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POVERTY: AN ESSENTIAL ELEMENT IN CHARITY AFTER ALL?

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In 1951, an argument that schools should be charitable only if they offer free or reduced tuition was dismissed by the court as a "startling proposition".[1] Yet, in 2010, an independent school was assured of its charitable status only when it agreed to offer means-tested bursaries.[2] So did the law change with the Charities Act 2006 ('the Act')?

Well, yes and no, says the Charity Commission ('the Commission').[3] Yes, in that the Act removed a presumption that the advancement of education is for the public benefit, with the result that schools, whether already registered as charities or not, must manifestly demonstrate that they operate for the public benefit. No, in that case law already provides that opportunities to benefit must be provided to people in poverty and, where fees are charged by the charity for its services, to people unable to afford those fees.

This paper will examine whether the Commission is right to require that people who are unable to afford the fees charged by a charity, including people in poverty, are given opportunities to benefit from the charity's activities. It will submit that the Commission's responses are neither justified by statute or case law, nor do they render the above-mentioned argument any less startling or flawed.

I. THE PRESUMPTION

The Act defines a charity as an institution established for purposes which fall within certain categories and are "for the public benefit". It also provides that "public benefit" shall have the meaning given to it in underlying case law.[4] Subsection 3(2) provides that public benefit is not to be presumed in any particular case. The Commission maintains that this provision removes a presumption of public benefit. However, it is

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[1] *The Abbey Malvern Wells Ltd.* v. *Ministry of Local Government and Planning* [1951] Ch. 728, 737 per Danckwerts J.

[2] Highfield Priory School initially 'failed' the Commission's public benefit assessment but later passed, having submitted a plan to offer means-tested bursaries in addition to (unchanged) opportunities for public access etc: *Emerging Findings* report, July 2009, and subsequent decision, July 2010, both published by the Commission.

[3] In guidance published to promote awareness and understanding of the public benefit requirement; notwithstanding the complex legal subject, the guidance was written by the Commission's Policy Division, but with assistance from legal staff.

[4] Section 3(3).

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misleading to suggest that public benefit, as understood in charity law, was ever presumed. To the extent that a presumption existed in case law, it was a rebuttable presumption that an organisation with the purposes of advancing education (or relieving poverty or advancing religion) was prima facie charitable, because those purposes were assumed to be beneficial.[5] The presumption was always subject to those purposes not being shown to be illegal or contrary to public policy[6] or more detrimental than beneficial.[7] The need for multiple purposes to be exclusively charitable still had to be satisfied and the requisite public character, the "public" element of public benefit, was not presumed.[8]

The express stipulation that public benefit is not presumed is no more than a statement of the existing law.[9] Public benefit cannot be "presumed", because the courts must be satisfied that the necessary public character exists and that there are no factors which detract from apparent charitable status. The provision means that a court must be satisfied that purposes are for the public benefit and not that a charity must always "manifestly demonstrate" that that is the case, nor that it *operates*[10] for the public benefit. A court may continue to take judicial notice of matters which it considers do not need evidence, including that a school's provision of education is prima facie charitable.[11]

II. Relevant Principles Under Case Law

The Commission interprets case law as embodying the principle that opportunities to benefit must be provided to people unable to afford a charity's fees, including people in poverty. However, the principles that emerge from the case law are, first, that poverty is not an essential element of charity and, secondly, that the charging of fees is permissible, provided there is no intention to profit for private gain.

[5] Though not conclusively: a school for pickpockets or prostitutes might be educational but not beneficial: *Re Pinion* [1965] Ch. 85, 105. Once accepted as charitable under the fourth head (see note 13), other purposes were also treated in this way.

[6] *Ibid.*; *Coats* v. *Gilmour* [1948] Ch. 340, 347 and 357.

[7] *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31, 65; *Re Macduff* [1896] 2 Ch. 451, 474.

[8] Unless, perhaps, there was no question of any private class or section of the public (*Funnell* v. *Stewart* [1996] 1 W.L.R. 288, 197). Where it appears to be assumed, it is always subject to contrary evidence (*Oppenheim* v. *Tobacco Securities* [1951] A.C. 297, 315).

[9] Picarda QC: Memorandum to Joint Committee (DCH 297): "Mere reversal of the 'presumption' of public benefit cannot change the declared law on this point"; HL Deb. vol. 669 col. GCGC112.

[10] This is the test applied by the Commission, even though case law prescribes a purposes (rather than activities) test, as acknowledged by the Commission in its publications (*e.g. Analysis of the Law Underpinning Charities and Public Benefit*, December 2008, part 4); cf. Charities and Trustee Investment (Scotland) Act 2005 which requires a charity to *provide* public benefit.

[11] The provision may lead to a court openly addressing the various aspects of public benefit in each case and not just when evidence in rebuttal is presented.

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A. Poverty is not essential

Whether or not poverty, and the needs of the poor, must be addressed in all cases of charity has proved to be a contentious aspect of charity law. On the one hand, there have been clear authoritative statements to the effect that poverty does not always need to be considered. Most notably, perhaps, in a Privy Council decision in 1924,[12] Lord Wrenbury made it clear that poverty is not "a necessary element" in charities under the fourth head[13] and, similarly, that education and religion "do not require any qualification of poverty to be introduced to give them validity."[14] On the other hand, the relevance of poverty has been argued on occasion, principally in relation to charities dealing with the aged or infirm and where fees are charged for the charity's services.

To say that poverty is not an essential element of charity is to say, first, that the relief of poverty does not need to be one of the purposes of the organisation and, secondly, that there is no requirement in charity law for the poor to be given the opportunity to benefit from an organisation's charitable purposes. It may well not accord with popular notions of charity, but that is because "charity" has a distinct legal meaning that is "clear and distinct, peculiar to the law" and "not depending upon or coterminous with the popular or vulgar use of the word".[15] The technical nature of the legal definition of charity was not changed by the Act.

The beneficiaries of a charity's purposes might comprise all poor, all rich, or a combination of poor and rich. For our purposes, "rich" means "not poor" and "poor" means "not rich". The two terms are thus mutually exclusive and require no further definition.[16] Whilst accepting the principle that a class need not be confined to the poor and that the rich may also benefit, the Commission maintains that, where all the beneficiaries may be rich, the poor must also be given material opportunities to benefit.

A class comprising only the rich might arise in the following ways:

- By an indifference to whether those who actually benefit are rich or poor
- By declaring that purposes are aimed at the rich or with a proviso or qualification that the poor shall not benefit (an "express exclusion on the terms")

[12] *Verge* v. *Somerville* [1924] A.C. 496.
[13] At 499–500, referring to the four heads of charity (relief of poverty, education, religion and other purposes beneficial to the community) outlined in *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel* [1891] A.C. 531, 583 ("*Pemsel's case*").
[14] *Ibid.*, p. 503. See too *Re Compton* [1945] Ch. 123, 139.
[15] *Pemsel's case* [1891] A.C. at 581, per Lord Macnaghten.
[16] Thus avoiding the inevitably tortuous problems of scope and definition which the Commission fails to resolve: since the law does not rule out rich beneficiaries, there is no need to address any other class on the sliding scale between the wealthy and the impoverished.

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- By describing a class of beneficiaries in such a way that only the rich could possibly fall within it (an "implied exclusion on the terms")
- By declaring purposes which can only benefit the rich because high fees are charged (an "implied exclusion in practice")

Except where purposes are clearly aimed at relieving poverty, very often there is no intention that a potential beneficiary's wealth should be taken into account in considering his eligibility to receive the benefits of the charitable purposes[17] and this lack of concern on the part of the donor is reflected in the courts' attitudes. It seems unlikely that an express exclusion on the terms would arise in practice and even less likely, if it did, that charitable status would be advocated or defended with any vigour.[18] An implied exclusion on the terms is more likely to arise and, indeed, has arisen in some cases[19] and, of course, an implied exclusion in practice is commonplace where fees are charged.

1. The relief of poverty

Clearly poverty is an essential element under the first head of charity. In the case of membership organisations, which are potentially non-charitable because of their non-public character, charitable status will only exist if the purpose, or one of the dominant purposes, is to relieve poverty.[20] Thus in *Re Hobourn Aero Components Limited's Air Raid Distress Fund*,[21] the Court of Appeal held that a fund which was primarily for contributing employees who had suffered from air raids did not constitute a charitable trust, principally on the ground that it was of a private and not public nature.[22] Had there been a requirement of poverty in those eligible for assistance, the trust would have been charitable, whereas the relief of distress from air raids (which would be capable of being charitable in a public context) would not render a private arrangement charitable.[23]

2. Advancement of education

In *Attorney-General* v. *The Earl of Lonsdale*[24], the Vice-Chancellor, Sir John Leach, dismissed outright an argument by counsel that a free

[17] For example, the services offered by a charitable lifeboat organisation are available to all distressed seamen, without regard to their means.
[18] Some judicial dicta (below) which suggest that charitable status would be denied if the poor were excluded appear to be limited to such an express exclusion (it is submitted that this covers any exclusion of persons less rich than those included (so that, again, there is no need to consider various degrees of wealth)).
[19] E.g. a school for the sons of gentlemen: *Attorney General* v. *Earl of Lonsdale* (1827) 1 Simons 105, 57 E.R. 518.
[20] *Spiller* v. *Maude* (note), 1864. S. 22; *Re Lacy* [1899] 2 Ch. 149.
[21] [1946] Ch. 194.
[22] *Ibid.*, p. 203.
[23] *Ibid.*, p. 210; nor will restricting a non-charitable purpose to a particular locality: *Williams' Trustees* v. *I.R.C.* [1947] A.C. 447, 456.
[24] 57 E.R. 518 (in 1827).

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school for the education of gentlemen's sons could not be charitable. He conceded that such an object would not be charitable "in popular language" but then stated that "in the view of the statute of Elizabeth, all schools for learning are so to be considered".[25] Nearly a century later, Lord Cozens Hardy M.R. refused to accept that a trust for the advancement of education could not be charitable unless there was an element of poverty: "There is no foundation for it in authority nor is there any foundation for it in reason."[26]

Many fee-paying schools were founded for the education of the poor.[27] Fee-paying boarders were initially few in number, or introduced at a later date, but, typically, became the sole or main category of pupils. This evolution in educational provision led to many repeated calls for independent schools to be closed, or for fiscal privileges and/or charitable status to be removed,[28] but it did not hinder the unswerving attitude of the judiciary in attributing charitable status to them in the nineteenth and twentieth centuries.[29]

Provided purposes are actually seen as tending to advance education,[30] they have been held to be charitable without any consideration of the presence or absence of poverty.[31] A failure to attract charitable status, on the other hand, has not been due to the absence of poverty but other reasons, most notably lack of public character where education has been intended for relatives or employees.[32]

3. Advancement of religion

The relevance of poverty was central to *Pemsel's case*,[33] where the House of Lords held that the purposes of "advancing the missionary establishments among heathen nations of the Protestant Episcopal Church"[34] were charitable and entitled to income tax allowances. Three of their Lordships, dismissed the "restricted"[35] view that charity implies the relief of poverty and that the testator must be found to have had an intention to provide such relief. They found the purposes to be charitable, notwithstanding that there was no intention to discriminate between rich and poor heathens.

[25] *Ibid.*, p.520 (referring to the Charitable Uses Act 1601).
[26] *R* v. *Special Commissioners of Income Tax ex p. University College of North Wales* (1909) 78 L.J.K.B. 576, 578.
[27] Including Eton and Winchester.
[28] See, for example, I. Williams, *The Alms Trade* (London 1989).
[29] *Brighton College* v. *Marriott* [1926] A.C. 192; *Abbey Malvern* [1951] Ch. 728.
[30] The courts have interpreted 'education' widely but not without limitation: Re *Pinion* [1965] Ch. 85; *Re Shaw* [1957] 1 W.L.R. 729.
[31] E.g. *Re Gott* [1944] Ch. 193; *Re Koeppler Will Trusts* [1986] Ch. 423; *Smith* v. *Kerr* [1902] 1 Ch. 774; *Inland Revenue Commissioners* v. *McMullen* [1981] A.C. 1.
[32] *Re Compton* [1945] Ch. 123; *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297, 306; *Inland Revenue Commissioners* v. *Educational Grants Association* [1967] Ch. 993.
[33] [1891] A.C. 531.
[34] *Ibid.*, p. 532.
[35] *Ibid.*, p. 571 per Lord Herschell.

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As with education, the presence or absence of poverty has not been a determining factor in purposes for the advancement of religion.[36]

4. Cases falling under the fourth head

After identifying the fourth head of charity in *Pemsel's case*, Lord Macnaghten added that trusts within that category "are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly".[37] Of course, in itself, this tells us only that the beneficiaries of a charitable trust are not required to be exclusively poor and not that poverty is an irrelevant consideration. Whilst it is authority for the proposition that the rich may benefit incidentally, it is not authority for saying that the rich cannot benefit in ways that are not merely incidental.[38] To suggest that it requires at least some poor to benefit, regardless of purpose and charges, would be to ignore the historical and factual context of the case.

Later dicta address more explicitly the relevance of poverty in charities under the fourth head. In *I.R.C.* v. *Baddeley*,[39] trusts were declared to be non-charitable because the purposes were not recognised by law as exclusively charitable. Lord Reid was clearly of the opinion that, had the purposes been exclusively within the fourth head, "the element of poverty is not necessary to make them valid charitable purposes".[40] In *Re Resch*,[41] Lord Wilberforce referred to Lord Wrenbury having "held generally that poverty is not a necessary qualification in trusts beneficial to the community".

Again, numerous purposes have been found to be charitable under this head without any consideration of poverty[42] and charitable status has been denied on a number of grounds but not the absence of poverty[43].

5. Relief of the aged or infirm

The significance of poverty has been especially prominent where the purposes are concerned with the aged or infirm.[44] In these cases are

[36] E.g. *Re Manser* [1905] 1 Ch. 68; *Re Hood* [1931] 1 Ch. 240; *Farley* v. *Westminster Bank* [1939] A.C. 430; *Cocks* v. *Manners* (1871) L.R. 12 Eq. 574.
[37] [1891] A.C. 531, 583.
[38] Recognised by Lord Wrenbury in *Verge* v. *Somerville* [1924] A.C. 496, 503.
[39] [1955] A.C. 572.
[40] *Ibid.*, 604.
[41] [1969] 1 A.C. 514, 542.
[42] E.g. *Re Good* [1905] 2 Ch. 60; *Scottish Burial and Cremation Society Ltd* v. *Glasgow Corporation* [1968] A.C. 138.
[43] E.g. *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31; *I.R.C.* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380 (likewise the 'animal cases' contain no consideration of poverty: *Re Wedgwood* [1915] 1 Ch. 113; R*e Grove-Grady* [1929] 1 Ch. 557).
[44] Perhaps because the preamble to the 1601 Act includes the relief of the "aged, impotent and poor people", without indicating whether a conjunctive or disjunctive interpretation was intended.

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to be found some of the most notable suggestions of a judicial reluctance[45] to accord charitable status to purposes that do not include an element of poverty. In the mid-twentieth century, academics debated whether a trust for the relief of "aged peers" or "impotent millionaires" would be charitable. Megarry noted the evolving cases of the time and identified the nub of the problem as it seeming "to accord ill with the spirit of the Statute to open the doors of charity to those who are wealthy and well able to provide for themselves, merely because they are aged".[46] Brunyate,[47] however, considered the example of a rich blind man and distinguished between gifts of money on the one hand and curing blindness or providing braille services on the other.[48] Taking a bolder approach than some, he noted: "to regard a rich man who is blind or maimed as in no sense a proper object of charity would surely be taking a very worldly view of human suffering".[49] The cases which addressed this issue over the following two decades[50] reflected this view and to relieve the needs of aged or impotent persons came to be regarded as charitable without any need for poverty, just as other prima facie charitable purposes had not been disqualified through an absence of poverty.

After a period of reticence, where judges appeared to be reassured to find evidence which suggested that the testator had intended to benefit aged people who were also poor[51] or indigent[52], a new confidence emerged in *Re Robinson*[53], where Vaisey J. held, without hesitation, that a gift to people aged over 65 was charitable without any need for poverty. The requirement for some relief of a *need* attributable to age, however, was favoured as an approach and emphasised in *Joseph Rowntree Memorial Trust* v. *Attorney General.*[54] Peter Gibson J. in that case considered a number of schemes for the provision of special housing for the elderly and found that the relief of that need was prima facie charitable without any qualification of poverty. Basing his decision on logic as well as judicial authority, he expressed his conclusion with utmost clarity: "It would be as absurd to require that the aged must be impotent or poor as it would be to

[45] Or "great disinclination": *Re Lewis (Deceased)* [1955] Ch. 104, 107.
[46] (1951) 67 L.Q.R. 164.
[47] (1945) 61 L.Q.R. 268; see too *Attorney General* v. *Duke of Northumberland* (1877–78) L.R. 7 Ch. D. 745, 749.
[48] Echoed by Peter Gibson J. in *Joseph Rowntree Memorial Trust Housing Association Ltd.* v. *Attorney-General* [1983] Ch. 159, 171.
[49] 61 L.Q.R. at p. 272. See too P.S. Atiyah, "Public benefit in charities" (1958) 21 M.L.R. 138, at 140.
[50] Briefly, but helpfully, reviewed in the *Joseph Rowntree* case, note 48 above, at pp. 172–173.
[51] *Re Lucas* [1922] 2 Ch. 52.
[52] *Re Glyn's Will Trusts* [1950] 2 All E.R. 1150 (note).
[53] [1951] Ch. 198. See too *Re Neal* (1966) 110 S.J. 549; *Re Bradbury* [1950] W.N. 558.
[54] [1983] Ch. 159. This emphasis on need is also discernible in *Re Resch.*

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require the impotent to be aged or poor, or the poor to be aged or impotent."[55]

The question of whether poverty is essential in gifts for the relief of the infirm was to the fore in *Re Lewis*.[56] Roxburgh J., in construing gifts of £100 to blind boys and girls, boldly decided to "grasp the nettle" and decide whether or not the absence of "any element of poverty whatsoever" was fatal to finding that the gifts were charitable.[57] He was also happy to endorse the disjunctive interpretation (and its necessary consequences) adopted by Danckwerts J. and Vaisey J.[58] Like Peter Gibson J,[59] Roxburgh J pointed to the illogical nature of the counter-argument that would mean that a trust for poor people would not be charitable unless they were also aged or infirm.

Re Resch[60] is considered below in relation to fee-charging, but for present purposes it is worth noting the words of Lord Wilberforce in that case where, keen "to dispose of a misapprehension", he said that "it is not a condition of validity of a trust for the relief of the sick that it should be limited to the poor sick …. there is no warrant for adding to the condition of sickness that of poverty".[61] The first part of this statement of principle is narrow but the second is much wider and, logically, must embrace the possibility that all beneficiaries could be rich.[62]

6. Locality cases

Where the public generally, or a section of the public defined by location, is to benefit then poverty is seen not to be essential. Thus in *Mitford* v. *Reynolds* (1842),[63] a bequest for the benefit of the native inhabitants of a named city was construed as being "not for any particular class of the native inhabitants, but for all the native inhabitants in general, both rich and poor"[64] and thus charitable. Similarly, in *Jones v Williams*,[65] a gift to supply water to the people of Chepstow was charitable as "a gift to a general public use, which extends to the poor as well as to the rich". Despite mention of rich and poor in both cases, neither decision appears to require that some poor must be able to benefit from the bequest. Rather, it appears sufficient that the public

[55] [1983] Ch. at p. 171. See too *McGovern* v. *Attorney General* [1982] Ch. 321, 333 where the principle was reiterated without question.
[56] [1955] Ch. 104.
[57] *Ibid.*, p. 107.
[58] In *In Re Glyn's Will Trust* and *Re Robinson*, note 52 and 53 above.
[59] In the *Joseph Rowntree* case, note 48 above.
[60] [1969] 1 A.C. 514.
[61] *Ibid.*, p. 542.
[62] As indeed did his later dicta, see below p. 666.
[63] 41 E.R. 602; *Howse* v. *Chapman* (1799) 4 Ves. 542; *Re Mann* [1903] 1 Ch. 232.
[64] 41 E.R. at p. 605.
[65] 27 E.R. 422.

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benefits indiscriminately, that is without reference to wealth or poverty.[66]

In the leading case of *Goodman* v. *Saltash*,[67] the House of Lords concluded that the privilege of removing oysters from a fishery amounted to a charitable trust for the benefit of free inhabitants of ancient tenements in the borough of Saltash. None of their lordships was concerned to find any element of poverty. This case is significant because the charitable trust was tantamount to a trust for the rich alone[68] and the potential or actual exclusion of the poor did not prevent that conclusion. Lord Fitzgerald understood the term "free inhabitants" to mean persons "on whom privileges were conferred in respect of their having erected houses within its limits, and being inhabitants or residents therein".[69]

In construing the Inclosure Act 1802,[70] the Court of Appeal was reluctant to find that it created a trust unless it could be framed as a charitable trust in line with judicial authorities. It seems that some comfort was derived from conjecturing that the Act might originally have been aimed at poor people, although this was said only to support (and not to prove) the view[71] that the court had already reached on the basis of features in common with those in *Goodman* v. *Saltash*, namely that the Act gave rise to a charitable trust for the benefit of occupiers of the cottages, whether poor or not.

7. Charitable and non-charitable purposes

Where the courts have ruled that philanthropic or benevolent purposes are not charitable, it has not been because those purposes have failed to address the needs of the poor.[72]

However, the relevance of poverty might appear to be prominent in *Re Macduff*[73] where the court was faced with the task of determining whether purposes could be "philanthropic" but not "charitable". Lindley L.J. suggested a distinction in that "purposes indicating

[66] The reference to the poor in *Jones* v. *Williams* may have been to make clear the charitable nature of gifts of general public utility as an alternative to the usual relief of poverty (P. Luxton, "*Making Law? Parliament v The Charity Commission*" Politeia 2009, p. 21); later references to this definition, which omit the sub-clause concerning rich and poor, also suggest that the significance of it was to emphasise the public nature of the gift: *Pemsel's case* [1891] A.C. 531, 543; *Nightingale* v. *Goulburn* 67 E.R. 1003, 1006 and *Taylor* v. *Taylor* [1910] 10 C.L.R. 223, 237, where Isaacs J. described the words as "merely explanatory".

[67] (1881–82) L.R. 7 App. Cas. 633; applied in *Peggs* v. *Lamb* [1994] Ch. 172.

[68] An implied exclusion on the terms; Cross calls the case a "stumbling block to anyone who wishes to reduce the law of charity to some semblance of order" but not because of the wealth of the beneficiaries: "Some recent developments in the law of charity" (1956) L.Q.R. 72, 187 at 201.

[69] L.R. 7 App. Cas. at p. 668.

[70] *Re Christchurch Inclosure Act* (1888) L.R. 38 Ch. D. 520.

[71] *Ibid.*, p. 533.

[72] *Re Diplock* [1941] Ch. 253; *Houston* v. *Burns* [1918] A.C. 337.

[73] [1896] 2 Ch. 451.

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goodwill to rich men to the exclusion of poor men"[74] would be philanthropic but not charitable. He did not say that poverty, whilst clearly not an essential element of philanthropy, was an essential element in charity. Although such purposes would probably be non-charitable in any event for being uncertain, his comment by way of explanation, namely that he doubted "very much whether a trust would be declared to be charitable which excluded the poor",[75] does indicate that he considered that even a prima facie charitable purpose would not be charitable if it "excluded the poor". Since his lordship must be presumed to have been aware of the decisions of the courts in *Attorney-General* v. *Lonsdale*[76] and *Goodman* v. *Saltash*[77], his words cannot be taken as authority for holding an implied exclusion on the terms to be non-charitable. It seems, rather, that his Lordship's comments can be taken only as an obiter suggestion that an express exclusion of the poor could not be charitable.

The technical meaning of charity, which depends on purpose and public character, appears to provide no reason, in logic or judicial precedent, why such an express exclusion should render something non-charitable that would otherwise be charitable.[78] Is there any difference between a gift "for the benefit of gentlemen's sons but not the poor" and one "for the benefit of gentlemen's sons"? To say "for all children but not adults" means nothing more than "for all children". And if a test of charitable status survives describing the class as, essentially, wealthy people, why would it fail if the beneficiaries, though not described in such clear terms, would need to be so in order to pay any contributions charged? However, an express exclusion of the poor undoubtedly arouses the sort of sentiments that associate charity with poverty. It would not be surprising, therefore, if the courts, unfettered by precedent and accustomed to evolving empirically, chose to deny charitable status on the grounds of policy, even though logic alone might lead to a different conclusion.

In the same case,[79] Lopes L.J. indicates that he would not consider "recreation grounds and grounds devoted to sport which are not for the poorer classes, but are generally for rich and poor alike" to be charitable. It is submitted that the view he is expressing, in response to a point raised in argument, is that the provision of such facilities is not a prima facie charitable purpose, but could only be charitable if provided specifically for the poor, in which case they might be treated as fulfilling the undoubtedly charitable purpose of relieving

[74] *Ibid.*, p. 464.
[75] *Ibid.*
[76] Note 24 above.
[77] Note 67 above.
[78] Provided the charitable purposes are other than the relief of poverty.
[79] [1896] 2 Ch. at p. 469.

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poverty.[80] His second example of purposes that are philanthropic but not charitable is that of a gift to landowners affected by agricultural depression whose incomes drop to £300 p.a. Since the only possibly charitable purpose might be to relieve poverty, the wealth of the recipients is clearly relevant and there can be no charitable purpose of relieving the poverty of the rich,[81] including someone with an income of £300 in 1896. Hence the gift is philanthropic but not charitable. Peter Gibson J. made the same point in 1983:[82] "a gift of money to the aged millionaires of Mayfair would not relieve a need of theirs as aged persons".

Rigby L.J., similarly, illustrates his conclusion that some purposes may be philanthropic but not charitable by considering a gift of residue on trust "towards advancing the happiness and the position in life generally" of the "well to do or moderately well to do".[83] Again, neither making people happier[84] nor making them "in some sense better than they now are" is a charitable purpose in law but only philanthropic. If the aims were to advance the happiness or improve the position of poor people, these might be construed as ways of relieving poverty, but one cannot relieve the poverty of the "well-to-do".[85]

B. Fees may be charged but not for private gain

The fact that a charity may charge for the benefits and services it provides is a well-established principle of charity law. Lord Upjohn put it simply: "It is quite clear that the mere making of a charge for the services rendered does not prevent an organisation, otherwise charitable, from being charitable".[86]

However, the effect of charging fees is to highlight the distinction between rich and poor and it becomes entirely foreseeable that the beneficiaries of a charity which charges high fees will comprise a significant proportion of rich people. This makes the question of whether

[80] To argue that the purpose is rendered non-charitable only because of the admission of some rich to the grounds would be to suggest that a class must be confined to the poor, a view not supported by authority (nor propounded by the Commission).

[81] *Attorney-General* v. *Duke of Northumberland* (1877–78) L.R. 7 Ch. D. 745, 752.

[82] *Joseph Rowntree* [1983] Ch. 159, 171.

[83] *Re Macduff* [1896] 2 Ch. at p. 471.

[84] At least not unless by charitable means such as circulating religious and virtuous learning: *Browne* v. *Yeall* 7 Ves. 50, n.

[85] Similarly, Harman J. in *Re White's Will Trusts* [1951] 1 All E.R. 528, 530 notes that a rest home for millionaires would not be charitable, but he appears to make this comment on the basis that a rest home is not charitable per se unless for the benefit of doers of charity (as in *Re Estlin* (1903) 72 L.J. (Ch.) 687 and *Re James* [1932] 2 Ch. 25) or objects of charity (as in *Re Chaplin* [1933] Ch. 115) and millionaires are neither; H. Picarda's statement that "gifts for the exclusive benefit of rich are not charitable" (*The Law and Practice relating to Charities*, 4th edn. (Haywards Heath 2010), p. 149), based in part on Rigby L.J.'s dicta and also *A-G v Duke of Northumberland* (1877) 7 Ch. D. 745 at 752, per Sir George Jessel M.R., appears not to make the distinction, which he goes on to describe, between gifts of money and other purposes, nor to distinguish between express and implied exclusions.

[86] *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation* [1968] A.C. 138, 149.

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poverty is an essential element in charity more acute and the tension between the popular and legal meanings of charity more pronounced. It is not surprising, therefore, that the legitimacy of charities charging fees has been challenged, but the courts have not refused charitable status on the grounds of fees being charged, even high fees, provided any surplus or profit is applied to charitable purposes.

1. Level of fees

If an organisation's purposes are charitable, charitable status will not be denied because the means of fulfilling that purpose involve the running of a business.[87] The courts have not imposed any objective requirement that fees should be fair or reasonable or necessary.[88] The trustees have discretion in setting the level of fees and determining the basis on which they are charged. Even fees set on a commercial basis have not affected charitable status, whether they have been charged to some in order to subsidise others, or across the board. Thus schools have been considered to be charitable despite "substantial fees"[89] or fees fixed "on commercial principles" giving rise to fee receipts significantly exceeding working expenses[90]. Fees for the hospital in *Re Resch*, too, were substantial and produced surpluses but, in line with the common approach, the court was more concerned with the application of the surplus than the level of fees and found the trust to be charitable.[91] Fees are typically expressed to be at a rate necessitated by the cost of providing the services[92] or at less than cost[93]. The charges may vary in order to reflect different levels of services received[94] or different categories of beneficiary[95].

The courts' approach is summarised in *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General:*[96] "… it is clear that the mere fact that charges on a commercial scale are made for services rendered by an institution does not of itself bar that institution from being held to be charitable – so long, at any rate, as all the profits must be retained for its purposes and none can enure to the benefit of

[87] *I.R.C.* v. *Falkirk Temperance Café Trust* 1927 S.C. 261; *Incorporated Council of Law Reporting for England and Wales* v. *Attorney General* [1972] Ch. 73.
[88] The Commission's requirement that fees are "reasonable and necessary" is not founded in law, nor does the Commission offer any authority for it (although it seems possible that it may have misconstrued the words of Isaacs J. in *Taylor* v. *Taylor*, below).
[89] *Abbey Malvern* [1951] Ch. 728.
[90] *Brighton College* v. *Marriott* [1926] A.C. 192.
[91] See too *Falkirk* case, note 87 above.
[92] *The Commissioners of Inland Revenue* v. *The Trustees of the Roberts Marine Mansions* 11 T.C. 425; *Re Neal* (1966) 110 S.J. 549.
[93] *Re Cottam* [1955] 1 W.L.R. 1299; *Re Clarke* [1923] 2 Ch. 407.
[94] *Cawse* v. *Nottinghamshire Lunatic Hospital Committee* [1891] 1 Q.B. 585.
[95] *Roberts Marine Mansions*, note 92 above.
[96] [1972] Ch. 73, 90 per Sachs L.J.

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its individual members". There was no suggestion that extra provision should be made for people unable to afford the fees.[97]

2. Destination of profits

However, if a profit is intended to be made for the private gain of its founders, managers, owners or members, there is no charity.[98] Numerous cases and judicial dicta have noted the destination of profits, and not the benefits available to people unable to afford the fees, to be the critical test in relation to charitable status. Danckwerts J summarised the principle thus: "as the whole purpose of this deed was to secure the education of girls at the Abbey School on a non-profit-making basis, the trusts are plainly of a charitable nature".[99] Similarly, Buckley L.J., in the *Law Reporting case*[100], concluded that the fact that business profits were permitted but could only be applied in furtherance of its objects meant that the Council was "*consequently* not prevented from being a charity by reason of any commercial element in its activities".[101]

Likewise, in *Re Smith*,[102] Upjohn L.J. described two ways of treating the sick: the charitable way, being a hospital where funds are applied exclusively to the relief of the sick, and the non-charitable way, being the application of funds to an institution run for profit, ie where the funds are applied in part to the treatment of the sick and in part to earning profits. Russell L.J. also noted that profit motives would exclude an institution for treating the sick from the legal concept of charity.[103]

[97] H. Picarda identifies the destination of profits as the relevant issue where fees are charged and does not address high fees in particular: *op. cit.* (note 85), p. 25; by contrast J. Warburton (*Tudor on Charities, 9th edn.* (London 2003), p. 11) states that if charges are "set at a level which deters or excludes a substantial proportion of the beneficial class the public benefit requirement will not be met", although also saying that "charges may be set at a level which generates a surplus to assist the funding of a charity's other current or future activities": regrettably only *Re Resch* is cited (where 'a substantial proportion' of the public were presumably 'deterred' by the hospital's charges) without analysis and reference is made to the Commission's publication RR8 (although it did not have force of law and was superseded by the guidance); also J. Warburton makes no particular mention of fees charged by schools (despite being very likely to deter or exclude a substantial proportion of the public) in the context of education and public benefit (*ibid.* p. 72, although fee-paying schools are mentioned in relation to bounty (*ibid.* p. 33).

[98] But see *GPDS* v. *Ereaut* [1931] A.C. 12, 24 (where the possibility of profit was held not to be conclusive against finding that a school was a 'public school' within tax legislation). Note too that the fact that there is no intention to make profits for private gain does not necessarily mean that something *is* a charity: *Re Bushnell, Decd.* [1975] 1 W.L.R. 1596.

[99] *Abbey Malvern* [1951] Ch. 728, 738; payment of dividends or an entitlement to a return of capital may be critical (*The Birkenhead School Ltd* v. *Dring* 11 T.C. 273) unless they have to be reapplied to charitable purposes (*Abbey Malvern*, supra; *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation* [1968] A.C. 138) or do not amount to a purpose of the school (*GPDS* v. *Ereaut*, note 98 above; cf. *GPDS* v. *Minister of Town and Country Planning* [1951] Ch. 400.

[100] [1972] Ch. 73, 104.

[101] Italics added. See too *I.R.C.* v. *Falkirk Temperance Café Trust*, 1927 S.C. 261, 268 (Lord Sands insisting that "all private gain must be eliminated").

[102] [1962] 1 W.L.R. 763, 768.

[103] *Ibid.*, 769. See too *Taylor* v. *Taylor*, below, where absence of private gain was critical.

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The position may be different, however, where the profit-making institution is not the purported charity itself but another institution which might be used as a vehicle for carrying out the charity's purposes. In *Taylor* v. *Taylor*,[104] Isaacs J. contemplated circumstances where founding or endowing a non-profit-making institution would not be practicable and expressed his view that the charitable intention could properly be carried out by providing financial assistance to a profit-making institution which would meet the needs of the beneficiaries.[105]

The principal fee-charging charities are independent schools and hospitals and the courts may have shown a greater readiness to affirm charitable status in education cases.[106] However, it is submitted that the essence of the decisions can be extracted and generally applied. This is that there must be some charitable, or altruistic, element that distinguishes the organisation from a commercial venture. There must be some "benevolent source or sources" which result in the beneficiaries receiving the services for less than the full commercial or market rate.[107] This might be an original gift of money or property, or ongoing source of income such as donations, subscriptions or investment income, or higher fees charged to some in order to subsidise others. Provided an organisation's purposes are charitable, the "unselfregarding" diversion of profits into those charitable purposes will also suffice.[108] The courts have not generally insisted on one form of altruism over another.[109] Without such evidence of altruism, the organisation is indistinguishable from a commercial venture.[110]

3. Reduction or waiver of charges

Of course, one of the consequences of an organisation's charitable foundation or income is that it may be able to reduce the charges to some beneficiaries in particular or to waive them altogether. This is

[104] [1910] 10 C.L.R. 218, 239.

[105] The Commission appears to disregard the context of the judge's comments in this case.

[106] See the decisions in *Brighton College* v. *Marriott, Abbey Malvern*, notes 90 and 99 above; also counsel's argument in *Re Resch* [1969] 1 A.C. at p. 531, that "the educational cases stand on their own" in not requiring gratuitous or means-tested services to be provided to the poor.

[107] *Inland Revenue* v. *Peeblesshire Nursing Association* 1927 S.C. 215, 222 per Lord Sands: "It is not fatal to the charitable character of an institution that the beneficiaries should pay for the benefits they get, always provided that they pay less than the market price of that benefit, and that the difference is made up to them from benevolent sources."

[108] *Incorporated Council of Law Reporting for England and Wales* v. *Attorney-General* [1972] Ch. 73, 104. Note that a diversion of profits to charitable purposes alone does not render non-charitable purposes charitable: *Oxfam* v. *Birmingham City District Council* [1976] A.C. 126.

[109] Although an endowment in particular (for the whole or partial maintenance by charity) was required for tax allowances purposes in *Blake* v. *City of Mayor of London* [1887] 19 Q.B.D. 79 and *Needham* v. *Bowers* (1888) 21 Q.B.D. 436; cf *GPDS* v. *Ereaut* [1931] A.C. 12, where the approach of the House of Lords was to weigh up a number of factors, each described as non-conclusive.

[110] On the other hand, of course, the existence of a benevolent source does not necessarily mean that the organisation will be charitable, any more than the absence of profit will render something charitable.

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different from providing services to all beneficiaries at below cost or market value. Such a reduction or waiver of fees may be targeted at the less well-off and, therefore, becomes a significant part of any policy or argument which seeks to correlate legal charity and relief of the poor.

An organisation's obligation or willingness to reduce or waive fees, therefore, has been raised in evidence and argument and may be relied upon as indicative of charitable intention where the charitable nature of the purposes is in question. However, the courts have not required fee-charging charities to offer reduced or nil fees for their services before charitable status can be attributed.[111] For example, Nicholas J. in *Perpetual Trustee Co* v. *St Luke's Hospital*[112] commented that "… a hospital is not excluded from the category of charitable institutions because it accepts no patients who do not pay fees …" and he intimated that charitable status cannot depend on precise numbers of those receiving below-cost services or their proportion to the total number of beneficiaries or the precise level of fees.[113]

4. Re Resch[114]

Having identified the purposes of the hospital as prima facie charitable, the Privy Council considered two "disqualifying indicia" that might render it non-charitable: first, whether it was run for private profit and, secondly, whether it failed the necessary test of public character by not benefiting a sufficiently large section of the community. It was not disqualified on either count.

There was evidence that some patients had benefited without payment. However, there were no rules or constitution for the hospital (nor provision in the will) which required some services to be given *gratis*, and so the position could have varied from year to year. Counsel for the hospital did not seek to rely on such provision for the less well-off[115] and although Lord Wilberforce commented on this part of

[111] *GPDS* v. *Ereaut*, [1931] A.C. 12; cf. *Blake* v. *Mayor and Citizens of the City of London*, supra, 82 per Lopes L.J. (although his words regarding gratuitous provision can be taken to refer to a reduced cost for all, in the light of the absence of evidence of free or reduced fees for some and the school's endowment; also his words are cited in *Cawse* v. *Nottingham Lunatic Hospital Committee*, apparently, to refer to 'reduced' fees for all due to a charitable endowment, rather than reduced or nil fees for some).

[112] (1939) 39 S.R. (NSW) 408, 419.

[113] *Ibid*., 421 (in what seems a sensible and pragmatic approach that avoids the myriad of problems created by the Commission's approach); it seems neither evidence of reduced or waived charges (*Falkirk case* 1927 S.C. 261) nor an express power to reduce and waive charges (*Roberts Marine Mansions* 11 T.C. 425) are critical in establishing charitable status; see too *Cawse* v. *Notts Lunatic Hospital* [1891] 1 Q.B. 585, where the existence of endowed funds was treated as preserving the original eleemosynary character of the hospital notwithstanding the paying patients and absence of free or reduced services; equally, generous gratuitous provision will not be conclusive in favour of charity: *Needham* v. *Bowers* (1888) 21 Q.B.D. 436.

[114] [1969] 1 A.C. 514.

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the evidence in summarising the facts of the case,[116] he can hardly be said to have attached weight to it and it is not a conclusive, or even critical, part of the Privy Council's decision.[117] Certainly there was no suggestion that the provision of reduced or free services should be a qualifying factor of charitable status.[118]

Recognising the high cost of medical services, the court held that a trust for providing medical facilities would not be deprived of charitable status "merely because by reason of expense they could *only* be made use of by persons of some means".[119] This principle is significant in stating that a charitable purpose can be charitable even though high fees (as opposed to an express exclusion on the terms) mean that only the rich can benefit.[120] Of course, the purpose could still be rendered non-charitable by an intention to make a profit for private gain or to apply monies also to non-charitable purposes. However, having a class of beneficiaries comprised only of "persons of some means" does not deprive the institution of charitable status on the basis of it failing to benefit a sufficiently large section of the community.

Lord Wilberforce identified indirect benefit and said that it could be taken into account in determining public benefit,[121] apparently as much to do with the sufficiency of the section of the public as with the charitable nature of the purpose. Independent schools provide an indirect benefit to society by educating some of its number and by relieving the burden to the state. However, although indirect benefit alone may even be sufficient,[122] the courts have not insisted on

[115] As one might have expected if the law had established this to be a necessary element of charitable status.

[116] *Ibid.*, at 539 ("from time to time patients have been treated free of charge or at reduced fees") and, at 544 (patients who "cannot get a reduction of or exemption from the charges" being some of those excluded from benefiting).

[117] Nor does it appear in the headnote to the case; C. Buckley calls the weight attached to this evidence "negligible": "The Charities Act 2006: Consolidation or reform?" C.L. & P.R. 2009 vol. 11 issue 1, 1.

[118] See too *Perpetual Trustee Co* v. *St Luke's Hospital* (1939) 39 S.R. (NSW) 408, where the hospital was held to be charitable even though there was no free treatment and it was a 'great objective' but not a requirement of the hospital to provide some services at less than cost price.

[119] *Ibid.*, 544 (italics added). It should be noted that Lord Wilberforce suggested that to the extent that the poor could be said to be excluded, that would mean that the services were not open to all and not that they were non-charitable.

[120] Whether or not the case can be seen as illustrating an implied exclusion on the terms must be open to debate, given Lord Wilberforce's comment that the poor were not excluded (because some poor might obtain gratuitous services or have contributed sufficiently to a medical benefit scheme (although counsel's argument that anyone who contributes to such a scheme cannot be poor has some merit)); however, it would appear to do so to all intents and purposes (and *Perpetual Trustee Co* v. *St Luke's Hospital*, note 118 above, would appear to represent an implied exclusion on the terms and was nonetheless charitable).

[121] [1969] 1 A.C. at p. 544.

[122] *Re Good* [1905] 2 Ch. 60. See too M. Albery, "Trusts for the benefit of the inhabitants of a locality" (1940) 56 L.Q.R. 49 at 51–52 suggesting that certain cases should be interpreted as conferring charitable status because of relief to the public purse rather than as purposes for the general inhabitants of a parish or town.

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identifying indirect benefit in addition to direct benefit once purposes have been acknowledged to be charitable.[123]

III. The Commission's Principles From Case Law

The principles which the Commission extrapolates from underlying case law are that opportunities to benefit must not be unreasonably restricted by ability to pay fees and that the poor must not be excluded from the opportunity to benefit.[124] In expounding those principles, and in its public benefit assessment programme, the Commission demands a rather more proactive approach than these words might suggest and requires trustees to provide "sufficient opportunity to benefit in a material way for people unable to afford the fees, including those in poverty".[125] This places a significant burden on trustees, which runs counter to the extensive judicial authority indicating that poverty is not a qualification of charity.[126]

The Commission bases these principles on *Re Resch*[127] in particular, and six other cases.[128] Only two cases involve fees[129] and none offers even tentative support for the stated principles.[130] In its legal analysis, it quotes dicta from *Jones* v. *Williams*[131], *Pemsel's case*[132], *Re Macduff* (Lindley L.J.)[133] and *Taylor* v. *Taylor* (Griffith C.J.)[134] but does not provide any analysis of those dicta. It also cites *Oppenheim* v. *Tobacco Securities Trust Co Ltd*[135] but gives no specific reference.[136] These cases

[123] Cf. P.S.Atiyah, "Public benefit in charities" (1958) 21 M.L.R. 138; and no amount of indirect benefit will render charitable what is otherwise non-charitable: *Re Compton* [1945] Ch. 123; *Gilmour* v. *Coats* [1949] A.C. 426; *I.R.C.* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380.

[124] Sub-principles 2b and 2c respectively: *Charities and Public Benefit*, December 2008.

[125] E.g. *Public Benefit and Fee Charging*, para. B4.

[126] Arguably putting trustees in potential breach of their duty to carry out the organisation's charitable purposes in the best interests of its beneficiaries.

[127] [1969] 1 A.C. 514.

[128] *Analysis of the law underpinning Public Benefit and Fee Charging:* Commission, December 2008; in addition to the cases mentioned here, the Commission also refers to *Re Coulthurst* [1951] Ch. 661 regarding the definition of 'poor' and various other cases to support the (uncontested) principle that charities are permitted to charge fees.

[129] *Re Resch* (Privy Council) and *Taylor* v. *Taylor* (High Court of Australia), both of persuasive authority only.

[130] Luxton accuses the Commission of having "cobbled together an assortment of legal justifications which, on further analysis, do not effectively support the Commission's general stance": op. cit. p. 28.

[131] 27 E.R. 422 (discussed above).

[132] [1891] A.C. 531 (discussed above).

[133] [1896] 2 Ch. 451, 464 (discussed above).

[134] [1910] 10 C.L.R. 218, 226: again it appears that Griffith C.J. had in mind profit-making institutions and his view that a gift to a non-profit making but fee-charging institution like the one in *Cawse* v. *Notts Lunatic Hospital Committee* would be charitable, "unless, perhaps, if the poor were excluded from its benefits" suggests that he envisaged only an express exclusion rendering it non-charitable.

[135] [1951] A.C. 297.

[136] Poverty could only be said to be relevant in this case in the sense that only if the purpose had been the relief of poverty rather than the advancement of education, would the private character of the trust have been capable of being charitable.

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are said to support the principle in *Re Resch* that an organisation which "wholly excluded poorer people from any benefits, direct or indirect, would not be set up, and operate, for the benefit of the public and therefore would not be a charity".[137]

In fact, Lord Wilberforce articulated no such principle. Although his approach might be interpreted to favour the view that an express exclusion of the poor on the terms of the trust might have rendered it non-charitable, any such principle could not be applied to an implied exclusion in practice, since that would conflict with his stated principle that a charitable purpose was not rendered non-charitable only because high fees meant that "only people of some means" could benefit from it.

The Commission fails to comment upon this principle but concentrates instead on Lord Wilberforce's contrasting example, that "to limit admission to a nursing home to the rich would not be charitable"[138]. However, this example cannot be taken as authority for the Commission's analysis. His reference to limiting admission must be construed as referring to an express exclusion on the terms if it is not to conflict with the afore-mentioned principle, or it may be seen as a "belt and braces" approach, akin to the examples of philanthropic but non-charitable purposes in *Re Macduff*[139]. In addition,[140] it seems likely that his lordship was referring to institutions run for profit and therefore not charitable in any event. Five years earlier, Wilberforce J, as he then was, was required to interpret the word "hospital" in a will.[141] Since the word "hospital" could be construed as including non-charitable institutions, he held that the purposes were not exclusively charitable and the gift failed. On appeal, Lord Denning M.R. agreed that the word "hospital" was capable of covering "both voluntary hospitals, dependent on voluntary contributions, and also nursing homes run for private profit",[142] but it was held that only the former were intended by the testator. Upjohn L.J. described the non-charitable purpose most pertinently: "The non-charitable way of treating the sick is by applying funds to an institution run for profit, commonly called a 'Nursing Home'."[143]

The Commission concludes that the access provided by the hospital to those not able to afford the fees was "clearly more than minimal or nominal … or … by chance" and that "it was therefore clear that there

[137] Op. cit., para. 3.59.
[138] [1969] 1 A.C. at p. 544.
[139] [1896] 2 Ch. 451.
[140] Although it should be noted that the example was given in the context of considering the poor being excluded and not in relation to considerations of commercial profit (the second and first 'disqualifying indicia' respectively).
[141] *Re Smith* [1962] 1 W.L.R. 763.
[142] *Ibid*., p. 766.
[143] *Ibid*., p. 768.

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were sufficient benefits to poorer people who could not afford the fees in this case"[144] and yet this is at odds with the expressions of small and occasional gratuitous services described by counsel and Lord Wilberforce. The Commission's legal analysis fails to explain the significance of a fee-charging charity's surpluses and does not differentiate between express and implied exclusions of the poor.

The Commission maintains that a school which fails to demonstrate either of these principles[145] is not operating for the public benefit, with the consequences that the trustees are "operating in breach of their charity's trusts" and the school is "not, in substance, a charity".[146] Highfield Priory School was declared to be "capable of being charitable" but only if it met the public benefit requirement which, the Commission reported, it was not doing because it failed to meet these two principles.[147] As an institution which "it [the Commission] no longer considers is a charity", the Commission could, perhaps should, have removed it from the register of charities.[148] However, this might have led to an argument that the school had never been a charity and had been registered in error (since it had not changed materially since registration). In these circumstances, the Commission might have been forced to accept that the school could then continue as before, but removed from the Commission's regulatory regime and without the fiscal and other benefits of charitable status.[149] Instead, the Commission accepted the school's "plan" to provide means-tested bursaries worth 4.9% of gross fee income, in return for which it was reassured of its continuing charitable status.[150] In the face of potential liability for breach of trust and divestment of charitable status, it is hardly surprising that the school's trustees did the Commission's bidding.

IV. Conclusion

The law continues to require an organisation to be established for exclusively charitable purposes (now listed), which are neither outweighed by detriment nor illegal nor contrary to public policy, and which are for the benefit of the public or a section of the public.

[144] *Legal analysis*, para. 3.58.
[145] Sub-principles 2b and 2c.
[146] *Emerging Findings*, Commission July 2009, Section I2.
[147] It was also said to fail sub-principle 2d (no private benefits) due to a potential conflict of interest faced by parent-governors (arguably more a matter for regulatory action than impinging on questions of charitable status).
[148] Charities Act 1993, s. 3(4)(a) provides that the Commission 'shall' remove such an institution from the register.
[149] There could be no question of a cy-pres application of the school's assets; the consequences of failing the public benefit requirement are of utmost importance but not adequately explained by the Commission and are beyond the scope of this article.
[150] The Commission's willingness to accept projections and expressions of hope and intent, without any apparent conditions attached as to the plan becoming a reality, suggests that it is not keen to test the consequences of a registered charity failing to meet its test of public benefit.

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Subsection 3(2) effects no substantive change in the law. The Commission's two principles regarding the poor are founded on the principle that a charity cannot have a class of beneficiaries which comprises only the rich. *Re Resch* is not authority for that proposition in the context of fee-charging charities and the other cases which the Commission cites in support are specifically said, in *Re Resch*, not to support it.

Although judicial dicta suggest that an express exclusion of the poor on the terms may result in charitable status being denied on policy grounds, the law does not require the trustees of a charity to provide services for nil or reduced fees to the poor, or to provide opportunities to people outside its beneficial class.

The Commission's conclusion that a school which fails to operate for the public benefit is in breach of trust is a distortion of the law by a non-ministerial government department responsible for offering guidance on the law.[151] It appears to have fashioned its exposition of the law on its stated aim to "help the general public to see what charities do actively to reflect the benefits of their special status".[152] Notwithstanding its promises, the Commission has failed to act in the same way as the courts.

A wish to see wider access to those less well off is a legitimate ideology and was a recurrent theme in many of the debates in Parliament before the Act was passed. It is, of course, open to the legislature to remove any or all of the privileges afforded to charities or to legislate for greater access to services.[153] However, the 2006 Act did neither and provides no justification for the Commission's approach.

When Highfield Priory submitted its revised plans, the Commission may have congratulated itself on a job well done. Now that members of the Upper Tribunal (Tax and Chancery) have considered the Attorney General's reference and application for judicial review brought by the Independent Schools Council,[154] the judgment of the court might be expected to reveal a different conclusion.

[151] Interestingly, the guidance presents a quite different interpretation of the law from the Commission's previous publication, RR8 The Character of Charity, published February 2001 (notwithstanding the three decades that *Re Resch* had already spent on the case books), perhaps lending weight to the argument that the Commission is (or was) intent "on making law … in order to further the political intentions of the government"' (P. Luxton, op. cit., p. 28).

[152] *Emerging Findings*, foreword; and yet the courts have been careful to separate consideration of fiscal privileges from determinations of charitable status (note the distancing comments of Viscount Dilhorne and Lords MacDermott and Hodson in response to Lord Cross's comments in *Dingle* v. *Turner* [1972] A.C. 60).

[153] The Supreme Court's scope for law reform is limited, not least by the dearth of cases before the courts.

[154] Both applications were heard by the Upper Tribunal in May 2011 (and, at the time of writing, no judgment has been delivered).

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