UNIT 6: CHARITABLE TRUSTS



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- Charitable purposes
- Political purposes
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- Reforming charities
- Investment

UNIT 6: LEARNING OUTCOMES

- Summarise the development of charitable trusts
- Identify key advantages to charitable status
- Explain the legal tests for identifying that a trust is charitable
- Explain the regulatory mechanisms for charities
- Explain the availability of cy-pres to reform charitable purposes
- Explain approaches to resolving conflicts between purposes and investments
- Apply the law to factual scenarios

INTRODUCING CHARITIES

- The last 5 units have focused on private express trusts
  - Diverse nature
  - Limited regulation of private trusts
  - 3 certainties primarily determine if trust or not
- Beneficiary principle directs that mostly PETs must have an identifiable beneficiary (to benefit and enforce trust)
- Two exceptions to beneficiary principle:
  - non-charitable (unit 5) and
  - charitable purpose trusts: benefit society not individuals (though indirectly may do)
- Courts still have an oversight/regulatory role, but day to day Charity Commission has a regulatory role (E&W)
- Abuse of legal charity frequently appears in news



CHARITABLE TRUSTS

- Key stats:
  - 185k charities (including 14k linked) in E&W
  - 924k trustees; 6.6m volunteers, 1m employees
  - £98bn in Income,
    - c£28bn from donations; £47bn from activities
  - £78bn expenditure on charitable activities
- Legal charitable status provides structure for many organisations, including education, health and religion
- Controversy can arise of what should be considered a charitable purpose: private schools one recent debate
- Generally, charitable trusts subject to same rules as private trusts, but enjoy several key advantages.



ADVANTAGES FOR CHARITIES

- Legal and Fiscal Advantages of Charitable Status
  - No requirement for certainty of objects: ***Moggridge v Thackwell*** **[1792] 30 ER 440**
  - Charitable trusts are enforceable by the Attorney General in the name of the Crown, even without specific beneficiaries.
  - Exemption from the Rule Against Perpetual Trusts:
    - property can be dedicated indefinitely for charitable purposes.
    - property between charity to non-charity must vest within the perpetuity period, but for gifts between charities can vest beyond the period ***Christ's Hospital v Grainger*** **[1849] 41 ER 774.**
  - Tax Exemptions:
    - Exempt from income tax, corporation tax, and capital gains tax.
    - Gifts to charity are generally exempt from inheritance tax.
    - Business Rate Relief: exemption for property used wholly/mainly charitably (e.g. 50% discount)
    - Charities bear VAT on goods and services purchased.
  - Cy-Pres Doctrine for failed trusts
  - Majority rule (not unanimity) for trustees ***Re Whiteley*** **[1910] 1 Ch 600**

ACTIVITY 1: CHARITY SECTOR

- Spend a few moments searching for a charity which is of interest to you. Find their details on the charity commission's register
- Who is the charity?
- What do they do?
- How many trustees do they have? Do they have any employees?
- What was their income/expenditure in the last cycle?

DEVELOPMENT

- Charities can exist for diverse purposes: some operate on a large, even global scale, whilst others on a very small/micro scale
- Law captures diversity and fluidity in altruistic efforts
- But, not all efforts are deemed charitable purposes
- Requires precision when defining charity
- Legal definition of charity developed over 4 centuries
- Day to day decisions of whether an individual organisation's activities are charitable made by charity commission
- Origins in E&T trusts law, so duties of trustees almost identical to those of private express trustees (some modifications)

"In its widest sense the charity idea is not capable of the exact definition that the lawyer's question demands. It is nothing less than acting on belief in common humanity and doing something about it by donating money, time and effort to better the conditions of life, especially for those who are more vulnerable than the majority. The ideals, attitudes and ways of doing it are in a constant state of change."

Sir John Mummery, 2014-15, p. 5

CHARITIES ACTS

- Five main statutory modifications introduced by CA 2006
    a. restatement of charitable purposes in modern language
    b. public benefit obligations
    c. changes in function of Charity Commission
    d. creation of Charity Tribunal
    e. improve range of legal entities available to charities
- CA 2006 was repealed and replaced by CA 2011
- CA 2011 defines a charity as:
    - established for charitable purposes only
    - falls to be subject to control of HC in exercise of inherent supervisory jurisdiction for charities
        - does not prevent charity being charity where activities happen abroad.



CHARITABLE PURPOSES

- Charitable Uses Act 1601 preamble (not intended to be binding)
- Elizabethan parliament motivated to reduce tax avoidance but did not want to discourage charity
- Preamble identified several purposes deemed charitable:
  - ‘relief of aged, impotent and poor people; the maintenance of … schools of learning, … scholars in universities; the repair of bridges, ports, … churches, … and highways’
- Body of cases grew, showing what fell within spirit of 1601 preamble:

  Pemsel case, four divisions… ‘Charity’ in its legal sense comprises….
  - trusts for the relief of poverty;
  - trusts for the advancement of education;
  - trusts for the advancement of religion; and
  - trusts for other purposes beneficial to the community, not falling under any of the preceding heads



Key sources: *Commissioners for the Special Purposes of the Income Tax v Pemsel* [1891] 531 AC (HL) 583

RESTATING CHARITABLE PURPOSES

- CA 2006, modernised framing of charitable purposes to improve clarity.
- Did not improve much on judicial definition

1. ss1(1)(a) and 2(1): provide that an institution is charitabe where it is established
    a. **exclusively for charitable purposes AND**
    b. **for the public benefit**

- s3(1) lists **thirteen purposes** that may be charitable
- these build on *Pemsel's* four heads (1891).
- Note language updated from 'trusts' to recognise may take a variety of corporate forms.



Key sources:
Charities Act 2011

LIST OF CHARITABLE PURPOSES (S3)



a. the prevention or relief of poverty

b.the advancement of education

c.the advancement of religion

d.the advancement of health or the saving of lives

e.the advancement of citizenship or community development

f.the advancement of the arts, culture, heritage or science

g.the advancement of amateur sport

h.the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity

i.the advancement of environmental protection or improvement

j.the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage

k.the advancement of animal welfare

l.the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services

m.....

LIST OF CHARITABLE PURPOSES (S3)

- *m.any other purposes:*
  - *i.that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,*
  - *ii.that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or*
  - *iii.that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.*

- Section 3(1)(m) preserves the fourth head of Pemsel, allowing decision-makers to recognise novel charitable purposes falling outside the previous twelve items.
- In these circumstances, historic case law will guide developments in the law
- Some purposes could fall within this list and yet be non-charitable, e.g. political or detriment outweighs benefit

Key sources:

Which charitable purpose does your chosen charity refer to?

PUBLIC BENEFIT IN STATUTE

- Second element to show is that is of public benefit
- This prevents organisations from claiming a charitable status where despite promoting a charitable purpose, their doing so is not for public good, e.g. teaching terrorism
- Technical concept. CA 2011, s4(3) explains:
    - ‘public benefit’ as ‘a reference to the public benefit as that term **is** understood for the purposes of the law relating to charities in England and Wales’
    - i.e adopt the common law definition
- s4(2) says that is not to be presumed that a purpose of a particular description is for the public benefit’. But this caused some confusion.



PUBLIC BENEFIT IN CASE LAW

- Two general senses of public benefit:
  - institution's purpose itself to benefit community
  - those who benefit must be sufficiently numerous.... to constitute a section of the public: **R (Independent Schools Council)... [2011] UKUT 421 (TCC), [2012] Ch 214**
- sufficiently numerous section of public depends on context, and even purposes like religion or education, cannot take for granted (presumed) that meet public benefit.
  - ***Re Pinion*** **[1965] Ch 85 (CA) 106 (Harman LJ):** educating pick-pockets not charitable
  - ***Oppenheim v Tobacco Securities Trust Co Ltd*** **[1951] AC 297 (HL)**: education fund for employees at a single company not to be presumed charitable as benefiting large group
  - ***Gilmour v Coates and others*** **[1949] AC 426 (HL)**: nunnery closed to public: not charitable despite religious
- Problem for relief of poverty: as historically created for narrow classes, e.g. air-raid relief, or poverty of employees of a company, or members of a family. Upper Tribunal accepted can rely on the poverty anomaly which survived CA 2011, s4(2)

ACTIVITY 2: CHARITABLE PURPOSES

- With references to CA 2011, would the following trusts be charitable?

1. A trust for the establishment of a museum in Birmingham that is dedicated to the history of nursing.
2. A trust to provide emergency food parcels for people living in the north west of England.
3. A trust to promote the sport of extreme skateboarding among the general population.
4. A trust to provide college bursaries for the Children of Members of Parliament.



POLITICAL PURPOSES

- Charities cannot be set up for political purposes: ***Bowman and others v Secular Soc Ltd*** **[1917] AC 406**
- Politics' in charity law means seeking to change law or government policy or supporting a political party: ***McGovern and others v Attorney General and another*** **[1982] Ch 321 (Ch) 340C–E**
- Example:
  - A charity may be created for to prevent poverty
  - but not to campaign to Parliament for Universal basic Income, even if that would prevent poverty
- Difficulties for contract culture
- Charitable status is a question of the purpose institution was created
- Once set up, trustees have discretion on how to achieve purposes



CHANGING LAW OR SEEKING CLARITY?

- Commission revised its political campaigning guidance (2022): recognising tenancy for self-censorship
- Requirement for trustees to avoid liability in ensuring that any activity direct furthers charitable purposes. e.g. a validly created poverty prevention charity may spend a portion of its income on a UBI campaign. Trustees cannot side with one political party or another, they must be careful.
- Political purposes rule becomes more difficult when the definition of charity was enacted in statute.
- Some statutory purposes, e.g. advancing human rights, very closely related to politics



AMNESTY INTERNATIONAL

- **McGovern and others v AG and another [1982] Ch 321 (Ch)**
- In the 1970s, Amnesty International sought to establish a trust to oversee the charitable aspects of its work.
- The trust's objectives were to uphold the rights outlined in the *Universal Declaration of Human Rights 1948*.
- Its mission included supporting the release of individuals imprisoned for their political, religious, or conscientiously held beliefs, or due to their ethnic origin, gender, race, or language—provided they neither used nor advocated violence.
- Additionally, the trust opposed the death penalty, torture, and inhumane or degrading treatment.
- It intended to operate globally, free from political bias.
- Slade J held: trust did not qualify as charitable.



ACTIVITY 2: HUMAN DIGNITY TRUST

- Human Dignity trust supports human rights liberation against criminalisation of homosexuality. It aims to have such criminalising law or policy reversed.
- In light of McGovern:
  a. Are the purposes of the Human Dignity Trust (HDT) political? (Note that HDT only seeks to bring cases in jurisdictions where criminal law or policy violate constitutional or international human rights.)
  b. Is there a difference between seeking law reform via legislation, and seeking legal changes through litigation?



Key sources:

Human Dignity Trust v Charity Commission for England and Wales, 9 July 2014, CA/2013/0013 (Ft-T (Charity))

ARE MODERN CHARITIES ACTUALLY TRUSTS?

- Though originally born out of trusts law, some debate as to how easily modern charities can be defined as trusts
  - **Warbuton (1999):** charitable trusts operate in a sufficiently different legal, fiscal and social environment and have such differences in internal law that they should now be considered to be a **unique form of trust**
  - **Hudson (2015):** charitable trusts are not properly trusts at all, but a form of **quasi-public body** in which the officers have fiduciary duties that are overseen by a regulatory structure made up of the Attorney General and the Commission.



ROLE OF THE ATTORNEY GENERAL

- For PETs, certainty of objects seen as fundamental to ensure someone could enforce the trust: **Morice v Bishop of Durham (1805) 10 Ves Jun 522**
- Absence of an identifiable beneficiary (per se) for charities means no obvious party to enforce the trust
- However, charities are an exception to certainty of objects because AG traditionally has had a role in enforcing charitable trusts
- Role now shared with the Charity Commission (most actions in fact brought by Commission)



Attorney General's Office

REGULATING CHARITIES

- Historically, courts could be asked to enforce trustee duties in case of poor governance - high court inherent jurisdiction in relation to charities: ***Mills v Farmer* (1815) Mer 55; AG v *Sherborne Grammar Schools Governors* (1854) 18 Beav 256**
- Inherent jurisdiction overriding aim: ensure the trustees duly administers the trust in accordance with, and to give effect to its purposes (Dennis, 2007).
- Not all charities have trustees. s177 CA 2011 defines charity trustees as: *"persons having the general control and management of the administration of a charity"*
    - Broad enough to capture 'de facto' trustees:
        - people who act as if trustees: ***David Jennings v Charity Commission for England and Wales, 16* Dec 2014, CA/2014/0017,** and
        - directors of charitable companies: Cf **Companies Act 2006, ss 171-77**
- May support that charities are quasi-public bodies, but does not expalin why trust law principles apply to all types of charity trustee

CHARITABLE TRUSTEE DUTIES

- Like private family trust and pension trusts, charitable trusts usually contain discretionary distributive and administrative powers and provisions, which are important in playing a significant role in giving effect trusts
- Charitable trustees' duties are founded on generally applicable of ordinary trusts (as with PET), but have been adapted by courts, statute or other regulation (Dennis, 2007)
- These duties relate to discretionary dispositive powers and the duty to consider, and to the disclosure by trustees of trust documents and information.
- These are embodied in the 'generic trust-defining duty' (Harris, 1971), which is the duty to secure execution of the (charitable) trust



CHARITABLE ORGANISATIONS

- Charitable bodies can exist in various forms:
- **Express trusts:** any form of express trust can be set up for charitable purposes
- **Corporations:** great deal of charitable activity conducted through corporations, e.g. incorporated by royal charter, or my statute (e.g. Universities, or hospital trusts). Some created by Companies Act 2006, as private companies limited by guarantee
- **Charitable incorporated organisations:** first legal form specifically created for charities, avoiding dual regulation
- **Unincorporated associations:** group of people not incorporated, set up for charitable purposes. Funds usually held by committee, absence of committee vested in members on trust for charitable activity



INCORPORATED CHARITIES

- Possible that charities can have double registration as companies and charities: these are incorporated charities
    - registered with Companies House, and Charity Commission (and submit accounts to both)
- can also be a Charitable Incorporated Organisation (CIO) which is governed by CA 2011. As CIOs need only registered with charity commission, avoid double regulation
- Whichever form is adopted, rules of E&T law are highly influential or directly apply
- Charities increasingly set up as companies. Courts supervisory jurisdiction covers charitable companies as well as trusts: **Liverpool and District Hospital for Diseases of the Heart v AG [1981] 1 All ER 994.**
- Pre-2020, duties of members (not directors) of charities unclear.
- UKSC: members can owe fiduciary duties to the company's charitable purposes. members must vote in charity's best interest: **Children's Investment Fund Foundation (UK) v Attorney General and others [2022] AC 155, [2020] UKSC 33, [214]**

CHARITY COMMISSION FOR E&W

- Remit is E&W – Scotland and NI have similar bodies of their own
- Disregarding charitable purposes amounts to an abuse of the charity form
- Commission will take action when it is alerted to:
  - trustee misconduct or mismanagement
  - use of charity for improper purposes, e.g. tax avoidance
- Rarely the court will be called upon, as the court has similar powers to court
- If litigation needed: commission has similar powers to those of AG to bring action (**CA 2011 s114**)



Key sources:
Charities Act 2011, s114

CHARITY COMMISSION: OBJECTIVES

- Five statutory objectives:
  - increasing ‘public trust and confidence in charities’;
  - increasing ‘awareness and understanding of the operation of the public benefit requirement’;
  - promoting ‘compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities’;
  - promoting ‘the effective use of charitable resources’;
  - enhancing ‘the accountability of charities to donors, beneficiaries and the general public’



Key sources:
Charities Act 2011, s114

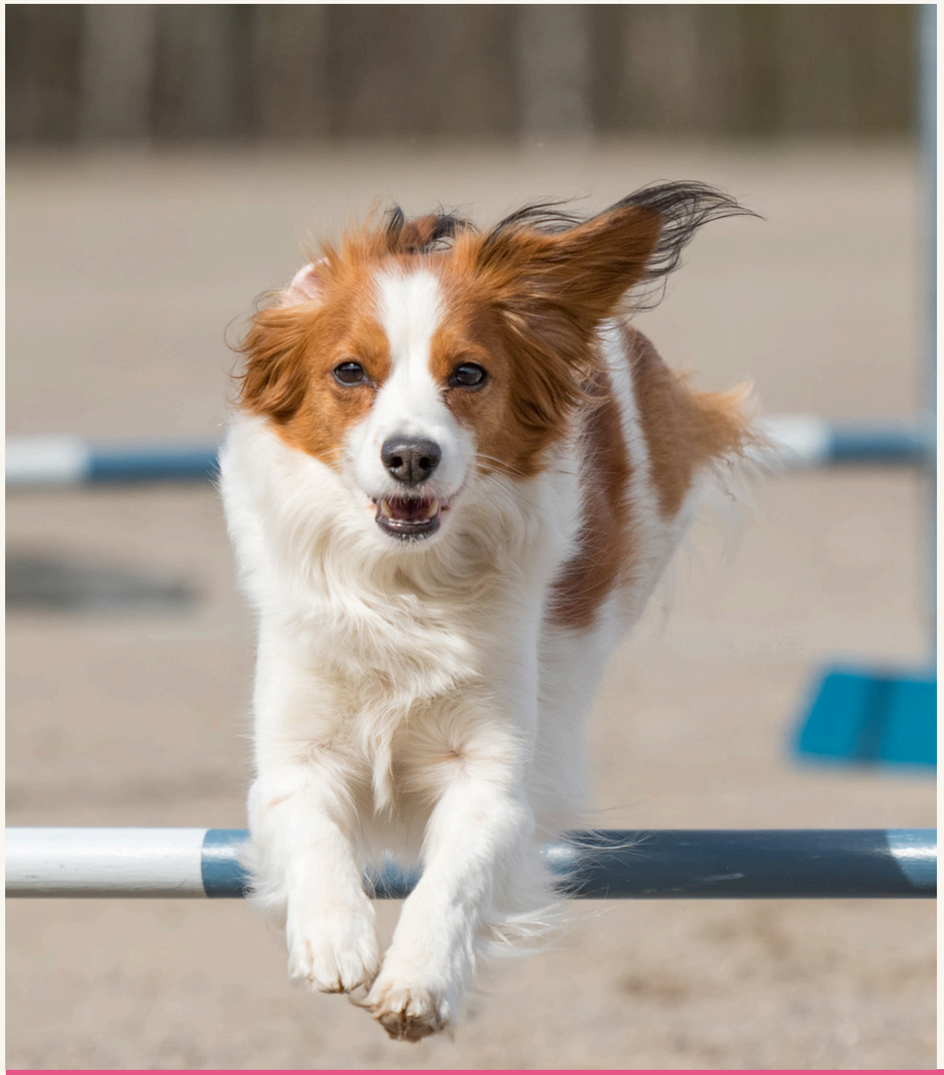
CHARITY COMMISSION: FUNCTIONS

- General functions include (s15):
  - Deciding whether institutions are or are not charities.
  - Encouraging and facilitating better charity administration.
  - Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking action in connection with that misconduct or mismanagement to remedy it or protect charity.
- Must consider which action is most appropriate for meeting its objectives:
  - Can institute an inquiry
  - Alter charity's administrative arrangements
- Reputational impact of inquiry: trustees want to avoid
- Trustees can ask commission for advice (s110), and rely on it
  - unless knows that other facts/proceedings contradict

Key sources:
Charities Act 2011,
ss15-16, 46, 69, 76, s110

CHARITY COMMISSION: APPROACH

- Non-interventionalist approach of courts reflected in the Commission's framework
- Commission prevented from (s20):
  - exercis[ing] functions.... of a charity trustee in relation to a charity, or;
  - otherwise ... be[ing] directly involved in the administration of a charity
- If misconduct/mismanagement identified: first response is to co-operate with trustees to encourage improvement
- Failure to improve: may launch inquiry to understand issues before formal action (s46)



CHARITY COMMISSION: ACTIONS

- Formal action can include (s76(3)):
  - restricting the transactions that a charity may enter into
  - appointing additional trustees
  - ‘freezing’ a charity’s bank account
  - suspending or removing a trustee
  - appointing an interim manager
- Powers of formal action can only be instigated **after three steps:**
  - inquiry
  - finding of misconduct/mismanagement
  - finding that action is necessary to protect charity property or ensure its applied to its purposes
- Charity Commission (2013) priority is to:
  - ensure trustees meet their legal requirements and obligations
  - where abuse/non-compliance require correction or take action
- If trustees disagree with commission, can challenge at tribunal



MAINTAINING CHARITIES REGISTER

- Charities are required to register: public register of charities maintained: **CA 2011, s29**
- Why?
  - help commission understand and oversee sector
  - ensure charity transparency
- Must register if meets definition of charity, and meets an income threshold: CA 2011, s30
- Registration grants conclusive presumption of charitable status: access to tax reliefs etc.
- HMRC has limited role in ensuring that non-charities do not benefit from charitable tax relief
- Relationship between HMRC and commission can cause some tensions: **H*arrogate Fairtrade Shop v Charity Commission for E&W*, 27 March 2014, CA/2013/0009 (Ft-T (Charity))**
- In other cases, HMRC can prevent abuse of charity that is missed by or outside scope of Commission

CHARITY TRIBUNAL FOR E&W

- Pre-2008, no route to challenge. Whilst significant work in combating charitable abuse, powers have been described as ‘draconian’
- Legal challenges had to go to the Commission’s board, or High court as JR - costly and inconvenient
- Bespoke tribunal emerged to enhance access to justice, increasing regulatory transparancy and accountability
- Initially standalone tribunal, but soon formed into a two-tier system (CA 2006, s8)
- Recipients or subjects of the Commission’s actions can bring challenges in the Tribunal (including charities, trustees, and affected persons) CA 2011, s319, s321, sch 6
- transparency and open to hearing challenges to regulatory decisions affecting local communities (Crumley and Picton, 2018)



CHARITY TRIBUNAL FOR E&W

- Two limbs (CA 2011, s315(1)):
  - First-tier Tribunal (Charity)
  - Upper Tribunal (Tax and Chancery)
- High Court judges often sit in upper tribunal: and decisions create binding precedent: **Tribunals, Courts and Enforcement Act 2007, s 3(5).**
- First-tier decisions not binding, but likely to be followed
- Applicants, including the Attorney General, can challenge the Commission in 'appeals' and 'reviews' (CA, s315)
- In an appeal, CT will consider regulatory action 'afresh' and decide whether the institution should be on register: (s319)
- In review: panel is to apply the same JR principles: s321



CHARITY TRIBUNAL: REFERENCES

- Commission or AG can also submit a reference (s325)
- a reference can be submitted at any time and ask any question that (s325 and 326):
  - has arisen in connection with the exercise by the Commission of any of its functions …
  - involves … the operation of charity law in any respect, or
  - [involves] the application of charity law to a particular state of affairs
- References are more pro-active than waiting for appeals/reviews
- Effectively asking for an opinion up front on a specific issue



JUDICIAL REVIEW

- As the Charity Commission is a public body, its decisions can also be subject to judicial review (public law)
- More limited action, given new actions created as tribunal application will generally provide a convenient and effective remedy or means of redress against the Commission and therefore should be used before considered: **R (Watch Tower Bible & Tract Society of Britain and others) v Charity Commission [2016] EWCA Civ 154, [2016] 1 WLR 2625**
- Could JR CC's order under s52 CA 2011 to produce documents or information.
    - s52 order can only be challenged in tribunal on grounds it neither relates to a charity, or is not relevant to functions of CC
    - Watch Tower Bible &Tract case: was relevant to commissions functions and did relate to a charity, so Tribunal power had no jurisdiction to hear case
    - JR was the only route to challenge that s52 order was unlawful or disproportionate
- This power is critical to ensuring trustee duty performance

PUBLIC TRUST AND CONFIDENCE

- One of the Commission's duties is to: increase public trust and confidence in charities
- The Commission (no date) has recognised that in carrying out its general functions under the act it must not seek to:
  - · either to give directions to charities by way of advice and guidance in the absence of any formal statutory enquiry, nor
  - · seek to restrict or fetter charitable trustees in the future exercise of their discretionary fiduciary powers and duties if acting properly within the objects of the charity and the exercise of the trustees' powers.



REFORMING CHARITIES: CY-PRES

- Sometimes charities need to change their purposes or administration, e.g. because circumstances changed
- Reformation of charity requires a *Cy-pres* scheme (Norman French for ‘as near as possible’)
- When reforming charity, it’s new purposes must be ‘as near as possible’ to it’s original purposes, though this area of law was relaxed by CA 2011, as amended by CA 2022 - makes more easy to instigate
- Cy-pres schemes can be used to remedy or preclude abuses of charity form.



TRIGGERING REFORM

- Before considering a potential new purpose, *cy-pres* must be 'triggered'. s62 CA 2011 lists the statutory *Cy-pres* triggers:
- *a.where the original purposes, in whole or in part:*
    - *i. have been as far as may be fulfilled, or*
    - *ii. cannot be carried out, or not according to the directions given and to the spirit of the gift,*
- *b.where the original purposes provide a use for part only of the property available by virtue of the gift,*
- *c. where:*
    - *i. the property available by virtue of the gift, and*
    - *ii. other property applicable for similar purposes,*
- *can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes.*

TRIGGERING REFORM

- *d.where the original purposes were laid down by reference to:*
  - *i. an area which then was but has since ceased to be a unit for some other purpose, or*
  - *ii. a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift, or*
- *e.where the original purposes, in whole or in part, have, since they were laid down:*
  - *i. been adequately provided for by other means,*
  - *ii. ceased, as being useless or harmful to the community or for other reasons, to be in law charitable, or*
- *iii. ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.*

Key sources:
Charities Act 2011, s62

TRIGGERING REFORM

- The factual circumstances will influence which trigger can be relied upon
- Some examples:
  - s62(1)(a): if charity established to find treatment for a disease is successful
  - s62(1)(b): if £6m donated to a cause that solved the issue with £3m
  - s62(1)(c): when two charities with different but related purposes wish to merge
  - s62(1)(d): charity is made redundant because someone else is addressing the issue, e.g. for flood victims, but government decides to improve flood defences making flooding impossible
  - s62(1)(e): catch-all: straightforward matter to trigger *cy-pres*, as long as all justifications are reasonable, e.g. could be used if trustees selling inherently charitable property where charity was set up to preserve that property: **Oldham Borough Council v Attorney General [1993] Ch 210**

Key sources:
Charities Act 2011, s62

APPROPRIATE CONSIDERATIONS

- Trustees may not realise that selling certain properties could be a breach of trusts, and not all abuses of charity require a *cy-pres*, sometimes an administrative scheme can be enough
- Under s62(1)(e)(iii) There is a need to consider 'appropriate consideration's when triggering *cy-pres. These are:*
  - *a.(on the one hand) the spirit of the gift concerned, and*
  - *b.(on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.*
- Spirit of gift:
  - *The need to have regard to the spirit of the gift requires the court to look beyond the original purposes as defined by the objects specified in the declaration of trust and to seek to identify the spirit in which the donors gave the property upon trust for those purposes. That can be done as it seems to me, with the existence of the document as a whole and any relevant evidence as to the circumstances in which the gift was made:* ***Varsani v Jesani*** **[1999] Ch 219 (CA) 238**

Key sources:
Charities Act 2011, s62

NEW PURPOSE

- After it is decided that *Cy-pres* is triggered, must then determine the new purpose.
- Per s67, these must be charitable purposes, and made in light of:
  - the spirit of the original gift
  - the desirability of securing that the property is applied for charitable purposes which are close to the original purposes
  - the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.
- This does not require that the new purposes align identically with the existing purposes: Instead, s67(3) requires the Commission to consider why the gift was originally made, and whether it is desirable to find closely related purposes.



Key sources:
Charities Act 2011, s67

NEW PURPOSE: EXAMPLES

- Gift donated in a spirit of racial or religious prejudice could be re-purposed for more enlightened spirit:
- Charitable school may no longer be desirable if cost of repair excessive: ***Alan Geoffrey Ground and others v Charity Commission for England and Wales and The Guildford Diocesan Board of Finance*, 6 December 2011, CA/2011/0004 (Ft-T (Charity)).**
- Merger between two charitable schools necessary, if alone too few students: ***Raymond Aliss and Martin Hesketh v Charity Commission for England and Wales, Lytham Schools Trustee Ltd, and The United Church Schools Trust*, 31 August 2012, CA/2011/0007 (Ft-T (Charity)).**



Key sources:
Charities Act 2011, s67

ACTIVITY 4: CY-PRES

- Toby left property on trust to be used to build and maintain an elephant exhibit at Swansea zoo. Shortly before Toby's death, the government passed an Act forbidding keeping elephants in captivity in England and Wales.
- **Would the Cy-pres doctrine apply in the following case? What advantage does this offer, over non-charitabe private express trusts?**



INVESTMENT CONFLICTS

- As with all trusts, one of the duties of the trustees will be to to preserve and safeguard the charitable trust's assets
- This typically requires the trustees to invest the trust assets, maximising possible returns to deliver charitable purposes
- Flexibility can be incorporated from creation of trust
- But need to follow statutory rules of investment, although can be restricted/excluded in trust deed.
- One important consideration is where most lucrative investments might conflict with purposes of the trust:
    - a trust devoted to environmental protection investing assets in fossil fuels
    - a charity devoted to researching lung cancer investing in tobacco industry



Must the trustees invest in the fossil fuel industry to maximise returns, despite conflicting purposes?

ETHICAL INVESTMENTS

- Question of whether trustees can adopt a policy of ethical investments has been considered by courts.
  - ***Cowan v Scargill* [1985] Ch 270:** trustees cannot ignore the **financial interests** of beneficiaries. Must put aside their own personal interests or views.
  - ***Harries v Church Commissioners* [1992] 1 WLR 1241:** trustees can accommodate views on **whether investment would conflict with charitable objects,** so long as course would not involve a significant risk of financial detriment.
  - **Trustees cannot impose their own ethical views on beneficiaries.** They must ensure that the beneficiaries share their ethical concerns and must not risk significant financial detriment.
  - More recently: question arose whether trustees could adopt an investment policy that excluded investments that were inconsistent with the Paris Climate Change Agreement (2016) - Re Butler-Sloss.

CHARITABLE TRUSTEE INVESTMENT (1)

- Charities whos principle purposes are environmental protection and improvement and relief of poverty.
- Court had to decide whether trustees could approve investment policies which excluded potential investments which conflicted with their purposes
- Two charities: Ashden Trust and Mark Leonard Trust, seeking approval of their investment policies.,
- Whilst Paris Climate Change agreement did not bind charities or private purposes, trustees considered it set an appropriate basis for assessing investments' consistency with charity purposes
- Excluded half of publicly traded companies and many commercially available investment funds
- The trustees had hoped for an above-inflation rate of return but accepted that they were unable to accurately determine the extent of the financial detriment that may be suffered by adopting the proposed investment policies.



Key source: *Butler-Sloss & others v Charity Commission* [2022] EWHC 974 (Ch)

CHARITABLE TRUSTEE INVESTMENT (2)

- Charity Commission's guidance Charities and investment matters: a guide for trustees (2023) was partly based on *Harries* [1992] decision
  - maximising financial return was the starting point when exercising duty of investment powers
  - exceptions however: accepted could choose not to invest in a particular type of business if they were satisfied that it would conflict with the very objects of the charity
  - Nicholls VC in Harries did not anticipate significant financial detriment arising in practice as a result of this methodology. As Green J, in Butler-Sloss, summarised, *'the Vice-Chancellor only had in mind the relatively simple cases of cancer charities not investing in tobacco or the Quakers not investing in armaments companies'*.



Key source: *Butler-Sloss & others v Charity Commission* [2022] EWHC 974 (Ch)

CHARITABLE TRUSTEE INVESTMENT (3)

- Green J held that *Harries* impose an absolute prohibition on charity trustees making investments that directly conflict with the charity's purposes.
- Set out considerations for charity trustees taking into account non-financial (including ESG) considerations when exercising their investment powers:
- 1. Trustees' powers of investment derive from the trust deeds and the Trustee Act 2000.
- 2. The power to invest must be exercised to further the charitable purposes of the trust.
- 3. That is normally achieved by maximising the financial returns on the investments that are made, whilst considering the need for diversification and taking appropriate advice. (Cont.)



Key source: *Butler-Sloss & others v Charity Commission* [2022] EWHC 974 (Ch)

CHARITABLE TRUSTEE INVESTMENT (4)

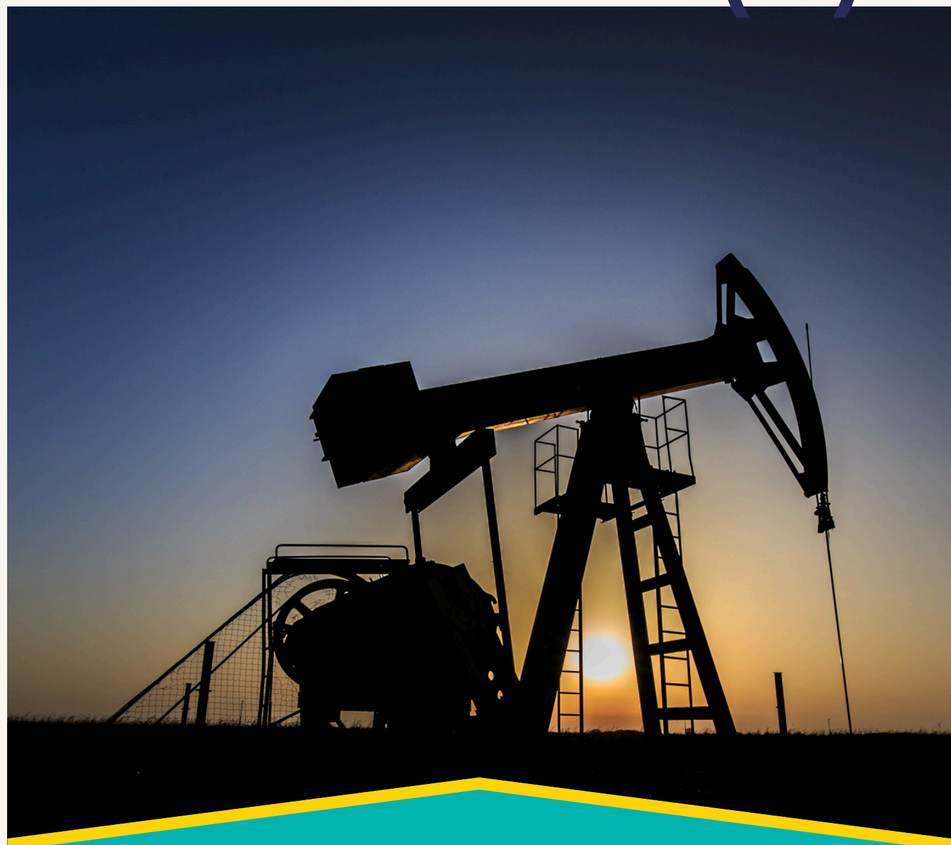
- 4. Social investments are made using separate powers than the pure power of investment.
- 5. Where specific investments are prohibited under the trust deed, they cannot be made.
- 6. But where trustees are of the reasonable view that particular investments potentially conflict with the charitable purposes, the trustees have discretion as to whether to exclude such investments and they should do so by reasonably balancing all relevant factors including, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion.
- 7. In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and among its beneficiaries.



Key source: *Butler-Sloss & others v Charity Commission* [2022] EWHC 974 (Ch)

CHARITABLE TRUSTEE INVESTMENT (5)

- 8. However, trustees need to be careful in relation to making decisions as to investments on purely moral grounds, recognising that among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues.
- 9. Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are conflicts, good judgment should be exercised by balancing all relevant factors.
- 10. If that balancing exercise is properly done and a reasonable and proportionate investment policy is adopted, the trustees have complied with their legal duties and cannot be criticised, even if the Court or other trustees might have come to a different conclusion.



Key source: *Butler-Sloss & others v Charity Commission* [2022] EWHC 974 (Ch)

CHARITABLE TRUSTEE INVESTMENT (6)

- Claimants had reasonably decided that there needed a dramatic shift in investment policies in order to have any appreciable effect on GHG emissions. Green J:
  - trustees had sufficiently balanced that objective with any financial detriment and that the investment performance would be tested regularly against recognised benchmarks
  - they had exercised their investment powers properly and lawfully and gave blessing for adopting the new investment policies.
- Charity Com intends to publish updated guidance to reflect decision.
- While case provides clarity for charity trustees and can be interpreted as a 'pro-ESG investment' outcome, its relevance may be limited to environmental charities, as the decision was focussed on the charities' purpose. It should certainly not be viewed as automatically applying to trusts (including discretionary trusts) generally (follow Harries)



Key source: *Butler-Sloss & others v Charity Commission* [2022] EWHC 974 (Ch)

ACTIVITY 5: INVESTMENTS

- The trustees of a charity dedicated to food poverty would like to adopt a policy of not investing in the tobacco industry.
- **Can the trustees adopt this policy?**



DUTY TO CONSIDER

- When exercising discretionary dispositive powers, trustees have fiduciary **duty to consider** whether and how they should exercise their powers to distribute income or capital of the trust fund
- This is fiduciary duty that underpins the individual ascertainability test for certainty of objects for discretionary trusts: ***Re Hay's Settlement Trusts*** **[1981] 3 All ER 786 (Ch)**
- Duty requires the trustee, when deciding on exercise of discretionary dispositive powers, to consider the exercise of that power responsibly:
    - *Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.* ***McPhail v Doulton*** **[1971] AC 424 (HL) 449**

DUTY TO CONSIDER

- Courts will only intervene in the exercise by trustees of their discretionary powers where trustees have:
  - acted in breach of duty: ***Pitt v Holt, Futter v Futter*** **[2013] UKSC 26,** or
  - bad faith: **Gisborne v Gisborne (1877) LR 2 App Cas 300**
- ***Re Beloved Wilkes Charity*** **(1851) 3 Mac & G 440:**
  - discretionary power to select candidate to be educated at Oxford University in preparation to become a CoE minister.
  - Trustees were obliged by deed to select any suitable candidate who came forward from certain nominated parishes.
  - In absence of any such candidate, the trustees had a general discretion to select a candidate. Chose someone not nominated by parishes.
  - Court declined to interfere with decision: duty of supervision confined to the question of honesty, integrity, and fairness with which the deliberation has been conducted, not accuracy of conclusion reached



TRUST EXECUTION

- For PET beneficiaries traditionally considered as having a proprietary right to trust documents, but no right to confidential information: **Re Londonderry's Settlement [1965] Ch 918**
- PC in ***Schmidt v Rosewood Trust Ltd*** **[2003] 2 AC 709**: adopted wider approach to the disclosure of information, rejecting proprietary basis.
- Beneficiary's right to disclosure should be approached from the basis of the court's inherent jurisdiction to supervise the administration of trusts:
    - *The more principled and correct approach … does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on court's discretion.*
- Supervisory jurisdiction may be discretionary, but it is also 'fundamental to trusts law'.
- Court will only exercise its power where necessary to enforce the overriding duty of the trustees to secure the due administration and execution of the trust (Dennis, 2007)

REVISITING THE DUTY TO CONSIDER

- Harris (1971) criticised duty to consider, arguing that *McPhail* imported into the duty to consider, the duties of of inquiry and ascertainment, and to survey, select, and distribute. Harris argued these are simply a 'generic trust-defining duty' of a trustee: to hold property for others... subject to rules of equity....
- Dennis argues this provides fundamental basis of the court's supervisory jurisdiction, over the exercise of the discretionary powers of trustees, whether in relation to charitable or private non-charitable express trusts.
- Fiduciary duty to consider is paramount if the trutee is to execute or carry the trust into effect
- All these

ACTIVITY 6: SBA CHARITY (SBA) 1

A group of circus artists would like to register their association as a charity. The group is funded by public grants, and the main purposes of the artists is to promote circus arts to the public, offering free classes and performances.

Which of the following best describes the advice that should be given to the group?

a)That they cannot register their association as a charity as membership organisations cannot gain charitable status.
b)That they cannot register their association as a charity as their activities are not for the public benefit.
c)That they cannot register their association as a charity as they are set up for a political purpose.
d)That they can register their association as a charity as they are set up for a charitable purpose with public benefit.
e) That they can set up a charity for aspects of their work.

ACTIVITY 6: SBA CHARITY (SBA) 2

A charitable trust was validly created to resolve food poverty in Swansea. A few years later, the local council decides to fund a ‘food for all’ programme which supplies adequate food for all Swansea residents. The charity decides that its activities in Swansea are no longer needed, and instead wishes to invest in resolving food poverty in Carmarthenshire.

Can the trustees repurpose their charity to undertake this new work?

a)Yes, the trust was originally set up to resolve food poverty. The trust can undertake any activities which fall within the scope of this charitable purpose.
b)Yes, but the trustees must apply to alter the charity’s purposes. They can do so as the charity’s original purposes have been fulfilled.
c)Yes, but the trustee must apply to alter the charity’s purposes. They can do so as the charity’s original purposes have since been adequately provided for by other means.
d)No, the trustees must bring the trust to an end and return any funds to their original doners.
e)No, the trustees must bring their trust to an end, but they can donate their funds to another poverty-related charitable trust.

ACTIVITY 6: SBA CHARITY (SBA) 3

The charity commission has received information that a registered charity is being used as a sham for tax evasion.

Which of the following best describes the most appropriate course of action for the Charity Commission?

a)Tax evasion is not an offence, and as such is a legitimate use of trust. The Charity Commission need not take further action.
b)The Charity Commission can do nothing as only HMRC can deal with tax evasion allegations.
c)The Charity Commission can take over management of the charity and act as its trustees.
d)The Charity Commission can launch an inquiry to identify if there is any misconduct/mismanagement.
e)The Charity Commission can immediately terminate the charity and trike it off the register.

UNIT 6: LEARNING OUTCOMES

- Summarise the development of charitable trusts
- Identify key advantages to charitable status
- Explain the legal tests for identifying that a trust is charitable
- Explain the regulatory mechanisms for charities
- Explain the availability of cy-pres to reform charitable purposes
- Explain approaches to resolving conflicts between purposes and investments
- Apply the law to factual scenarios

RECAP

UNIT 6: READING MATERIALS

- You can draw on the following chapters of your textbooks to deepen your understanding of the topics discussed in this unit.
  - Watt (2023) chapter 7
  - Ramjohn and Bray (2024), chapter 12
  - Barr and Pearce (2022) chapters 19-20

EXPLORING FURTHER

- You may find the following sources of interest to you in exploring the topics discussed in this unit further. You are not expected to read these to pass the module, they are provided should you wish to explore the topics further.
  - Charity Commission for England and Wales (2023) Charities and investment matters: a guide for trustees (CC14). Available at: https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14/charities-and-investment-matters-a-guide-for-trustees (Accessed: 9 October 2023).
  - Crumley, B. and Picton, J. (2018) 'Still standing? Cy-près and charitable service users in the first-tier Tribunal (Charity)', *Conveyancer and Property Lawyer*, 82, pp. 262-279.
  - Dennis, D. (2007) 'The judicial control of the exercise of discretionary powers by charitable trustees', *Charity Law & Practice Review*, 9(3), pp. 1-56.
  - Harris, J.W. (1971) 'Trust, power and duty', *Law Quarterly Review*, 87(1), pp. 31-65.
  - Nasim, I. (2021) 'Why charities must embrace transparency', Global Policy, 9 February. Available at: https://www.globalpolicyjournal.com/blog/09/02/2021/why-charities-must-embrace-transparency (Accessed: 25 September 2023).
  - Parkinson, P. (2002) 'Reconceptualising the Express Trust', The Cambridge Law Journal, 61(3), pp. 657-683.
  - Synge, M. (2016) 'The Attorney General and the Charity Commission: one rule without reason?', *Public Law*, pp. 409-417.
  - Warburton, J. (1999) 'Charitable trusts - unique?', *Conveyancer and Property Lawyer*, pp. 20-31.