[2012] UKUT 420 (TCC)

IN THE UPPER TRIBUNAL **FTC/84/2011**
(TAX AND CHANCERY CHAMBER)

B E T W E E N :

HER MAJESTY'S ATTORNEY GENERAL **Referrer**

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES
First Party

and

THE TRUSTEES OF THE PROFESSIONAL FOOTBALLERS' ASSOCIATION BENEVOLENT FUND

Second Party

and

THE CHARTERED ACCOUNTANTS' BENEVOLENT ASSOCIATION (A COMPANY) **Third Party**

and

THE TRUSTEES OF THE BRITISH AIRWAYS WELFARE AND BENEVOLENT FUND **Fourth Party**

and

THE TRUSTEES OF THE NATIONAL WESTMINSTER STAFF FOUNDATION (AKA RBS CARE HOMES FOUNDATION)
Fifth Party

and

THE TRUSTEES OF THE ROYAL BANK OF SCOTLAND GROUP BENEVOLENT FUND **Sixth Party**

and

THE TRUSTEES OF THE STOCK EXCHANGE BENEVOLENT FUND

Seventh Party

and

THE TRUSTEES OF THE HENRY SMITH CHARITY

Eighth Party

and

THE TRUSTEES OF THE BT BENEVOLENT FUND

Ninth Party

and

THE CHARTERED INSTITUTE OF PUBLIC RELATIONS BENEVOLENT FUND (A COMPANY)

Tenth Party

and

THE TRUSTEES OF THE GRAND STEWARD'S LODGE 250TH ANNIVERSARY BENEVOLENT FUND

Eleventh party

DETERMINATION OF A REFERENCE PURSUANT TO PARAGRAPH 2(1)(A) OF SCHEDULE 1D TO THE CHARITIES ACT 1993 (AS AMENDED BY THE CHARITIES ACT 2006)

THE TRIBUNAL: The Chamber President, The Hon Mr Justice Warren
Judge Alison McKenna

Heard in public at the Royal Courts of Justice, Rolls Building, on 15 and 16 November 2011

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

Kenneth Dibble, Chief Legal Adviser of, and for, the Charity Commission for England and Wales

Robert Pearce QC of counsel, instructed by Brabners Chaffe Street LLP for the trustees of the Professional Footballers Association Benevolent Fund

Andrew Westwood of counsel, instructed by Bates Wells and Braithwaite LLP for The Chartered Accountants' Benevolent Association and the trustees of the British Airways Welfare and Benevolent Fund

Matthew Smith of counsel, instructed by Lester Aldridge LLP for the trustees of the National Westminster Staff Foundation (otherwise RBS Care Homes Foundation) and the trustees of the Royal Bank of Scotland Group Benevolent Fund

Amanda Tipples QC of counsel, instructed by Russell-Cooke Solicitors for the trustees of the Stock Exchange Benevolent Fund, the trustees of the BT Benevolent Fund, the Chartered Institute of Public Relations Benevolent Fund and the Association of Charitable Organisations (intervening)

Christopher McCall QC of counsel instructed by Portrait Solicitors for the Trustees of the Henry Smith Charity

Simon Taube QC of counsel, instructed by Farrer & Co for the trustees of the Grand Steward's Lodge 250th Anniversary Benevolent Fund

Francesca Quint of counsel, instructed by Russell Jones and Walker Solicitors for The Police Federation of England and Wales (intervening)

The Proceedings

1. These proceedings concern a Notice of Reference ("**the Reference**") made by Her Majesty's Attorney General on 27 January 2011, by which he sought the Tribunal's determination of a number of issues relating to charities for the relief of poverty, in which the potential beneficiaries are connected by a family relationship to the founder, common employment or former employment, or their membership of an unincorporated organisation. The questions referred to us by the Reference and the answers to them are to be found in the Annex to this Determination.

2. The Reference was transferred to the Upper Tribunal (Tax and Chancery Chamber) from the First-tier Tribunal (Charity) on 1 November 2011, pursuant to rule 19A of The First-tier Rules, with the concurrence of the President of the General Regulatory Chamber of the First-tier Tribunal and the President of the Upper Tribunal (Tax and Chancery Chamber).

3. By the time of the hearing there were 11 parties and 19 interveners. The written evidence presented to the Tribunal is summarised below in order to give a flavour of the charities affected by the Reference. None of the evidence was disputed. We are grateful to all those involved for putting their cases to us so clearly.

The Parties and the Evidence

4. The Charity Commission is the registrar and regulator for charities in England and Wales. It did not provide witness evidence to the Tribunal but we were furnished with copies of its guidance (issued pursuant to section 4 of the Charities Act 2006) *Charities and Public Benefit* and *The Prevention or Relief of Poverty for the Public Benefit* (together "**the Guidance**", both published in 2008) with the accompanying published *Analysis of the Law underpinning Charities and Public Benefit* and *Analysis of the Law underpinning The Prevention or Relief of Poverty for the Public Benefit*. The Guidance does not itself raise any doubts about the status of charities for the relief of poverty where there are restrictions on

eligibility to benefit based on "personal connections"; however it is clear from the terms of the Reference that the Charity Commission at some point began to harbour doubt as to whether the 2006 Act (which had provided an express requirement for charitable purposes to be "for the public benefit" – see paragraph 20 below) had had the effect of depriving it of the jurisdiction it had previously exercised to register and regulate certain trusts and other bodies whose objects were the relief (and in some cases, prevention) of poverty. Those were the circumstances in which the Attorney General decided to make the Reference in order to clarify the law for all concerned.

5. The Professional Footballers' Association Benevolent Fund is an unincorporated association and a registered charity. It provided us with the witness statement of its chief executive Gordon Taylor OBE, who detailed its constitutional arrangements and activities. Its objects are "*the relief of poverty among members and ex-members of the PFA and their dependants who are in conditions of need hardship and distress*". Mr Taylor explained in his statement that the majority of the charity's income is derived from the various football leagues' broadcasting revenue, part of which is paid to the PFA and then distributed to charity.

6. The Chartered Accountants' Benevolent Association is a company limited by guarantee and a registered charity number 1116973. It provided the Tribunal with a witness statement from the President of its Board of trustees, Nicholas Brooks. He stated that the charity has been in existence for 125 years and has objects for "*the relief of poverty and sickness and the preservation of good health of the beneficiaries and such other purposes as are charitable under the laws of England and Wales for the benefit of the beneficiaries*". Mr Brooks explained that its beneficiaries are members and former members of the Institute, current and former employees of the Institute (and of the charity itself) and their dependants. He estimated that the beneficiary class is in the region of 500,000 people and detailed the charity's activities, which include the making of grants and loans to beneficiaries and the provision of training and advice on stress-management. The charity also undertakes some activities directed to the prevention of poverty, such as advice to Chartered Accountants who are threatened with unemployment or redundancy and it runs a debt advice service. Finally Mr Brooks gave us some

examples of circumstances in which the charity had been able to assist individual beneficiaries.

7. The British Airways Welfare and Benevolent Fund is a charitable trust, registered number 282480. It provided us with the witness statement of its Chairman Alan Buchanan. The charity was established in 1981 with the object of relieving poverty amongst past and present employees of British Airways and its predecessor companies and their dependants worldwide. Mr Buchanan estimates the number of potential beneficiaries as 400,000 and notes that in 2010 the charity provided some £430,000 in financial assistance to its beneficiaries by way of one-off grants for purposes such as the purchase of medical equipment, essential household repairs, and funeral costs. Mr Buchanan explained that whilst the charity was initially supported by British Airways, it is now self-supporting through its investment income.

8. The National Westminster Staff Foundation (also known as the RBS Care Homes Foundation) and The Royal Bank of Scotland Group Benevolent Fund jointly provided the Tribunal with the witness evidence of Lesley Davie, who is the Chairman of both charities. Ms Davie's evidence was that the Foundation was set up following receipt of a legacy in 1971, and initially provided care homes for employees or former employees of the Bank in need of the same. In recent years the care homes have made substantial operating losses and the trustees have applied to the Charity Commission for a scheme to allow the homes to be sold and the proceeds of sale applied cy-près. The trustees' application is currently being held in abeyance by the Charity Commission pending the determination of the Reference. The evidence provided about the Benevolent Fund was that it has its origins in relieving members of staff and their dependants who had suffered in the First World War, but currently has a beneficiary class comprised principally of employees and former employees of the Royal Bank of Scotland Group and their dependants, with objects to relieve them from need hardship or distress and to provide assistance towards their education. The potential beneficiaries are estimated to comprise a class of several hundred thousand individuals. Ms Davie explained that it is the intention of the trustees of both charities to seek the Charity Commission's permission to merge in due course.

9. The Stock Exchange Benevolent Fund is an unincorporated association, registered as charity number 254430. It has been in existence since 1801. The charity provided the Tribunal with a witness statement from its Secretary James Cox who stated that the charity distributes its investment income to relieve need amongst former members of the Stock Exchange and their dependants. Mr Cox estimates the charity's beneficiary class to comprise several thousand individuals and states that the charity distributed some £639,000 in grants to beneficiaries in 2010, assisting with the purchase of mobility aids, paying for medical expenses, and paying the cost of carers to enable beneficiaries to continue to live in their own homes.

10. The Henry Smith Charity, registered charity number 230102, is a charitable trust with an incorporated trustee body. The charity provided the Tribunal with the witness statement of its Director, Richard Hopgood. The charity was established by the will of Henry Smith in 1627. The will contained gifts for a number of charitable purposes, including the relief of poor captives of Turkish pirates, the relief of the poor in specified parishes and towns and the relief of the poorest of the testator's kindred. Mr Hopgood explained that the charity is now governed by a Charity Commission Scheme, with the relief of "poor kindred" of the founder being one of its objects. It also carries out a wide range of relief in need activities amongst needy beneficiaries who are not required to have a familial link with the founder. The grants made to "poor kindred" totalled £520,000 in 2010, whilst the charity's total charitable distributions in that year amounted to some £26,000,000.

11. The BT Benevolent Fund is a charitable trust registered number 212565. It provided the Tribunal with the witness statement of its Fund Manager, Deborah Terry, who stated that the Fund's object is the relief of financial hardship amongst BT employees past and present, and their dependants. It also has power to relieve need amongst the former public sector employees who transferred into BT when the post office was privatised, and to make grants to other charitable organisations for the relief of need. The charity has a potential beneficiary class of almost two million people, and in 2010 made grants totalling some £600,000 for purposes such as disability adaptations and aids, and to assist with debts such as utility bills.

The charity makes some weekly grants to pensioners to help pay for a carer, so that they may stay in their own home.

12. The Chartered Institute of Public Relations Benevolent Fund is an unincorporated association and a registered charity number 242674. Its witness evidence was provided by its Chair of trustees, John Brown. Its objects are to relieve poverty amongst members of the Institute, their dependants and the dependants of deceased members. Mr Brown's evidence was that the Institute has some 9,000 members, who pay a subscription for membership and make voluntary donations to the charity. The potential beneficiary class is estimated to be between 40,000 – 50,000 people, and it distributes on average £14,400 per year in charitable grants. He gave examples of assistance provided by the charity, including a grant to allow adaptations to help a disabled beneficiary go into her garden (a grant for this having been refused by the local authority) and a grant to a widow whose husband had died whilst on holiday and who had been refused cover under her travel insurance policy due to the fact that her husband had been diagnosed with cancer before they travelled.

13. The Grand Steward's Lodge 250th Anniversary Benevolent Fund was permitted to join the proceedings at a fairly late stage, following the refusal by the First-tier Tribunal to permit the Masonic umbrella body (the United Grand Lodge of England) to join as a party to the Reference. It provided the Tribunal with the witness statement of its trustee Quentin Humberstone, who stated that the Fund is a charitable trust with the following objects: "*to or for the relief of such poor and distressed Brother Masons or their poor and distressed widows and children or to or for the benefit of such Masonic charities or other charitable institutions societies and objects as the Lodge shall in duly constituted meeting from time to time direct*". Mr Humberstone explained that this wording is from a model declaration of trust widely adopted by Lodges of Freemasons. Lodges are unincorporated associations, of which there are some 8,000 with approximately 250,000 members in England and Wales. The charity has supported a number of Masonic and non-Masonic charities in recent years, including a hospice, a children's hospital and the Royal Masonic Trust for Girls and Boys, which

provides long-term support for poor children and orphans who are the children or grand children of Freemasons.

The Interveners' Written Submissions

14. The following interveners made written representations to the Tribunal pursuant to rule 33 and/or rule 5(3)(d) of the First-tier Rules: The trustees of the Middlesex Hospital Nurses' Benevolent Fund; The trustees of the Institution of Plant Engineers Benevolent Fund; The trustees of the TSB Staff Benevolent Fund; The trustees of the University College Hospital London Nurses' League (Dora Finch and Barbara Yule Benevolent Fund Trust); The trustees of the Spread Eagle Foundation; The trustees of the Barclays Overseas Benevolent Fund; The Police Federation of England and Wales; The trustees of the Western Gazette Benevolent Fund; The trustees of the Alfred Simmons Benevolent Fund; The Association of Charitable Organisations, jointly with the trustees of the John Laing Charitable Trust and the Reuters Centenary Fund; The trustees of the Chartered Institute of Library and Information Professionals Benevolent Fund jointly with the trustees of the NAGS Fund, the trustees of the Kings College Hospital Nurses League Benevolent Fund, the trustees of the Unison Welfare and the trustees of the Ambulance Hardship Fund.

15. Counsel appearing for The Police Federation of England and Wales and for The Association of Charitable Organisations were also given permission to make oral submissions at the hearing.

16. It is not necessary to summarise the interveners' submissions in this Determination, as they are overwhelmingly concerned with the individual circumstances and activities of the charities making them.

17. An important point to acknowledge is the evident concern that the making of the Reference caused to the 1500 or so benevolent charities which the Charity Commission estimated were affected by it. Charitable status brings with it valuable fiscal and reputational benefits which the charities concerned were evidently worried they might lose as a result of the Reference. We recognise that many charities were keen to have their say in those circumstances and the process

of allowing so many of them to intervene was intended to facilitate this. We also note that a number of the interveners appeared strictly to fall outside the terms of paragraph 2.2 of the Reference because their beneficiary class was drawn from public sector employees rather than "commercial" employers. Further, given some of the written submissions we had received, Mr Henderson on behalf of the Attorney General invited us to clarify the implicit distinction in the terms of the Reference between public and private sector employees as beneficiaries. We were further assisted by the oral submissions of Ms Quint, made on behalf of the Police Federation of England and Wales, on this particular point. We return to this issue at paragraph 83 below.

18. We particularly wish to refer here to the helpful submission provided by the Association of Charitable Organisations ("**ACO**"), which is the umbrella body for 130 benevolent funds. ACO was established in 1946 and is now constituted as a charitable company limited by guarantee. Its objects are to promote for the public benefit the efficiency and effectiveness of charities, particularly but not exclusively those which relieve individuals in need, by assisting in their better administration and promoting the sharing of information and practices useful to such charities. ACO formed a steering group of twenty two charities for the purpose of making a comprehensive joint submission to the Tribunal in connection with "membership" and "single employer" benevolent funds. The submission made some perceptive points about the terms of the Reference at the outset, for example pointing out that "membership" benevolent charities may not involve membership of an unincorporated association only but may also relate to membership of a corporation. It commented that some single-employer funds comprised an entire profession, whilst others did not. It also provided some examples of charities where the beneficiary class was not connected by employment but rather by other contractual relationships with commercial companies, such as the Water Utility charities. (It seems to us that these charities are likely to be covered by our answer to question 2.3 of the Reference, as the "nexus" linking the beneficiaries is one of common customer status, which seems to us to be more closely related to common membership of an unincorporated association than to a nexus based on common employment).

19. Overall, the ACO submission provided us with a valuable overview of the activities of its constituent members, who collectively provide some £70 million per year in grants to needy individuals and have collective assets of £2 billion. The submission makes the point that this charitable activity is sometimes complementary to state provision but sometimes addresses the gaps in state provision for the poor; and argues that benevolent funds are uniquely placed to raise charitable funds from the membership, professions and organisations with which they are linked. The ACO submission gave us a comprehensive picture of the constitutional provisions, funding arrangements and activities of each of the charities on the steering group and provided us with additional insight into the benevolent sector more generally, for which we were most grateful. It also made helpful submissions about the law which were supplemented by the oral submissions of its counsel at the hearing.

The 2006 Act

20. The relevant provisions of the 2006 Act can be taken quite shortly:

    a. 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."

    b. Under section 2(1), "a charitable purpose" is one which falls within subsection (2) and which, under section 2(1)(b), 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) the first of which is "the prevention or relief of poverty".

    c. 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)."

The Issues

21. By the time of the hearing of the Reference, it was common ground between the parties, with the exception of the Charity Commission as well as the interveners that the 2006 Act did not in fact cast doubt on the continued charitable status of the type of charity with which the Reference is concerned. One might wonder, therefore, why the Reference was felt to have been necessary. Mr Henderson for the Attorney General told us that, in the light of the doubts which had been expressed by the Commission and within the sector, there had been sufficient uncertainty for the Attorney General to have considered it appropriate to make the Reference. The Attorney General's view now was that institutions with objects for the relief of poverty which had been charitable prior to the coming into force of the 2006 Act had remained so afterwards.

22. This conclusion was arrived at on the basis, in summary, that:

    a. the case law provides that, in order to be charitable, a trust must be established for the public benefit;

    b. this requirement is given express statutory form in section 2(1) of the 2006 Act and section 2(2) includes "the prevention or relief of poverty" in the list of potentially charitable purposes;

    c. the abolition of the presumption of public benefit in section 3(2) of the 2006 Act has no impact on relief of poverty trusts because their charitable status has never rested on a presumption;

d. the Tribunal should follow the reasoning of Harman J at first instance in *Gibson v South American Stores (Gath & Chaves) Ltd* [1949] Ch 572, (***Gibson***) to the effect that public benefit was necessary in order for trusts for the relief of poverty to be charitable, but that the requisite public benefit was provided either by the potential beneficiaries of such a trust constituting a sufficient section of the public even where they are a narrow class, or alternatively that there is a significant indirect benefit to the public as a whole which arises from the relief of poverty and satisfies the public benefit requirement by itself. Whilst *Gibson* was appealed to the Court of Appeal, its decision at [1950] Ch 177 had not specifically addressed this point. Harman J's analysis is nevertheless good law and should be followed by the Tribunal in preference to the cases which suggest that there is no need to show public benefit in relation to trusts for the relief of poverty, cases which do not establish precedent on this point.

23. Mr Henderson additionally submitted that some of the charities affected by the Reference were properly to be regarded as charitable, not for the relief of poverty, but rather under an alternative head, such as the advancement of health, the saving of lives or the promotion of the efficiency of the police services. He was supported in this by the Charity Commission and others. Without casting doubt on the shared view, we do not in this Determination consider it is appropriate to say anything in relation to these submissions, which go beyond not only the actual questions referred to us but also beyond anything in the area of uncertainty which those questions raise.

24. Mr Henderson's submissions were adopted by all the parties other than the Charity Commission, subject to some important points of variation which are dealt with in more detail below. The Charity Commission's representative Mr Dibble explained to the Tribunal that it was neutral on the questions in the Reference, but was putting to the Tribunal an alternative argument in order to assist the Tribunal in determining the Reference. That argument was, in summary, that

a. charities for the relief of poverty had been held by the Courts to be exempt from the *Compton* test (*ie* the principle, established by the Court of Appeal

in *In re Compton* [1945] Ch 123 and subsequently approved by the House of Lords, that a trust would not be charitable where the potential beneficiaries were defined by reference to their relationship to "*a named propositus*");

b. some of the cases refer to the reason for this as being that anomalously there is no public benefit requirement at all in trusts for the relief of poverty, others refer to the requirement for public benefit being present in all charitable trusts but operating differently in trusts for the relief of poverty so as to exclude the *Compton* test;

c. the 2006 Act imposes at section 2(1) an express requirement that for a purpose to be charitable, it must be for the public benefit. The term "public benefit" is, by virtue of section 3(3) of that Act, to be understood as a reference to "*public benefit as that term is understood for the purposes of the law relating to charities in England and Wales*"; and

d. if relief of poverty trusts were properly to be understood as not having had to satisfy a public benefit requirement under the pre-2006 Act law, that is no longer acceptable and such trusts no longer have charitable status.

25. In order to address the questions put to us by the Attorney General (set out at the Annex below), we will need firstly to address some issues of principle concerning:

a. the law of public benefit as it applied to trusts for the relief of poverty or the prevention of poverty prior to the coming into force of the 2006 Act;

b. the basis on which charities for the relief of poverty or prevention of poverty amongst a beneficiary class of the sort we are dealing with here were said to be "anomalous" or at least different from other classes of charity under the pre-existing law; and

c. the effect (if any) that the coming into force of the 2006 Act had on the pre-existing law and consequently on the charities affected by the Reference.

26. A number of issues in respect of the statutory public benefit requirement were addressed in the recent decision *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) (*"**ISC**").* We were two of the three members of that Tribunal and, so far as relevant to the matters which we have to decide in the present case, we see no reason to depart from what was said in the decision. However, as was made clear in that decision (see in particular at paragraphs 14 and 15 of the decision), the reasoning about public benefit there was confined to charities with educational purposes. In this Determination, we address charities for the relief (and prevention) of poverty only and make clear that what we say is confined to this head of charity only, in view of the differing nature of the public benefit requirement which has developed for different types of charity in the case law, as noted in [15] and [16] of *ISC.*

27. Issues (a) and (b) can, we think, be taken together.

The Pre-2006 Act Position

28. The concept of public benefit prior to the 2006 Act was considered at [42]*ff* of the decision in *ISC.* The starting point for us, as it was for the Tribunal in *ISC*, is the Charitable Uses Act 1601 (commonly known and referred to as "the Statute of Elizabeth") and the preamble to it ("**the Preamble**"), the Preamble containing the long but not exhaustive list of purposes (including the "releife of aged and poore people") which has been so influential in shaping the legal understanding of charity in England and Wales. Neither the Statute of Elizabeth nor the Preamble refer expressly to public benefit but, as the Tribunal pointed out in *ISC*, a public element was nonetheless inherent to the concept of charity. What we have to address in this Determination is whether there is any such requirement in the context of trusts for the relief of poverty and, if there is, its extent.

29. Reference was made in *ISC* (at [43]) to the statement of the general requirement for public benefit, namely in *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 ("***Oppenheim***"), itself referring to one of the old cases, *Jones v. Williams* (1767) Amb 651. We will need to return to *Oppenheim* since it is one of the cases which suggest that public benefit is not a requirement in the context of the relief of poverty.

30. The decision in *ISC* explains (see [44]*ff*) how it is possible 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 was referred to as public benefit in the first sense. In that sense, the Tribunal said that the advancement of education (by the provision of the type of mainstream education found in schools across the country) had the necessary element of benefit to the community. We adopt, but do not repeat, the discussion of *Williams' Trustees v Inland Revenue Commissioners* [1947] A.C. 447 and of *Verge v. Somerville* [1924] A.C. 496 by the Tribunal at [46] and [47] of the decision although we do emphasise the following. Lord Wrenbury, in *Verge v Somerville*, had posited as a first enquiry whether the trust was for the benefit of the community or for a sufficient section of the community *ie* with the focus on what we have referred to as public benefit in the second sense. As to that, Lord Simonds in *Williams' Trustees* said this:

> "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."

31. It is apparent, we think (as we did along with Judge Ovey in *ISC*) that Lord Simonds was here 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. But the requirement for a trust to be of benefit in that sense – for it to be "charitable" to use Lord Simonds' word – is we think as much part of the "public benefit" as that term is understood as is the requirement for the trust to be for the benefit of a sufficient section of the community.

32. The conclusion to be drawn, we consider, is that the requirement that the purpose of a trust (*eg* relief of poverty or advancement of education) should be, of its nature and without regard to the section of the community to be benefited, beneficial to the community and within, or within the spirit of, the Preamble, is intrinsic to what was meant when it was said that a purpose was for the public benefit. We should add here that we do not consider, for reasons which will become apparent, that the line of cases suggesting that it is not necessary to show public benefit in the case of trusts for the relief of poverty detracts from that conclusion.

33. 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.

34. These two elements were discussed in *ISC* at [44] to [53]. A number of cases were referred to including *Verge v. Somerville* [1924] A.C. 49, *Gilmour v. Coats* [1949] A.C. 426, *Williams' Trustees v. Inland Revenue Commissioners* [1947] A.C. 447, *In re Compton* [1945] 1 Ch. 234 and *Oppenheim*. We do not need to repeat that discussion. We do, however, wish to emphasise the *ad hoc* development of the law in this area and to draw attention to two of the consequences of it mentioned by the Tribunal in *ISC:*

    a. The first is that what satisfies the public benefit requirement may differ markedly between different types of allegedly charitable purposes. Thus, when the 2006 Act speaks in section 3(3) of public benefit "as that term is understood for the purposes of the law relating to charities in England and Wales", it is referring to the meaning of that term in the context of the particular purposes under consideration.

    b. The second consequence (see [46] of the decision) is that the authorities do not provide a comprehensive statement of the public benefit requirement but provide rather a series of examples of when the public

benefit requirement is or is not satisfied. There is no application of some overarching, coherent, principle by which the Courts have been guided.

35. In our view, the purposes of the institutions with which we are concerned insofar as they relate to the relief of poverty – we will deal with the prevention of poverty separately later in this Determination - which were all charitable institutions prior to the 2006 Act, are all purposes which are for the public benefit in the first sense. The relief of poverty is, we consider, ordinarily to be seen a purpose of a nature which is for the public benefit just as ordinary education is of a nature which is for the public benefit. It is a purpose which is expressly mentioned in the Preamble and thus of a nature which is charitable. But just as there may be educational purposes which are not charitable because they are not for the public benefit in the first sense – the school for pickpockets again: see [48b] of the decision in *ISC* – it is possible that there could be a trust for the relief of poverty which is not for the public benefit in the first sense either. Indeed, in his speech in *National Anti-Vivisection Society v Inland Revenue* [1948] AC 31 at page 60, Lord Simonds gave practical examples of such a possibility and observed, at pp 69-70:

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

36. In *Gilmour v Coats* [1949] AC 424 Lord Simonds considered whether the requirement of public benefit was satisfied in relation to a trust to apply the income of a fund for the purposes of a Roman Catholic priory of cloistered nuns. The Tribunal in *ISC* quoted a passage from his speech which it is worth repeating:

> "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."

37. This reflects the uncontroversial proposition that what we have referred to as public benefit in the first sense is a requirement of any charity. More significantly, however, it is consistent only with the view that that requirement is all part and parcel of what is and is not within the meaning of "public benefit" as that term is understood for the purposes of the law of charity. And it also makes clear that the "measure" of "public benefit" varied according to the type of charitable purpose.

38. Our conclusion that the institutions with which we are concerned are charitable (leaving aside until later the special cases where the purposes include the prevention of poverty) accords, happily, with the stated view of all the parties other than the Charity Commission on whose behalf Mr Dibble presented, as we have explained, the contrary arguments.

39. In the light of the discussion at [45] to [71] of *ISC* we do not think that the abolition of the presumption of public benefit in section 3(2) of the 2006 Act has had any impact on whether a trust for the relief of poverty is charitable or not. There is no presumption that a trust for the relief of poverty is for the public benefit, any more than there is a presumption that education is for the public benefit. In either case, the Court or Tribunal will form its own view on the evidence before it whether the trust is for the public benefit and it will do so, not by way of assumption, but by way of decision. It will no doubt take account of other decided cases; and it will take judicial notice of facts where appropriate. But as the Tribunal said at [68] of the decision in *ISC*, this is far from a "presumption" in the usual sense.

40. We now turn to the nature of the "anomalous" treatment of trusts for the relief of poverty in the case law. We consider here four authorities: *Gibson v. South American Stores (Gath & Chaves) Ltd* [1949] Ch 572 (Harman J), [1950] Ch 177 (C.A.); *Oppenheim, Re Scarisbrick* [1951] Ch 622 (C.A.) and *Dingle v. Turner* [1972] AC 601. We do so because the first three, at least, might be thought to cast

doubt on the proposition that what we have referred to as public benefit in the first sense is really nothing to do with public benefit at all, but constitutes a separate and distinct requirement for a purpose to qualify as charitable.

41. *Gibson v. South American Stores* concerned a trust fund for necessitous and deserving employees and ex-employees of the company, its subsidiaries and agents, and their necessitous and deserving spouses, dependants and others. It was held by both Harman J at first instance and subsequently by the Court of Appeal that the trusts were charitable. Harman J decided that public benefit was necessary even in the case of trusts for the relief of poverty, but that such benefit was provided either by reason of the class of potential objects being a sufficient section of the public or by reason of there being a sufficient indirect benefit to the public as a whole, or both (see the passage quoted at the end of the next paragraph).

42. At p 576, he observed that "…charity in its legal sense does not include private charity which in the eyes of the law is benevolence" and went on to consider *Re Compton* [1945] Ch 123 and *Re Hobourn Aero Components Ltd* [1946] Ch 194. He cited at some length from both decisions. The passages cited, as well as what the Judge himself said (to which we will come in a moment), are clearly focused on public benefit in contrast with private benefit and do not consider at all the question of public benefit in the first sense. This is not surprising since the relief of poverty is ordinarily to be seen as just the sort of purpose which is, of its nature, charitable. The language used, however, might be taken as seeing this element of what it is to be charitable as the beginning and the end of the "public versus private" issue. Thus we find the Judge saying this at p.579:

> "The position therefore on the authorities is now this, that in the second and third and fourth categories of charity as defined in Pemsel's case there can be no doubt that a public element is essential but there is at least a suggestion that this is not necessary in the first category. I do not myself feel able to adopt this suggestion. It seems to me a public object is always necessary to make a trust legally charitable and that the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories. The law may well (as the Master of the Rolls suggested in *In re Compton*) consider that to relieve even one man's poverty is a benefit to the whole community while to relieve his ignorance or to minister to his

> ungodliness is not such a benefit and similarly with the miscellaneous objects in the fourth category. Viewed in this light, is the object here a public object or no? I think it is."

43. In that passage, the Judge saw relief of poverty of a private class as being sufficient to provide the required benefit to the public as a whole. This is not, strictly, public benefit in the second sense which focuses on the potential class of direct beneficiaries: in the case of poverty, the class whose poverty can be relieved, in the case of a school, those eligible to attend the school. In the poverty cases, the class of potential direct beneficiaries may be very small and not sufficient, even in the case of poverty, to satisfy the public benefit requirement in the second sense. What the Judge is saying in this passage is that benefit to the community is always present where there is relief of poverty and that is a sufficient element of benefit for (public) charity to be present. There is a close analogy here with the animal welfare charities where there is no direct human beneficiary at all and yet the trusts can be charitable on the footing that the community as a whole benefits by the elevation of the moral character of members of society.

44. Later on, at p 580, Harman J said this:

> "…The present fund is devoted not only to employees but to ex-employees and to the dependants of both classes and also to the employees and ex-employees and dependants of subsidiary companies and of agents of the company. This, as it seems to me, in a poverty case – and I say nothing about any other category – and the class is sufficiently wide to constitute a public element and accordingly I hold this to be a good charity."

45. The Court of Appeal in *Gibson* appreciated that it was faced with the difficult question of whether a trust for a class of poor persons defined by reference to the fact that they were employed by some person, firm, or company, was a good charitable trust, or whether it failed through "the absence of the necessary public element" as Evershed MR put it at p.191. The way in which that question is posed might suggest, again, that this was the beginning and the end of the "public versus private" issue. But this was one of those cases where it was simply not necessary to draw the distinction between what we see as the two separate elements of public benefit so that it would be wrong to conclude that the Court

saw what we have referred to as public benefit in the first sense as nothing to do with the meaning of "public benefit" as that term is understood for the purposes of the law relating to charities.

46. The Court of Appeal answered the difficult question in a slightly unsatisfactory way, ultimately following the unreported decision of the Court of Appeal in *Re Sir Robert Laidlaw* (unreported, 1935): see at p 197, with the relevant facts being set out at pp 195-6. Unfortunately, there is no record of the reasoning of the Court of Appeal in *Re Laidlaw*. Mr Henderson suggests we might not be bound by it on the basis that 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 *ISC* at [92], applying 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. We see the force of that; but the submission, if correct, would have to be applied equally to the Court of Appeal in *Gibson* when that Court was itself addressing *Re Laidlaw*; and yet the Court in *Gibson* considered (a) that it could not be said that *Re Laidlaw* was decided *per incuriam* and (b) that it was bound by *Re Laidlaw*. It would be curious if we were to hold that the Court of Appeal's decision in *Gibson* is not binding on us. We decline to do so and think that this question is one which can only be dealt with properly by the Court of Appeal or the Supreme Court.

47. More importantly for present purposes is what the Master of the Rolls said, at p 197, in relation to Harman J's explanation of the poverty cases:

> "It does not appear on what precise ground the case [*Re Laidlaw*] was determined, and I therefore feel it right, in case the matter is hereafter considered in a higher court, to say that I must not be taken to accept the view that the ground for justifying such decisions as the poor-relations cases is, as Harman J. expressed it - I have read the passage - "The explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories." I think, as Lord Greene M.R. stated in *In re Compton*, that that may be an explanation. On the other hand, it may be that they simply must be regarded now as a well-established anomaly. I find it unnecessary in the circumstances to say any more or to express a view one way or another whether the principle to which Harman J.

> referred should be treated as well established, or whether the three cases, *Spiller v. Maude*, *In re Gosling* and *In re Buck* ought now to be regarded as rightly decided. I think that, so far as I am concerned, this question has been determined by *In re Sir Robert Laidlaw*, on grounds which are not apparent, and I loyally follow them without affirming or disaffirming any of the grounds relied on by Harman J."

48. What Lord Greene MR himself had said in *Re Compton* is to be found at pp 139-40:

> "If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently on the ground that their purpose was a private family purpose, lacking the necessary public character, but it is in my view quite impossible for this court to overrule these cases. There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded: whereas in the case of an educational trust, where there is no poverty qualification, the funds may at any time be applied for the purpose of educating a member of the family for whose education ample means are already available, thus providing a purely personal benefit and one freed, incidentally, from the burden of income tax. Failing such a ground of distinction, I can only regard the "poor relations" cases as anomalous, and I prefer to let them remain as such rather than to extend the anomaly to a different class of case….."

49. Again, one sees in those passages a focus on public benefit in the second sense; but, like *Gibson*, this was a case where it was simply not necessary to draw the distinction between what we see as the two separate elements of public benefit.

50. We do not need to say much about *Oppenheim*. It was considered at some length in *ISC* and there is not much which we can usefully add. It illustrates the two separate aspects of public benefit. 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. Further, the case was one where the benefit to the public had to be found, if it was to be found at all, in the provision of benefit to the limited class of direct beneficiaries. This was not the sort of case where the necessary element of public benefit could be found in the benefit to the community generally of

educating the particular direct objects of the trust. We do need, however, to mention what Lord Simonds said in his speech at p. 305 in a passage more fully quoted by the Tribunal in *ISC* at [43]:

> "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. …… 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. ……"

51. This reference to "public benefit" is directed, it seems to us, at the second sense of the public benefit requirement; the contrast is being drawn between a public benefit and a private benefit. The poverty exception – anomalous in Lord Simonds' view – is an exception from that requirement. Lord Simonds has nothing to say in the passage (or anywhere else in his speech) about what the Tribunal in *ISC* called public benefit in the first sense. There is no suggestion that a trust for the relief of poverty is an exception from the requirement to show public benefit in the first sense.

52. *Re Scarisbrick* concerned a testamentary trust for the poor relations of the testatrix's son and daughter. This was held by the Court of Appeal (reversing Roxburgh J) to be a charitable trust. At p 637, Evershed MR referred to the "poor relations" cases as anomalies or exceptions to the general rule "which requires benefit to the public or to a section of the public, as an essential element of a valid charity". Again, this focuses on the second aspect of public benefit, there being no issue concerning the first aspect. Unfortunately for us, it was not necessary for him to decide, on the approach he took, whether the "poor relations" trusts were to be justified by reference to the indirect benefit to the community at large, or whether they were simply an anomalous exception: see at pp 639-640.

53. In contrast, Jenkins LJ had rather more to say about the exception. At p 649-50 he said this:

"(iv) There is, however, an exception to the general rule, in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are therefore not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood (as in the numerous so-called "poor relations" cases, to some of which I will presently refer) or of contract (e.g., the relief of poverty amongst the members of a particular society, as in *Spiller v. Maude*, or amongst employees of a particular company or their dependants, as in *Gibson v. South American Stores (Gath & Chaves) Ltd*).

(v) This exception cannot be accounted for by reference to any principle, but is established by a series of authorities of long standing, and must at the present date be accepted as valid, at all events as far as this court is concerned (see *In re Compton)* though doubtless open to review in the House of Lords (as appears from the observations of Lords Simonds and Morton of Henryton in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*)"

54. Further relevant references to public benefit in the judgment of Jenkins LJ are to be found at p 652 (referring to the application of the trust to a class of relations "with the result that its potential beneficiaries do not comprise the public or a section thereof under the decisions to which I have referred.") and at p 656 (where he stated that the "exception of gifts or trusts in relief of poverty from the general rule under which an element of public benefit is essential to every other form of legal charity may be anomalous" and referred to such gifts as being those which "alone among charitable dispositions require no element of public benefit to make them valid").

55. Hodson LJ appears to have agreed with both Evershed MR and Jenkins LJ on the issues of principle; at least he had "nothing to add": see the end of p 658 to the top of p 659. It is true that he described the "poor relations" cases as "anomalous and an exception to the general principle" but he did not say whether he saw the anomaly and exception as justified by reference to indirect benefit to the public.

56. It is only Jenkins LJ, therefore, who might be read as saying that there is no public benefit at all (that is to say, in both the first and second sense) in the "poor relations" cases. If that was his decision, it is probably not binding on us as a matter of strict precedent: see *Harper v. National Coal Board* [1974] QB 614, per

Lord Denning MR at pp.620C – 622B). However, even if the analysis that the "poor relations" trusts are anomalous and cannot be explained by reference to the indirect benefit forms an essential part of Jenkins LJ's reasoning in reaching his conclusion that the trust was charitable, he was, like other judges in other cases, focusing on public benefit in the second sense: there was no need for him to consider what we have referred to as public benefit in the first sense. He was clearly not saying that there was no need for public benefit in the first sense in the "poor relations" cases since public benefit in that sense is necessary as much in relation to those cases as in relation to any other charity.

57. *Dingle v. Turner* was a case of a testamentary trust for paying pensions to poor employees of a company. It was held that this created a charity. The House of Lords recognised the poverty exception/anomaly and rejected the submission that the *Compton* tests should be applied to trusts for the relief of poverty. The House nonetheless recognised that the authorities drew a distinction between cases where the trust was charitable, even though the class to benefit was defined by reference to descent from a common ancestor, and cases where the trust was not charitable even though the objects had to be poor. The House decided that the line was to be drawn where *Re Scarisbrick* had drawn it: as Lord Cross put it at p 617, it is a matter of construction in each case "whether the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty among them being the motive of the gift".

58. Later in his speech, Lord Cross, at pp 623-4, said this in his discussion of *Oppenheim*:

> "In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public."

59. That has a resonance with what Lord Simonds said in *Gilmour v Coats*. It also highlights the point which we have already made and which is put in different words by Mr Taube QC (who appears for the Masonic charities): if the purpose of a trust is of its nature beneficial to the community, that purpose may still be charitable and for the public benefit, notwithstanding that the class of potential beneficiaries might fairly be regarded as a private class.

60. Mr Taube also observes that this point is borne out by the following consideration. A charitable trust does not have individual or private beneficiaries with an equitable interest in the trust funds: see *A-G v Cocke* [1988] Ch 414. Charity exists for the public benefit. Accordingly, in principle, it cannot be right to focus exclusively on the question whether the "beneficiaries" of a trust can or cannot be regarded as a section of the community when deciding whether or not the public benefit requirement for a charity is satisfied. We agree.

61. Our conclusions, in the light of that discussion, are these:

    a. First, to state the obvious, there is nothing in the authorities which raises the slightest doubt that what we have referred to as public benefit in the first sense is a necessary requirement for a purpose to qualify as a charitable purpose.

    b. Secondly, there is nothing in them which leads to the conclusion that what we have referred to as public benefit in the first sense has nothing to do with the public benefit requirement, but is (only) a separate and distinct requirement which has to be satisfied if a purpose is to be charitable.

62. Accordingly, it is an element of the “public benefit” as that term is understood for the purposes of charity law that the nature of the purpose has to be one which is capable of being of benefit to the community. Before the 2006 Act, the purposes of a trust, in order to be charitable, had to fall within, or within the spirit of, the Preamble. After the 2006 Act, the purposes of the trust must fall within section 2(2). But in each case, there is (or was) a requirement that the purpose is (or was) also one which is of its nature capable of being for the benefit of the community. Thus, a school for pickpockets fails the test even though it is educational; and

there may be a trust for the relief of poverty which is to be carried out in such a way that it fails the test too.

The Post-2006 Act Position

63. We now turn back to issue (c) in paragraph 25 above and to the 2006 Act (the relevant provisions of which are set out at paragraph 20). For an institution to be a charity, its purposes have to be "for the public benefit" and 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. Mr Dibble submits that each limb of the public benefit test must be satisfied in relation to an institution if it is to be charitable. Accordingly, even if the purpose of a trust for the relief of poverty is for the public benefit in the first sense, it is not, if restricted to a narrow class, for the public benefit in the second sense and is therefore not charitable.

64. We reject that submission. It is clear, we consider, that whether or not an institution satisfies the public benefit requirement must be assessed by reference to the criteria which are relevant to its purposes. For instance, as is clear from the cases, what is or is not a sufficient section of the public to satisfy the second aspect of public benefit varies depending on the nature of the charity: a sufficient section of the public in relation to an educational institution may not be sufficient in relation to a religious institution and *vice versa*. Accordingly, it does not make sense to address in abstract the public benefit requirement under the 2006 Act. Rather, it has to be asked what that requirement is in relation to the particular institution under consideration. In the case of a trust for the relief of poverty which had a narrow class of direct beneficiary, the trust was nonetheless charitable under the law prior to the 2006 Act even though the class was not wide enough to establish public benefit in the second sense as applied to poverty trusts. In order that a trust for the relief of poverty with a narrow class of beneficiary should be charitable, the public benefit requirement **as applied to such a trust** required only that public benefit in the first sense be established. The 2006 Act has not, in our judgment, changed that. The "public benefit" as that term was understood for the purposes of the law of charity required, **in the context of a**

trust for the relief of poverty, only that public benefit in the first sense should be shown. Of course, a trust for the relief of poverty might be one which is also for the public benefit in the second sense because the class of potential beneficiary is, on any view, a sufficient section of the community. But it does not follow from that consideration that every trust for the relief of poverty must be for the public benefit in the second sense.

65. That is enough to enable us to deal with the questions asked in the Reference. If we are wrong in our conclusions, it would be necessary for us to decide whether Harman J was right in his approach in *Gibson*. Although he held that the trust in that case was charitable because the necessary element of public benefit was present, the actual decision appears to have turned on his perception that the class of direct beneficiaries was wide enough to "constitute a public element" as he put it. He did not decide that the indirect benefit to the community generally of the relief of poverty was enough of itself to provide the necessary public benefit, although he did appear to be sympathetic to that view, referring with apparent approval to the suggestion of Lord Greene MR in *Compton*. Evershed MR in *Gibson* was careful to say that he should not be taken as accepting that view and that the "poor relations" cases may simply be an anomaly and no more than that. Since it is not necessary for us to decide this point and since there are eminent voices from the past to be heard in support of each view, we think it better to say no more about the issue.

66. There is, however, one point which we do need to make, arising out of the 2006 Act, in relation to the question whether what we have referred to as public benefit in the first sense is or is not in fact part of "public benefit" as that term is understood in the law of charity. If we are wrong in concluding that it **is** part of "public benefit" then unfortunate consequences would flow. A purpose is charitable, under section 2, if it falls within section 2(2) and is for the public benefit. Section 2(2) simply lists a number of purposes. A purpose which falls within an item on the list will not be charitable unless it is for the public benefit. But if "public benefit" does not include the first sense, purposes could be charitable which cannot possibly have been intended to be charitable. Consider, for example, a school for pickpockets which is open to anyone and where fees

payable by the poor are met by a philanthropic Fagin. The school is open to a wide section of the community and is not, therefore, precluded from being charitable by reference to public benefit in the second sense since it is not restricted to a private, rather than a public, class. And yet it is, *prima facie* at least, a trust for the advancement of education. If the word "education" in section 2(2)(b) is to be construed in a restrictive way in order to prevent such a school being accorded charitable status, that can only be so because of a public policy imperative. That policy has nothing to do with public benefit in the second sense. So, in giving effect to that policy, it has to be recognised that it not enough to show both (i) that the institution falls within section 2(2)(b) and (ii) that it serves a wide sections of the public. There is more to being a charity than that; the extra requirement is that there is public benefit in the first sense. This, we consider, is really to admit that public benefit in the first sense is, indeed, part of "public benefit" as that term is understood for the purposes of the law relating to charities.

67. The example of the school for pickpockets is, we accept, rather far-fetched and is given only to make the point. The same point can, however, be made in relation to a real case: *In re Hummeltenberg* [1923] 1 Ch. 237. This was referred to in [49] of the decision in *ISC*, where it was said that 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. This absence of "public benefit" was not related to the second aspect of the public benefit requirement; it was related only to the first aspect. If the first aspect is not part of "public benefit" when it comes to applying the 2006 Act, a school for mediums open to anyone would satisfy the public benefit requirement and it would not be easy to decide that, as a matter of public policy, such a school could not be regarded as established for the advancement of education.

68. The 2006 Act cannot, of course, inform the meaning of "public benefit" as that term was understood before the Act was passed. But we do find some small comfort in the fact that our conclusion avoids the difficulties we have identified.

Trusts for the prevention of poverty

69. Our discussion thus far has been conducted in the context of trusts for the relief of poverty. The 2006 Act refers to the purpose of "the prevention or relief of poverty". Accordingly, a trust for the prevention of poverty (whether alone or in conjunction with a trust for the relief of poverty) will be charitable if it fulfils the public benefit requirement. There can be no doubt that public benefit in the first sense must be shown in the case of a trust for the prevention of poverty just as much as in the case of a trust for the relief of poverty. We say no more about that, but it must not be lost sight of.

70. The question then is whether public benefit in the second sense must be shown if an institution having as its object the prevention (or the prevention and relief) of poverty is to be charitable under the 2006 Act. The starting point is an examination of what the position would have been if the issue had been addressed shortly before the 2006 Act. In this context, it must be remembered that the "poor relations" cases represent an exception to the general rule or an anomaly; they are not, therefore, to be extended. But within the exception, logic and coherence must prevail: that much is clear from the decision in *Re Scarisbrick* where the court declined to draw a distinction between a perpetual trust and one where the fund is to be distributed within a defined period. As Evershed MR put it at p 640, "If there must be an anomaly, let it be itself logical and coherent". The need for logic and coherence was recognised in *Dingle v Turner* where the House of Lords declined to draw a distinction between the treatment of the poor relations cases and the poor employee cases on the basis that it would be quite illogical to do so.

71. Mr Dibble, on behalf of the Charity Commission, made some submissions about this in the context of the post-2006 Act position but we think that what he says is equally relevant to the pre-2006 position. He suggests, by analogy with *Dingle v Turner*, that it may be reasonable not to draw a distinction between the work of an institution which relieves poverty and in doing so carries out some work in preventing poverty among the members of its beneficial class from arising. We agree with him that it may well be illogical to draw a distinction between that sort of prevention of poverty and the actual relief of poverty.

72. But, as he also points out, where prevention of poverty is a distinct purpose, it is likely to be concerned with general issues of a nature which have a wide impact. He suggests that it would be a nonsense if the class of direct beneficiaries did not need to be a sufficient section of the public. In this context, he has referred to us the guidance produced by the Charity Commission (relevant to the position after the 2006 Act), *The Prevention or Relief of Poverty for the Public Benefit*, where it was stated at E3 as follows:

> **"Charities for the prevention of poverty only:** the more restricted beneficial class, which can be sufficient in certain circumstances for the relief of poverty, may not be sufficient for the prevention of poverty. However, where a charity has only the prevention of poverty as a distinct aim, the beneficial class for such a charity is likely to be very broad. Preventing poverty is likely to involve addressing practices and issues within society which might have a very wide impact - for example, pursuing improvements in agricultural practices in order to address rural poverty. But it would not be appropriate to restrict the beneficial class for this aim in an artificial way, such as farmers from a particular family. An organisation which has only the prevention of poverty as a charitable aim and which has a very narrowly defined beneficiary class, such as a family or employer connection, might have difficulties in demonstrating that its aims are for the public benefit."

73. In relation to charities which have aims of both the relief and the prevention of poverty, the Guidance went on to state as follows:

> **"Charities for the prevention and relief of poverty:** in the case of a joint aim for the prevention and relief of poverty, prevention might be difficult to distinguish from relief in many cases involving assistance to an individual. We accept there might be circumstances in which the more restricted beneficial class that may sometimes be permitted for the relief of poverty, might also be accepted for a charity with the joint aim of preventing and relieving poverty."

74. Mr Dibble accepts that it is illogical to draw a distinction between trusts for the relief and prevention of poverty on the one hand and a trust for the relief of poverty *simpliciter* on the other hand, when the prevention work is essentially an aspect of relieving poverty. However, he submits that such a distinction is not illogical where the institution is addressing social issues of a generic kind which by their nature have implications for broad sections of the population who would most certainly comprise a sufficient section of the public. In the latter case, it

would be illogical for such an approach to be for the benefit of a group which is not a sufficient section of the public.

75. In a joint written submission on behalf of eight parties contributed to by a number of counsel appearing before us, it was correctly observed that there is obviously a difference between the "relief" of poverty and the "prevention" of poverty in section 2(2)(a), because the prevention of poverty entails addressing the causes of poverty, while relief entails addressing the consequences of poverty. The prevention of poverty is recognised by section 2(2)(a) as a stand-alone purpose which can be pursued, for example, by charities which provide money management advice. It is suggested by the authors of the joint written submission that it is difficult to see why there should be any difference in the public benefit test in relation to either of these charitable purposes. It is said that there is nothing in the 2006 Act, or in the pre-2006 Act case law, to suggest that the test should be any different for either of them. And other parties also suggest that there should be no difference between the two. Consistently with that last submission concerning the absence of case law, we know of no authority which has considered trusts for the prevention of poverty, let alone one which has considered the need to show public benefit in the second sense.

76. We acknowledge the illogicality identified by Mr Dibble and others. It leads us to conclude that there was no absolute rule, prior to the 2006 Act, which prevented any trust for the prevention of poverty – whether as a stand-alone purpose or as a purpose standing together with relief of poverty – from being for the "public benefit" as that term was understood for the purposes of charity law. Where public benefit in the second sense could not have been shown, deciding on the charitable status of a trust before the 2006 Act would have entailed a close examination of its purposes (that is to say, some sub-set of absolutely anything which might properly be said to amount to the prevention of poverty) to see whether those purposes were, in essence, ones which corresponded with the relief of poverty in a way which would have made it illogical to draw any distinction between its purposes and the relief of poverty. In some cases, a distinction would be seen to be illogical but in others it would not. That is something which is, correctly we think, reflected in the Charity Commission Guidance after the 2006

Act. Precisely where the boundary was to be drawn to establish the necessary correspondence could only have been determined on a case by case basis in the light of the precise purposes disclosed in the institution's constitution and in the light of the full factual background.

77. That, as we see it, was the position before the 2006 Act. The issue for this Reference, however, is the position after the 2006 Act, where the position is subtly different. The reason for this difference is as follows. Section 3(3), we remind ourselves, is in the following terms:

> "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."

The reference is to that term as it **is** understood, not as it **was** understood immediately prior to the 2006 Act. The concept of "public benefit" is not, we consider, fixed; as society changes, so too perceptions of what is for the public benefit can change in the future just as much as they have changed in the past. The incremental development of the concept of "public benefit" can continue.

78. That incremental development must, we consider, take account of the provisions of the 2006 Act. The presence of a purpose in the list in section 2(2) is a strong, indeed probably conclusive, indication that there must be circumstances in which that purpose can be seen as being for the public benefit. If there was any doubt about the position before the 2006 Act, which we do not think there was, there is certainly no doubt today that it is possible to create a valid charitable trust which has as its purpose the prevention of poverty. Such a purpose falls within the list of potentially charitable purposes so that, provided the public benefit requirement is met, the purpose will be charitable. For instance, such a trust could be (a) carefully drafted to ensure that the precise purposes of the trust were sufficiently circumscribed so as to be of public benefit in the first sense and (b) open to a sufficiently wide section of the public for the objects to be of public benefit in the second sense.

79. In addition, it is to be noted that section 2(2)(a) combines "prevention" and "relief" into a single "description of a purpose" to use the terminology of the Act - "the prevention or relief of poverty". We take this as some indication that, for the future at least, Parliament saw no real distinction between prevention and relief, although we acknowledge that these two purposes could be pursued independently. Accordingly, the drafting supports the conclusion that, just as it is not necessary to demonstrate public benefit in the second sense in the case of relief of poverty, it is not necessary to demonstrate it in the case of prevention of poverty.

80. But that is not to say that all trusts for the prevention of poverty are automatically charitable, any more than it can be said that all trusts for the relief of poverty are necessarily charitable. Further, not all trusts for the prevention of poverty can be seen as corresponding in a relevant way to a trust for the relief of poverty. It is not difficult to see that a step taken to prevent a person facing imminent destitution ought to be treated, for the purposes of the law of charity, as a step taken to relieve the poverty which would ensue if that step were not taken. It is something entirely different that a financial advice programme might help some people receiving the benefit of that programme in avoiding financial difficulties, including poverty and perhaps bankruptcy. But such a programme could not, as we see it, correspond to any trust for the relief of poverty.

81. In practical terms, there may not be an issue for two reasons. The first is that it seems quite likely that institutions which have prevention of poverty as an object (whether as a stand-alone object or together with relief of poverty) will nearly always, as Mr Dibble suggests, have a wide class of potential direct beneficiaries sufficient to constitute a sufficient section of the public to satisfy the second aspect of the public benefit requirement.

82. The second reason is that the 2006 Act has not changed anything relevant. Any charity registered as such before the 2006 Act remains as registered charity. If a charity was properly registered prior to the 2006 Act, it can only have been because it satisfied the public benefit requirement. Where public benefit in both the first and second senses was present before the 2006 Act, it is still present after

the 2006 Act. It is only the presumption under section 3 which might have altered the position, but, as we see it, the status of such a charity would not have turned on any presumption. Where public benefit in the second sense was absent, so that the public benefit requirement was satisfied without it, the 2006 Act does not require public benefit in the second sense to be shown. This is for precisely the same reasons as we have given for concluding that it is not necessary to show public benefit in the second sense in relation to a trust for the relief of poverty. If, in contrast, any trust or other institution had been incorrectly registered as a charity before the 2006 Act, the Act itself does not make any difference. It was incorrectly registered in the past and remains incorrectly on the register today.

83. Finally, we return, as we said we would in paragraph 17 above, to mention the position in relation to the public sector. It follows from our analysis that a trust for the relief of poverty by reference to employment within the public sector is capable of being charitable in the same way as a trust for the poor employees of a common private sector employer.

84. In the light of the above analysis, we provide answers to the questions referred to us in the Annex below. We have not found it appropriate to deal in this Determination with every one of the arguments put to us in the course of these proceedings. Interesting though they are, it did not seem to us to be necessary to consider issues such as the relevance of the Equality Act 2010 and of Article 1 of the First Protocol to the European Convention on Human Rights in order to determine the questions contained in this Reference. They may be questions for another day. We are nonetheless grateful to all the parties and interveners and to their legal teams for the careful way in which they have addressed these matters.

The Hon Mr Justice Warren **Judge Alison McKenna**

Dated:

RELEASE DATE:

Annex: Questions Referred and the Answers to them

Question 2.1: Whether a trust for the relief of poverty amongst a class of potential objects of the trust's bounty defined by reference to the relationship of the potential objects to one or more individuals is capable of being a charitable trust.

Answer: Yes

Question 2.2: Whether a trust for the relief of poverty amongst a class of potential objects of the trust's bounty defined by reference to their or a member of their family's employment or former employment by one or specified commercial companies is capable of being a charitable trust.

Answer: Yes

Question 2.3: Whether a trust for the relief of poverty amongst the members of an unincorporated association or their families is capable of being a charitable trust.

Answer: Yes

Question 2.4: Whether Part I Charities Act 2006 operates so as statutorily to reverse the decisions in any, and if which, of the following cases:

(a) *A-G v. Price* (1810) 17 Ves 371.

(b) *Re Scarisbrick* [1951] Ch 622.

(c) *Gibson v. South American Stores (Gath & Chaves) Ltd* [1949] Ch 572 (Harman J), [1950] Ch 177 (C.A.).

(d) *Dingle v. Turner* [1972] AC 601.

(e) *Spiller v. Maude* (1886) LR 32 Ch D 158 (Note).

Answers: No in all cases. We should enlarge on this since we have not yet ourselves referred to *A-G v. Price* or *Spiller v. Maude* although the latter was referred to in passages which we have cited from the Court of Appeal judgments in *Gibson* and *Re Scarisbrick*. *A-G v Price* concerned a gift in favour of the testator's poor kinsmen and kinswomen and their offspring and issue in a particular place. This was held to be

charitable. *Spiller v Maude* concerned the relief of poverty amongst the members of a particular society. It too was held to be charitable. Both of these decisions were mentioned and effectively approved in *Re Scarisbrick.* Our analysis of the cases and the principles demonstrated that none of the decisions referred to in this Question is affected by the 2006 Act because it is not necessary to show public benefit in the second sense, the absence of which is the only ground on which it could be argued that the 2006 Act has changed the position.

Question 2.5: Is the nature and extent of the public benefit required in order for a trust for the prevention of poverty amongst a specified class of persons to be a trust for a charitable purpose within s.2 Charities Act 2006 (i) the same as that which would be required for a trust for the relief of poverty amongst the same class to be a trust for such a charitable purpose or (ii) different, and if so in what, way?

Answer: This depends on the way in which the prevention of poverty is to be carried out in accordance with the purposes of the trust concerned. We have given some general guidance about the principles to be applied.

Mr Justice Warren (Chamber President)

Judge Alison McKenna

Release Date: 20 February 2012