Such a trust will be recognised where the profit derived directly from the principal's property (as in *Daraydan Holdings Ltd.* v. *Solland International Ltd.* [2004] EWHC 622 (Ch), [2005] Ch. 119) or derived from the exploitation of an opportunity or right which was available to the principal and would have benefited him had the fiduciary not intervened (as in *Cook* v. *Deeks* [1916] 1 A.C. 554). In both situations the recognition of the constructive trust is justified because the defendant profited from interference with the principal's actual or putative proprietary rights. In any other situation the fiduciary will only be personally liable to account for the profit made from breach of duty, and quite right too.

GRAHAM VIRGO

## CHARITABLE TRUSTS WITH POLITICAL OBJECTS

POLITICAL objects have a negative role in the law of charitable trusts. A trust is generally charitable if it fulfils two positive requirements: that it be (*i*) for a charitable purpose and (*ii*) for the benefit of the public. But political objects cancel those matters out. A trust which fulfils both positive requirements will not be charitable if its main purpose is to attain political goals. Significantly, trusts to seek legal change are invalid: to seek legal change is considered "political". This has been English law since 1917 (*Bowman* v. *Secular Society Ltd* [1917] A.C. 406, 442 HL), and was Australian law until the High Court rejected the political objects doctrine in *Aid/Watch Inc.* v. *F.C.T.* [2010] HCA 42, (2010) 241 C.L.R. 539. Should English law follow suit?

The question for the High Court was whether an organisation called Aid/Watch was a charity, and thus exempt from taxation. The majority (French C.J., Gummow, Hayne, Crennan, and Bell J.J.) held that it was. Its object was "the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid", which was a purpose beneficial to the community (*Pemsel's Case* [1891] A.C. 531, 583 HL; Charities Act 2006, s.2(2)(e), (c)(ii), (m)). So framed, Aid/Watch's object might have fallen outside the political objects doctrine in its original form, when it was directed to gifts to secure a change in the law. In the majority's view, securing legal change was not Aid/Watch's object. However, since *Bowman* the class of "political objects" has become remarkably wide. "Political objects" now include opposing change to English law; promoting or opposing change to the laws of other countries; and seeking the reversal of government policies and administrative decisions. Until *Aid/Watch*, therefore, Aid/Watch could not have been a charity.

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The current English position lacks cogency. The difficulties began with the original formulation of the political objects doctrine in *Bowman*. Lord Parker said the doctrine applied because "the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift": [1917] A.C. at 442. However, this reason is problematic. It would be cogent if it meant that courts "cannot" adjudge whether a gift to change the law will or will not benefit the public where there is no evidence in point. But Lord Parker was not talking about evidence. He was invoking a substantive principle under which a gift to change the law is not charitable even where there is evidence that it will benefit the public – and even where the proposed change concerns the law on an established charitable purpose. A substantive principle with such curious outcomes is not cogent either.

In *Aid/Watch*, the court searched unsuccessfully for a deeper rationale. Lord Parker gave no further explanation of the doctrine, they said. And the explanation favoured by subsequent courts is obscure. This is that courts "cannot" adjudge whether a gift to change the law will or will not benefit the public because that would involve the law "stultify[ing] itself": *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31, 50, 62 HL. Powerful reasons support the High Court's rejection of this *ad hoc* explanation. To stultify is to cause something to become ineffective or useless, or to make it appear foolish or absurd. A court would appear foolish and absurd if it decided the validity of a gift on the basis of laws which it proclaimed to be incorrect. But real stultification is only likely in unrealistic situations such as this. In many quite conventional situations, the courts have said, without making themselves appear foolish or absurd, that Parliament might see fit to change the law. A court which upheld the validity of a gift to seek a change in the law would be saying no more than that.

The lack of cogency in the political objects doctrine is enough to make the state of Australian law, since *Aid/Watch*, preferable to the current English position. However, the majority in *Aid/Watch* added a further ground for their decision. The political objects doctrine conflicts with key features of Australian law: the existence of representative and responsible government with a universal adult franchise; the ability to amend the Commonwealth Constitution by popular referendum; and the implied (Commonwealth) constitutional freedom of communication between electors, legislators, and officers of the executive. In sum, "[t]he system of law which applies in Australia … postulates for its operation the very 'agitation' for legislative and political changes" with which the political purposes doctrine is concerned. While Australian and English constitutional law differ substantially, it would be surprising if the UK Supreme Court were to deny that the English

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legal system postulates political agitation. But as already said, the lack of cogency in the political purposes doctrine is reason enough to reject it.

To reject the political objects doctrine is not to say that all political objects are charitable. Working out the limits will be crucial to the development of Australian law and, if England follows suit, English law too. Two potential limits present themselves. First, it may be that encouraging public debate will only be a charitable purpose if the debate concerns an established charitable purpose. Secondly, a trust with political objects will apparently not be charitable if (*i*) its formation or performance depend on, or further the doing of, an illegal act or an act contrary to public policy; or (*ii*) it is contrary to "the established system of government"; or (*iii*) its means and ends do not contribute to the public welfare.

Finally, *Aid/Watch* gives no encouragement to the thought that courts should be permitted or required to evaluate the merits of a change in the law which a supposed charity may desire. Those things would compromise a court's institutional integrity. It is significant that Aid/Watch was held to be charitable, not because it favoured a particular change in the law, but because it sought to encourage public debate about the activities of government in relation to the relief of poverty.

P.G. TURNER

## INSURING THE CHARTER: WHO BEARS THE COST?

IN Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, Judgment of 9 November 2010, not yet reported, (noted at [2011] C.L.J. 306), the EU Charter of Fundamental Rights was used for the first time to review and invalidate secondary EU legislation. This marked a turning point in the case law of the Court of Justice of the EU. Until then, the Charter had played only a limited role in adjudication in the EU. While it was proclaimed as a solemn political declaration in 2000, it was only made legally binding in December 2009 with the entry into force of the Treaty of Lisbon.

Further light was shed on the status and effects of the Charter under the Lisbon arrangements by the much awaited judgment of the Court of Justice in *Test Achats* (C-236/09) (judgment of 1 March 2011, not yet reported). The case concerned the compatibility of Article 5(2) of Council Directive 2004/113 EC (OJ 2004 L373, p. 37) implementing the principle of equal treatment between men and women in the access to and supply of goods and services – the so called "Gender Directive",

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