if it was intended to require that benefits should be provided to the "poor" – a sub-group of those who are unable to pay fees, as is made clear on page 5 of *Fee Charging* – this is a most

obscure way of saying so. Assuming, however, the requirement, consistently with principle 2c, is directed at the "poor" – and here we remark that the Guidance does not identify what it is to be poor in the context of a private school – it must mean that the poor must benefit in "some material way". *Public Benefit* itself does not explain what is meant by "some material way", although in *Fee Charging* (described as "supplementary guidance") it is said that "material" means "significant, important, relevant and tangible". But who is to judge what is material and what level of provision is required? The test of reasonableness runs throughout both *Public Benefit* and *Fee Charging*. With some hesitation, we have taken the Guidance to require provision of a level of benefit which the Charity Commission or the court considers to be reasonable and which goes beyond that which it is necessary to provide in order for the benefit to be more than *de minimis* or simply a token benefit. But that is not, on our analysis, a requirement. Although it is necessary that there must be more than a *de minimis* or token benefit for the poor, once that low threshold is reached, what the trustees decide to do in the running of the school is a matter for them, subject to acting within the range within which trustees can properly act. That is something entirely different from imposing on the trustees the view of anyone else about what is "reasonable". In some circumstances, it may be that the trustees would be acting properly if they provided a quite modest benefit for the poor in excess of the *de minimis* level. The public benefit requirement applicable to the school would then be fulfilled; and in that context, we repeat that provision of education to the full-fee-paying students is itself for the public benefit. The error of the approach of the Charity Commission as we read the Guidance is to view the public benefit test as satisfied if, and only if, the provision for the poor (or as it might say, for those who cannot pay fees) is reasonable.

230. As to [4] and [5], we do not disagree with them as statements taken in isolation. But they are written in the context of the charging of fees where the issue has been addressed in the Guidance as turning on the question whether there is in the operation of the charity a benefit to a sufficient section of the public, determined by reference to reasonableness. But that, on our analysis, is not the correct approach. Once provision is made for the "poor" which is

more than *de minimis* or merely token, we see no reason why an identified wider benefit should not be taken into account in deciding whether, overall, the way in which the school is being operated is for the public benefit.

231. That is not to say that the mere fact that education is a good thing and is, generally, a purpose which is for the public benefit in the first sense, can be relied on: clearly it cannot. But if the operation of the institution brings with it an identifiable wider benefit, it must be of relevance. Thus it is said that private schools reduce the burden on local authorities; that is a benefit of which account should be taken. In principle, we think that approach must be right. But in point of fact, however, we do not think the point matters because the only wider benefit which has been identified is the reduction in the burden on local authorities to provide schooling for those attending private schools. For reasons already given (see paragraphs 206 to 208 above) we see this factor (a) of very little weight and (b) in any case very speculative.

232. As to [6], this all depends on what is meant by "opportunity to benefit" where that phrase is used in F11, which includes the following:

> "This does not mean, in effect, introducing an element of relieving poverty into all charitable aims. It is not the case that people in poverty actually have to benefit…..It merely means that people in poverty must not be excluded from the **opportunity** to benefit".

233. Apart from provision of a benefit for the poor going beyond the merely *de minimis* or token, we do not see that there is necessarily any obligation to give the poor the opportunity to benefit. It is, as we hope we have explained, entirely up to the trustees how they decide to operate their school subject only to acting within the range within which they may properly act. In some circumstances, it may be proper to provide no further benefit for the poor whilst at the same time not restricting benefits to the full-fee-paying students: for instance, bursaries may be given to persons who are not poor but are unable to pay fees. As to the meaning of poverty, we have explained what this means in the context of charity law. Whilst the definition in the Oxford English Dictionary may be a sensible starting point, we do not think that what follows in the Guidance on page 26 is a fair reflection of how the concept is

applied in the case of charities which charge in the light of both *Re Resch* and *Joseph Rowntree*.

234. As to [7], we consider that the paragraph is erroneous in referring to benefits being "unreasonably restricted" by ability to pay. The implication is that a school must provide "reasonable" benefits to those who are unable to afford the fees. As we have explained, it is not a question of reasonableness. It is a question of the proper exercise of the trustees' powers.

235. For those reasons, we conclude that principle 2b of the principles of public benefit on which the Guidance focuses is wrong. As the Charity Commission states in *Fee-Charging*, that principle and principle 2c overlap and we conclude that principle 2c, at least as explained in the Guidance, is also wrong. It follows that, as explained above, various passages in *Public Benefit* and *Fee Charging* which are based on those principles are themselves obscure or wrong in a number of respects. *The Advancement of Education for the Public Benefit* will also be affected by what we have said about the principles, although principles 2b and 2c are not themselves discussed there.

Relief on JR Application

236. It follows from those conclusions that the Guidance should be corrected. Mr Pearce did submit to us that if we came to the conclusion that the Guidance was indeed wrong, we should nevertheless conclude that the Charity Commission had taken a reasonable view of the law in framing it as they did and should refrain from quashing any part of it, leaving it to the Commission to amend or withdraw the Guidance as they saw fit to reflect this Decision. Although we have every sympathy with the Commission in the difficulty of the task it faced in producing guidance on this area of law, we do not think it right that we should simply leave matters to the Charity Commission to correct without granting the ISC any relief at all. As we indicated at the hearing, we propose to allow the parties to consider what relief should be granted to the ISC in the light of our conclusions. We hope that the parties will be able to agree a form of wording, failing which we will deal with further submissions, an exercise which we hope can be carried out on paper.

Answers to the Reference Questions

237. A1: The answer to this question is Not necessarily, provided that it does not exclude the "poor" altogether. If the basis of the question is that the institution charges full fees for all of its students without providing any identifiable public benefit other than the general benefit to the public of an educated population, the answer is No. But if the institution, although charging fees, has in its student body a not insignificant number of persons whose fees are funded from other charitable sources, the answer is Not necessarily: it will depend on whether there is a sufficient degree of public benefit.

238. A2: The answer to this question is Yes.

239. B: As to B generally we note that we are asked whether charity law operates so as to cause the school identified in Questions B1 to B10 to be (i) not operating within the terms of its constitution and (ii) not operating for the public benefit. We do not see those as different questions. If a school is a charity, it is obliged to operate in a way which is for the public benefit; it is part of its constitution, either expressly (as in the hypothetical constitutions in the example: see Schedule 4 to the Reference) or implicitly, that the school will act for the public benefit as we have explained earlier in this Decision. A different question – not one we are asked and not one it is our function to determine on a reference – is whether a school with that constitution would be acting in accordance with its constitution if it operated in accordance with the factual scenarios set out in the Questions.

240. Under Schedule 4 to the Reference, the objects of the school are restricted to the advancement of education "by the provision and maintenance at the premises known as ABC school or elsewhere of a…school… or schools for the education of children or young persons…." It is not clear that all of the provisions listed in B.2.1 to 2.6 are within the constitution of the school quite apart from any question of public benefit; indeed, in relation to B.2.6 it is clear that they are not. We shall address the point in relation to each paragraph as we go along.

241. B1: This school is acting in accordance with its objects. As to the £12,000 fee, see paragraph 180 above. This school appears to exclude the poor in practice. Unless this situation is temporary because of special circumstances the answer to question B1 is Yes.

242. B2 to B10 appear to be designed to draw from us conclusions about where the lines can be drawn between what is, and what is not, a sufficient element of public benefit to determine whether a charitable school is acting properly. Although we will make some remarks about each of the hypothetical scenarios, we decline to give any sort of ruling which is intended to be definitive. Each real case will depend on its own factual circumstances. A tribunal addressing an actual school would need to have all sorts of detailed information: for example, it would need to see detailed accounts, to know the school's business plan, to know what its staff are paid and their level of qualification, to see how the school operates on the ground (is there any gold-plating for instance?), to know what its class-sizes are; and to know what facilities it has (such as playing fields, sports halls, art rooms, music rooms, laboratories, computer rooms, to name but a few). These are only examples.

243. Further, schools with different levels of endowment might be expected to make different types and different level of provision so that there is no "right" answer to what two otherwise similar schools should do. It may be that geographical location and the levels of deprivation in the local community have a part to play. The Attorney General presumably thinks that that might be the case since the hypothetical schools are all placed in Greater London or the Home Counties. But we wonder whether a school in Hackney is to be treated the same way as a school in Guildford.

244. It must be borne in mind that, according to our analysis earlier in the Decision, the "poor" cannot be excluded from benefit either as a matter of the school's constitution or, other than purely temporarily, in practice. But that is not all. Provision for the "poor" going beyond a *de minimis* or token benefit may be present, but it is not necessarily enough; the level of provision for them (taken with benefits to the not-so-poor who would otherwise be unable to afford the fees) must be at a level which equals or exceeds the minimum which any

reasonable trustee could be expected to provide. The question therefore in all cases is whether the trustees are acting consistently with their obligations, not whether they have provided a particular level of benefit for the "poor", although some such provision must, on any footing, be made.

245. With those words of (heavy) qualification, we turn to Questions B2 to B10.

246. Question B2:

a We do not think that any significant weight can be attached to B.2.1. It is in any case doubtful (and not for us to decide) whether this provision falls within the objects clause, but this has nothing to do with charity law.

b B2.2 and B2.3 are, it seems to us, within the objects clause; B2.4 may not be. However, assuming that all of these are within the constitution, B2.2 to 2.4 are a start to the provision of public benefit but the extent to which the poor are benefited is unclear. We do not know whether the pupils from the state school are poor or whether their parents could afford the fees in question but have chosen not to. We remark that there must be many parents in England and Wales who could afford to send their children to private schools if they were prepared to prioritise their family expenditure to do so. The fact that a family chooses to spend its resources on other matters does not mean that it is poor; and there are doubtless many citizens who share the views and concerns of the ERG and who send their children to their local state schools as a matter of deliberate choice and conviction. How they are spread between Hackney and Guildford we have no idea. We rather suspect that the marginal cost to the school of making this provision is not large.

c B2.5 is a more substantial public benefit. We think that the objects clause is probably wide enough to allow this provision to be made but do not decide the point. We assume, of course, the academy itself will apply the funds from the school for charitable purposes and that there is no question that its own activities might give rise to doubts about the

proper application of funds. Whether expenditure of £200,000 p.a. is to be seen as significant in the context of the school's overall financial position we do not know. But assuming it has no endowment, it looks quite considerable in the context of a turnover of £6.7m (£12,000 x 70 x 8: *ie,* fee p.a. x pupils per year x number of school years) or almost £5.9m similarly calculated if only 7 rather than 8 school years are included, and on the hypothesis of the question that the fees cover costs of running and maintaining the school, with allowance for future maintenance and improvement.

d B2.6: we do not consider that this can be taken into account. Although the provision of facilities for adult education is an educational purpose, it is clearly not for the benefit of children or young persons.

e Taking B2.1 to 2.5 together and in addition to the main benefit of education to fee-paying students, we think that this school probably is operating for the public benefit.

247. The school in Question B3 is the same as in Question B1 but unlike the school in Question B2, does one or some only of the things listed in Question 2. We consider that B2.5 alone is probably enough to show that the school is acting fully in accordance with its obligation in giving effect to the public benefit requirement. But none of the other matters, even if all taken together, is in our view likely to be enough.

248. The school in Question B4 is the same as in Question B1 except that it has an endowment fund out of which it provides scholarships meeting the full amount of fees to a number of entrants each year. It asks, in effect, whether the provision of various levels of scholarship is sufficient to show that the school is operating for the public benefit. Scholarships are awarded on the basis of an entrance examination. Whether scholarships are then awarded "blind" on the basis of the results, we do not know. Nor do we know the extent of the publicity for these scholarships. We think it unlikely in practice that a student would be selected without a reference from his or her existing head teacher or class teacher or without an interview. Whether the entire process from application to award is biased against "poor" people in favour of the "people

like us" at the school and therefore possibly discriminatory against persons of small means, does not appear from the scenario. We imagine it is intended to address a hypothetical "blind" situation however unreal that may be and we will proceed on that basis. Even so, we would suggest that it is not possible to ascertain whether the school is in fact being operated for the public benefit without having an idea of what the practical outcome of the entrance examination has been. If all the scholarships have gone to students whose families could afford to pay the full fees, it is not at all clear that the school could be said to be operating for the public benefit.

249. Quite apart from those matters, it is difficult to address the issues without knowing the size of the endowment: different answers might be given if the fund was enough to provide scholarships for 25% of the entrants but was utilised so as to provide scholarships for only 10%. We will assume for the purposes of the question that, taking one year with another, all of the income of the endowment fund is applied but no capital. Given that there are about 70 entrants per year, the specification of 1%, 2.5% and 5% of entrants cannot be precise: we will assume the number of scholarships to be 1, 2 and 3 respectively; the 10% and 50% figures assumed give 7 and 35 scholars respectively.

250. Subject to all of those matters and on the basis of those assumptions, we do not think that it could be maintained that 50% was insufficient to satisfy the requirement of public benefit. We also think it difficult to argue that 10% would not also be enough.

251. At the other end of the scale, the question is whether the trustees of the school would be acting properly if they failed to make any provision over and above the provision of a scholarship to one person each year, on an on-going basis. We do not think that it would be enough, even if that single person was "poor". Where the line is to be drawn between 1% and 10% is not possible to answer on a hypothetical basis. The answer will depend critically on a number of factors some of which we have already identified.

252. Question B5 repeats the scenario in Question B4 but adds in that the school does one only or some of the things listed in Question B2. We cannot usefully

add much to what we have already said. Let us suppose that provision of scholarships by the school at a particular level, say X% (somewhere between 1% and 10%) is sufficient to satisfy the public benefit test; then provision of the additional benefits is not relevant. However, if the school provides less than 10%, the other benefit, taken with the actual level of scholarships, may take the school above the necessary level of public benefit over and above the provision of education to fee-paying students. Clearly, from what we have already said, the provision in B2.5 will be enough. But just as it is very difficult to give an answer in relation to Question B4 about where the line is to be drawn in the case of scholarships, it is even more difficult to say what additional provision is necessary when not only is the starting point not known (*ie* what is the figure for X%) but it is necessary to make an assessment of how to bring the other matters into account.

253. Question B6 concerns a scenario similar to Question B4 save that means-tested bursaries are given rather than merit-based scholarships. The relevant student has to be capable of benefiting from the education (a qualification which applies also to fee-paying students given that all of the education provided by the school needs to be for the public benefit if the school is to be a charity). Question B7 modifies that scenario in the same way as Question B5 modified Question B4. The granting of bursaries to "poor" students is probably to be seen as more likely to result in compliance by the trustees of a school than the provision of corresponding scholarships. As with scholarships, we think that 50% is almost certainly enough and 10% probably so. We consider that 1% remains too low. Possibly, the line is to be drawn at a lower figure than the X% for scholarships but precisely where we cannot say any more than in relation to scholarships.

254. As to Question B8, a school with a (charitable) endowment might be expected to provide more by way of benefit other than to full-fee-paying students than an identically placed school with no endowment. But here again it is not possible to say that "this much" is enough but "that much" is not enough. Each case needs to be judged on its own particular facts.

255. Question B9 focuses on a case where bursaries are given as in Question B7 and B8 but where they are less than 100% of the fees. There is no reason why such scholarships should not be taken into account in deciding whether, overall, the school is operating in accordance with its public benefit requirement and its obligations as a charity (provided, of course, that it provides at least some benefit which is more than *de minimis* or token for the "poor"). Less weight is to be attached to a bursary of less than 100% than to a full bursary, but both are relevant to the overall assessment of whether trustees are acting within, or outside, the range within which trustees can properly act. We would only add, in relation to Question B9, that a bursary of 75% would result in fees of £3,125 pa on the basis of £12,500 pa full fee. It is at least arguable that a family which could afford that reduced fee, but no more, should be seen as "poor" in the context of this sort of educational charity. If that is right, 75% bursaries should carry the same weight as a full bursary.

256. Question B10: we do not think we can usefully add much to what we have already said. The application of 50% to improving facilities and services rather than bursaries means that the 50% is being applied for the benefit of all present, and to some extent, future students who will benefit from the improvements. This is all part and parcel of assessing the overall exercise by the trustees of their functions and of the appropriate allocation of resources, whether derived from endowment or fees, in the provision of facilities and services (including decisions about class sizes, extra-curricular activities and improvement to buildings).

257. Question C: this asks the same question as Question B in relation to a different objects clause. The only difference which this makes is that it is clear that the school is acting within its powers in providing the benefits under B2.1 and 2.6. Those matters would be make-weights in assessing whether trustees are acting in accordance with the overall public benefit duties. Our answers are no different.

258. Question D. this, too, asks the same question as Question B in relation to a third objects clause. This time, the school specialises in music education but provides, nonetheless, a general education. We do not see this case as raising

any separate issues from Question B subject to the following points. First, it may be – this would be a matter for factual enquiry – that specialist schools of this nature are more expensive to run, for instance because of the specialist nature of the teachers required or for other reasons. Secondly, in contrast with mainstream schools where there is universally available an education in the State sector, specialist schools of this nature fulfil a need (at least, we think that is the case) which the State generally does not meet. Talented musicians need a specialist environment in which to learn, and that is so whether they are rich or poor. We leave aside such impenetrable questions as to whether children of "rich" families are more likely, on average, to have sufficiently talented children than "poor" families, although we see no reason why this should be so. In these circumstances, the need for such provision would lead us to be more ready to think that the minimum provision for the "poor" going beyond *de minimis* or token provision is less than in the case of an ordinary school. But subject to a lower threshold, the same principles fall to be applied to the specialist school as to the ordinary school.

Final remarks

259. We thank the legal teams for all parties for their careful and thorough preparation of the case. The full skeleton arguments and other notes which we received have been of enormous assistance. We thank the speaking advocates for their clear presentations.

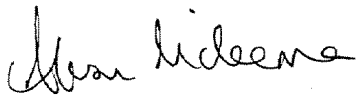
260. Our Decision will not, we know, give the parties the clarity for which they were hoping. It will satisfy neither side of the political debate. But political debates must have political conclusions, and it should not be expected of the judicial process that it should resolve the conflict between deeply held views. We venture to think, however, that the political issue is not really about whether private schools should be charities as understood in legal terms but whether they should have the benefit of the fiscal advantages which Parliament has seen right to grant to charities. It is for Parliament to grapple with this issue. It is quite separate from the issues which have dogged the many committees which have, over the years, addressed reform of charity law

but have never been able to come up with a definition of charity of more use than the concept which has developed through case law.

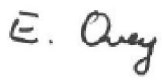
Signed: Dated: 13 October 2011

Mr Justice Warren

Judge Alison McKenna



Judge Elizabeth Ovey



ANNEXE A

Questions for reference by H.M. Attorney General to Tribunal under Paragraph 2(1)(a) of schedule 1D to the Charities Act 1993

Does Charity Law operate in any and if so which of the following ways?

A1. So as to cause a charitable educational institution which performs its objects solely by providing certain services for which it charges fees which cannot be afforded by a significant proportion of the population of England and Wales necessarily to be operating otherwise than for the public benefit within the meaning of "charity law" (as defined by paragraph 7(1) of schedule 11) to the Charities Act 1993).

A2. So as to cause an institution established for the sole purpose of the advancement of the education of children whose families can afford to pay fees representing the cost of the provision of their education not to be established for a charitable purpose.

B. So as to cause an institution with an objects clause set out in the First Schedule hereto, and the remainder of its constitution as set out in the Fourth Schedule which owns and operates a fee paying school (i) not to be operating within the terms of its constitution and/or (ii) not to be operating for the public benefit within the meaning of "charity law" (as defined by paragraph 7 (1) of Schedule 1D to the Charities Act 1993) in any, and if so which, of the following alternatives:

1. The school is day school for children aged 11 to 18 with an annual intake of approximately 70 pupils and:

    1.1 Is situated in an area of Greater London or the Home Counties where there is a demand for its services, but, if they were not provided by the institution in question, 50% of the pupils would attend the local Community Schools, and 50% would attend other independent schools.

    1.2 Charges fees of £12,000 per pupil per year, the fees being calculated by reference to the cost of running and maintaining the school, including the estimated costs of future maintenance and improvements.

    1.3 Provides a general education.

    1.4 Does not provide any scholarships or bursaries or free or subscribed places.

1.5 Does not make its facilities available to any persons other than its own pupils.

1.6 Does not make public its educational resources.

2. As in 1 (above), but the school also does all of the following:

2.1 Makes available its (unanswered) internal examination papers to the public on-line.

2.2 Provides 3 hours of lessons a week in "A" level science tuition to a class of 15 pupils from local state schools.

2.3 Provides 10 one hour one on one sessions per year between its teachers and pupils from local state schools in university entrance and interview techniques.

2.4 Permits its 3 football pitches to be used free for one afternoon per week by local state schools.

2.5 Acts as co sponsor to a local academy by:

(a) contributing the sum of £1 million, payable over five years to an endowment fund established for the academy's charitable educational purposes, to which one or more other sponsors will contribute a further £1 million over the same period: and

(b) making available at least one member of its senior staff for appointment as a governor of the academy.

2.6 Provides facilities free of charge for 6 hours per week for the holding of adult education classes for local people.

3. As in 1 (above) but the school also does one only or some (and in both cases if so which) of the things listed in 2 (above).

4. As in 1 (above), but the school has an endowment fund out of which it provides scholarship in the full amount of the fees, awarded on the basis of an entrance exam to:

4.1 1% of its entrants each year.

4.2 2.5 % of its entrants each year.

4.3 5% of its entrants each year.

4.4 10% of its entrants each year.

4.5 50% of its entrants each year.

5. As in 4 (above), but the school also does one only or some (and in both cases if so which) of the things listed in 2 (above)

6. As in 1 (above), but the school has an endowment fund out of which it provides bursaries in the full amount of the fees to:

6.1 1% of its pupils

6.2 2.5% of its pupils

6.3 5% of its pupils

6.4 10% of its pupils

6.5 50% of its pupils

With such bursaries being awarded subject to the pupil being judged to be one capable of benefiting from the education offered by the school, but otherwise on a means tested and availability basis (the means testing being applied to the pupil and to those having parental responsibility for him or her).

7. As in 6 (above), but the school also does one only or some (and in both cases if so which) of the things listed in 2 (above).

8. As in 6 (above), but the school has no endowment and, in order to fund the bursaries, it raises the fees charged to other parents or otherwise draws resource from its operating budget.

9. Separately as in 7 and 8, but with bursaries only covering up to the following amounts according to need:

9.1 75% of the fees.

9.2 50% of the fees.

9.3 25% of the fees.

10. Separately as in 6, 7 and 8, but with only 50% of the endowment income being directed towards funding bursaries, the remaining 50%

being directed towards enhancing the services and facilities offered by the school generally.

C. As in B but with the objects clause of the institution being that set out in the Second Schedule hereto.

D. As in B but with the objects clause of the institution being that set out in the Third Schedule hereto and with the school providing specialist ,usic tuition to its pupils:

1. For 25% of their teaching time.

2. For 50% of their teaching time.

FIRST SCHEDULE

OBJECTS CLAUSE OF THE NOWHERE FIRST SCHOOL COMPANY LIMITED

Objects

4. The charity's objects ("Objects") are and are specifically restricted to the following:

The advancement of education for the public benefit (within the meaning of that phrase in charity law) by the provision and maintenance at the premises known as ABC School or elsewhere of a boarding and/or day school or schools for the education of children or young persons of either sex or both sexes.

SECOND SCHEDULE

OBJECTS OF THE NOWHERE SECOND SCHOOL COMPANY LIMITED

Objects

4. The charity's objects ("Objects") are and are specifically restricted to the following:

The advancement of education for the public benefit (within the meaning of that phrase in charity law) including (but not limited to) the provision and maintenance at the premises known as DEF School or elsewhere of a boarding and/or day school or schools for the education of young persons of either sex or both sexes.

THIRD SCHEDULE

OBJECTS CLAUSE OF THE NOWHERE THIRD SCHOOL COMPANY LIMITED

Objects

4. The charity's objects ("Objects") are and are specifically restricted to the following:

   The advancement of education for the public benefit (within the meaning of that phrase in charity law) including (but not limited to) the provision and maintenance at the premises known as GHI School or elsewhere of a boarding and/or day school or schools for the education of children or young persons of either sex or both sexes and specializing in the teaching of music and/or singing and/or the playing of musical instruments.

FOURTH SCHEDULE

OTHER TERMS OF CONSTITUTION

[Charity Commission Model Memorandum and Articles of Association for a Charitable Company]

ANNEXE B

EXTRACT FROM THE PREAMBLE TO

THE CHARITABLE USES ACT 1601

Whereas Landes Tenementes Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money, have bene heretofore given limited appointed and assigned, as well by the Queenes most excellent Majestie and her moste noble Progenitors, as by sondrie other well disposed persons, some for releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causewaies Churches Seabankes and Highwaies, some for Educacion and prefermente of Orphans, some for or towards Reliefe Stocke Maintenance of Howeses of Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge tradesmen Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitantes concerninge paymente of Fifteenes setting out of Souldiers and other Taxes; Whiche Landes Tenementes Rents Annuities Profitts Hereditaments Goodes Chattells Money and Stockes of Money, nevertheless have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of Fraudes breaches of Truste and Negligence in those that shoulde pay delyver and imploy the same: