

TOPIC 10: CHARITY

REQUIREMENTS:

1. **A charitable purpose:** *Pemsel's* four categories
2. **For the public benefit**
 - a) **Qualitative-** Do the purposes being considered confer a tangible benefit directly or indirectly upon the public?
 - b) **Quantitative-** Is the class of persons eligible to derive a benefit from these purpose defined so as to constitute the public as a whole or section thereof?

Methods of creation

Can be created by:

- Inter vivos settlement
- By testamentary will

Potential challenged to validity

- Legatees or residuary beneficiaries under a will leaving property for a purpose;
- Taxing authorities

Advantages of charitable trusts

Charitable trusts are treated differently in a number of ways to private trusts:

- Significant taxation advantages- exemption from tax and duties
- Administrative advantages- more lenient rules of construction and assistance of the courts to fulfil the purposes of a charitable trust
- Technical advantages- charitable trusts are not subject to the rule against indestructible trusts and treated differently in relation to the perpetuity period

Differences with other express trusts

- No beneficiary principle
- Public trusts
- Indestructible
- Courts and Attorney-General have power of supervision

General Principles

- Charitable trusts are express trusts which exist for a purpose rather than for identifiable beneficiaries: ***Attorney-General (NSW) v Perpetual Trustee Co Ltd (1940) 63 CLR 209***
- Charitable trusts are for purposes and not persons
- The jurisdiction of the Attorney-General
- **The requirement of a public benefit** (except for relief of poverty). This is particularly important in the fourth class (trusts for other purposes beneficial to the community- neither education nor religion)
- The problem of political trusts
- Purposes must be exclusively charitable

(A) LEGAL CONCEPT OF CHARITY

- There is no exhaustive definition of the term "charitable purpose".
- The courts begin from the position established by the *Statute of Charitable Uses 1601* which is also referred to as the *Statute of Elizabeth*. The Preamble to the *Statute of Charitable Uses* contained a statement as to the types of charitable purpose that would be recognised at law. They include:
 - The relief of poverty;
 - Care of aged persons and the sick;
 - Care of soldiers and mariners;
 - Advancement of education through universities and schools;
 - Repair of bridges, havens, ports, churches and highways;
 - The care of orphans;
 - The maintenance of prisons;
 - The marriage of poor maids;
 - Support for young tradesmen and persons decayed;
 - The relief or redemption of prisons or captives; and
 - Relief for poor persons concerning the payment of taxed.

Technical legal meaning

For a purpose to fall within the technical legal meaning of 'charitable' it must be:

1. beneficial to the community; and
2. within the spirit and intendment of the Statute of Elizabeth.

The benefit of a charitable purpose need not be for the whole community; it may be for an appreciable section of the public. For a purpose of relieving poverty, those to benefit need not do so as members of the public.

For a purpose to be within the spirit and intendment of the Statute of Elizabeth it must be within or analogous to purposes set out in the preamble to that Statute, or purposes that the courts have found to be charitable within the technical legal meaning.

THE FOUR CATEGORIES OF “CHARITABLE PURPOSES” IN *PEMSEL’S CASE*

<i>Comms for Special Purposes of Income Tax v Pemsel</i> [1891]
<ol style="list-style-type: none">1. Relief of poverty2. Advancement of education3. Advancement of religion4. Trusts for other purposes beneficial to the community

Relevance of the Statute of Charitable Uses?

- The Act did not set out to define what a charity is. Rather its purpose was to provide for the proper enforcement of charitable uses and to provide for the reform of the many abuses of charitable trusts which had arisen. But it became a matter of practice to refer to this Preamble, and then a rule:
 - “It is probably impossible to define what is a charitable bequest; and it is certainly not advisable to attempt to do so. We must always go back to the analogy of the Statute [of Elizabeth]”: Rigby LJ in ***Re Nottage* [1985] 2 Ch 649 at 656.**

The spirit and intendment of the Preamble

- The question is whether the purpose is “within the spirit and intendment” of the Preamble per McTiernan, Menzies and Mason JJ in ***Royal National Agricultural and Industrial Association v Chester*, (1974) 48 ALJR 304** (trust for breeding and racing of pigeons failed because there was no analogous charitable purpose in the Preamble).
- Reason by analogy to the Preamble of the Statute of Charitable Uses
- ***Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138.**
 - Process of reasoning seen most clearly in Lord Wilberforce’s judgment upholding as a charitable purpose a society for the promotion of cremation. An evolutionary process from the “repair of churches” to maintenance of burial grounds in a churchyard. Then the principle was extended to treat as charitable a cemetery run by the local authority which was an extension of a closed churchyard. From here, it was a small step to treat a society which advocated cremation, and provided cremation services, as charitable. The process of reasoning starts off with a purpose which was charitable because it advanced religion, and ended up as being a purpose beneficial to the community.

(B) CHARITABLE PURPOSES

(I) POVERTY

- Trusts for the relief of **aged, impotent and poor**
 - These words must be construed disjunctively, so that a gift to the aged is charitable even if the aged are not all poor.
- Poverty is relative
 - It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to ‘go short’ in the ordinary acceptance of that term, due regard being had to their status in life and so forth”: Lord Evershed MR in ***Re Coulthurst* [1951] Ch 662 at 666.**
- ***Re Resch’s Wills Trusts* [1969] 1 AC 514:** trust for the purposes of St Vincent’s Private Hospital held to be charitable, it was no objection that it provided only for those who could pay the substantial fees. It was still beneficial to the community because it relieved beds and staff of the general hospital, the particular type of nursing and treatment supplemented that available at the public hospital and there were benefits in the standard of care for the public arising from the juxtaposition of the two institutions.
- ***Downing v FCT* (1971) 125 CLR 185:** Trust for the amelioration of the condition of dependents of any member or ex-member of Her Majesty’s naval, military or air forces”. Held to imply relief of poverty
 - An intention to provide for the relief of poverty need not be stated in express terms. It is a question of construction of the particular gift or trust; i.e. by inference/implication

(II) EDUCATION

- The word “education” may be used in a wide sense, certainly extending beyond “teaching”, but must improve the sum of communicable knowledge in an area which education may cover,

- Any trust broadly connected to education, not limited to schools and universities in an institutionalised academic sense but includes gifts to other groups improving knowledge in a broad range of areas:
 - Physical/artistic/moral/mental education
 - Boy scouts
 - Learned societies
 - Police boys
 - Student unions
 - Scholarship prizes
 - Foundation lectureships/chairs
- Not usually pure research which is knowledge acquisition unless the research was directed to increasing knowledge for communicable purposes. In this way, scientific research, medical research and many other forms of research have been accepted as charitable. Most research would now be regarded as falling into that category.
- Private schools, universities- no objection that the charge fees

Re Shaw (Dec'd) [1957] 1 All ER 745: property was left for purposes connected with investigating and advocating the virtues of a new alphabet. **Held** no teaching or educational purpose.

- "...if the object is merely the increase of knowledge, that is not in itself a charitable object, unless it can be combined with teaching or education."

Re Hopkins: trust to find the Bacon-Shakespeare manuscripts. **Held:** "In order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material or so as to improve the sum of communicable knowledge in an area which education may cover- education in this last context extending to the formation of literary taste and appreciation".

McGovern v A-G [1981] 3 All ER 493 Slade J

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

(III) RELIGION

- Definition of "religion" was provided by Mason CJ and Brennan J in **Church of the New Faith v Commr of Payroll Tax (1983) 154 CLR 120:**
 - (i) belief in a Supernatural Being, Thing or Principle; AND
 - (ii) acceptance of canons of conduct in order to give effect to that belief
- High Court of Australia held that "Scientology", i.e., beliefs, practices and observances of the "Church of the New Faith" in Victoria was a religion.
- **Thornton v Howe (1862):** a religious trust would not be void even though "the court might consider the opinions sought to be propagated, foolish or even devoid of foundation".
- **Neville Estates v Madden (1962):** As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none: per Cross J
- **Roman Catholic Archbishop of Melbourne v Lawlor (1934):** the testator made gifts to found a "Catholic daily newspaper". The next of kin claimed this was not charitable. **Held:** The purpose must be directly and immediately religious. It is not enough that they arise out of or have a connection with faith. The carrying on of a newspaper if not a charitable religious purpose.
 - Founding a Catholic daily newspaper not religious charitable purpose
 - "In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit, in itself secular, is actuated or inspired by a religious motive: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it" (Dixon J).
- **Gilmour v Coats [1949] AC 426:** Property left in trust to apply the income for the purposes of a Roman Catholic priory. The priory was a community of *cloistered* nuns who devoted their lives to prayer,

contemplation, penance and self-sanctification within their convent; they engaged in no exterior works. **Held:** trusts for private prayer or contemplation are of no public benefit and, as such, are not charitable.

- **Leahy v Attorney General of NSW [1959] AC 459-** *post mortem* trust gave trustee discretion to select an order of nuns or Christian Brothers to take beneficial ownership of his farm. Mixed charitable and non-charitable purpose trust (ie, contemplative orders- no public benefit) saved by legislation because the predominant purpose of the gift was charitable.

Advancement of religion generally

- Advancement of religion means promotion of spiritual teaching or the maintenance of the spirit of its doctrines and observances, including evangelism, support of people and facilities used for worship, trusts for buildings.

Trusts for buildings, grounds and cemeteries

- Trusts for the repair or building of churches and related buildings and the maintenance of church grounds are valid charitable trusts. Trusts for graveyards in church grounds are also charitable. If the trust is for a private chapel, it will not satisfy the test of public benefit.
- Gifts for the building of public places of worship (and ornaments in them) and houses for clergy are charitable; so too are gifts for burial grounds connected with churches and tombs in churches.

Gifts to religious office bearers or parishes

- A gift to a religious office bearer will take the form of a trust when it is intended to bestow a benefit on the office, rather than on the individual: *Re Hannah's Will* (1939)
- Gifts for the establishment of ecclesiastical offices or the financial support of those serving as or studying to be clergy are charitable; so are gifts for the benefit of musical instruments, musicians and choirs used in services.

(IV) OTHER PURPOSES BENEFICIAL TO THE COMMUNITY

Requires the trust to be both within the spirit and intendment of the Preamble AND of public benefit: **Royal National Agricultural and Industrial Association v Chester**

- **IRC v Baddley (1955):** land was conveyed for the promotion of the religious, social and physical wellbeing of persons resident in West Ham and Leyton by the provision of facilities for religious services and social and physical training of members or those likely to become members of the Methodist Church.
 - Any purpose that is vague or ambiguous fails to have sufficient certainty to be characterised as charitable.
 - It was held by the House of Lords that the trust failed for its vagueness and generality. Viscounts Simonds said (at 531): 'The moral, social and physical well-being of the community, or any part of it, is a laudable object of benevolence and philanthropy, but its ambit is far too wide to include only purposes which the law regards as charitable.'
 - Also invalid as it created a class within a class. Lord Simonds: "the intended beneficiaries are a class within a class; they are those of the inhabitants of a particular area and who are members of a particular church."
- **Downing v FCT (1971) 125 CLR 185:** Trust for the amelioration of the condition of dependents of any member or ex-member of Her Majesty's naval, military or air forces". **Held** to imply relief of poverty (ie, caring for dependents of veterans)
- **Williams Trustees v IRC [1947]** A purpose that is essentially social, recreational or sporting in nature is not charitable. **Held:** An institute to give social and other amenities to Welsh people in London was not a charitable purpose.
- **Incorporated Council of Law Reporting v FCT (1971) 125 CLR 659:** production of law reports held as a charitable purpose.
 - "...the production of law reports is clearly beneficial to the whole community because of the universal importance of maintaining the socially sustaining fabric of the law

Examples include: welfare of animals (generally, not for specific animals), promotion of the efficiency of the armed forces (see *Downing*), provision of emergency services, advancement of industry, agriculture, preservation of national heritage and the environment, public memorials, moral improvement, reclamation of prostitutes, assistance with the payment of taxes, protection of lives and property (eg a lifeboat, fire brigade), promotion of marriage, law reports, promoting ethical standards in business and corporate responsibility, promoting fair trade, relief of unemployment, promotion of urban and rural regeneration in deprived areas.