Charitable relief of financial hardship: the public benefit requirement

Article

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Charitable Relief of Financial Hardship: the Public Benefit Requirement

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This article suggests that the "relief of those in need because of financial hardship" (Charities Act 2011, s. 3(1)(j)) is significantly wider than the "relief of poverty" in the range of those who may be helped. Nevertheless, it is likely to enjoy the same relaxed public benefit requirement as the "relief of poverty". So, it would be charitable to assist the relatively affluent through a financially difficult period – such as the current pandemic – and this would be so even where the provision made was only for modest numbers and only for those with links to an individual business.

Introduction

The suggestion here is that a settlor may have greater scope than is generally thought to make charitable provision for people who are enduring financial hardship and who are associated with a business of the settlor – employees, suppliers, or others. This is an option that settlors may wish to consider during the current pandemic or in its aftermath, allowing them to provide specifically for those they feel a special concern towards, while securing the tax efficiencies that charitable provision can involve.

It is widely known that in the special case of the "relief of poverty" the public benefit requirement for charitable status is relaxed, and provision can be charitable although made only for small numbers and only for those with a "personal nexus" such as links to a common employer[1] – but it is generally thought the relaxation is made *only* in the case of poverty. The argument made here is that there is a neglected newly-listed charitable purpose in the Charities Act 2011, the "relief of those in need because of financial hardship"; that this is significantly wider than the relief of poverty in the range of those who may be helped; and that it would engage the same relaxation of the public benefit test as poverty does, so that it would still be charitable to assist only modest numbers and only those with a personal nexus such as links to a common employer.

The statutory framework for charitable status

Charities Act 2011, Part 1, Chapter 1 is usually summarised by saying that a trust (or other vehicle) has charitable status if: (1) it is for a charitable purpose, according to the listings in the Act; (2) it satisfies the public benefit requirement; (3) it is exclusively charitable, with no other purposes. By Finance Act 2010, Schedule 6, registration and management requirements must be satisfied to obtain the tax advantages associated with charitable status. We shall adopt the usual threefold test approach.

Charitable purpose

The list of charitable purposes in Charities Act 2011, s. 3(1), includes as paragraph (a) "the prevention or relief of poverty". A liberal meaning has been given to "poverty". The most widely cited definition is that of Sir Raymond Evershed M.R., delivering the leading judgment

[1] See n. 14, below.

holding that widows and orphans of bank workers could be regarded as in "poverty", in *Re Coulthurst*:[2]

> "It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life, and so forth."

The statutory list now also includes as paragraph (j) "the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage".[3]

What is the significance of the "financial hardship" provision? There appear to be no judicial pronouncements elaborating on it; although in *Credit Suisse International v Stichting Vestia Groep*[4] Andrew Smith J. accepted that those in Dutch social housing were in need of accommodation because of financial hardship within the provision's meaning. This may be a first indication that "financial hardship" will be seen by the judges as wider, and easier to find, than "poverty".[5] The Parliamentary debates shed no light.[6] The Charity Commission's current guidance says nothing about the financial hardship provision.[7] The leading monographs are sceptical whether "those in need because of financial hardship" are a wider class than those in "poverty". Hubert Picarda Q.C.'s *Law and Practice Relating to Charities* sees no extension to the previous law on poverty;[8] while *Tudor on Charities* grants only that there might be a small extension, saying need from financial hardship "almost completely overlaps with … poverty".[9] Although, helpfully to the argument made here, *Tudor* continues:[10]

> "However, the scope of 'the relief of financial hardship' may be wider than the relief of poverty because although as a matter of charity law 'poverty' is a relative term, persons who might not generally be described as poor might suffer from financial hardship from time to time."

To view the financial hardship provision as not adding meaningfully to the poverty provision would be inconsistent with presumption that "Parliament does nothing in vain": everything in a statute is assumed to have independent significance.[11] And it is established that that a person can be in "need" within paragraph (j) even if they are not in "poverty" within paragraph (a): *Joseph Rowntree Memorial Trust Housing Association Ltd v A.-G.*.[12]

We are left then with the natural meaning of the words "in need because of financial hardship"; starting from a presumption that something meaningful is intended to be added beyond the relief of poverty; and knowing on authority that a person can be in need even if not

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[2] [1951] Ch. 661 (C.A.), 665-66.

[3] Originally enacted as Charities Act 2006, s. 2(2)(j).

[4] [2014] EWHC 3103 (Comm), esp. [261].

[5] Contrast *Re Niyazi's Will Trusts* [1978] 1 W.L.R. 910 (Ch.), where Megarry V.-C. held a modest testamentary trust for the construction of a working men's hostel in an area of 1960s Cyprus with a housing shortage to be *only just* charitable as a relief of poverty, saying (915) "the case is desperately near the borderline, and I have hesitated in reaching my conclusion".

[6] Baroness Scotland did say about the list of charitable purposes, originally in Charities Act 2006 (H.L. Deb. 20 January 2005, vol. 668, col. 885), "The Government's intention is to clarify and codify the law, rather than to extend it significantly." But there were clear extensions; and her use of "significantly" is open-ended. This does not satisfy the rule in *Pepper v Hart* [1993] A.C. 593 (H.L.), 634 and 640, that only "clear" ministerial statements are admissible as an aid to statutory construction.

[7] Charity Commission, *Charitable Purposes* (September 2013).

[8] Hubert Picarda, *The Law and Practice Relating to Charities* (4th edn, Bloomsbury Professional 2010), 168.

[9] William Henderson, Jonathan Fowles and Julian Smith (eds), *Tudor on Charities* (10th edn, Sweet & Maxwell 2015), para. 2.209.

[10] ibid.

[11] Diggory Bailey and Luke Norbury (eds), *Bennion on Statutory Interpretation* (7th edn, LexisNexis 2017), sect. 21.2.

[12] [1983] Ch. 159 (Ch.), 174. Deciding non-profit provision of age-adapted housing was charitable as a relief of the needs of the elderly: selling leases to those able to afford them.

in poverty. It is suggested that in ordinary English there is an appreciable difference between being "in need because of financial hardship" and being in "poverty" (even given its liberal legal understanding). And that is being shown *very starkly* by current pandemic circumstances. Many usually relatively affluent people, who could not be sensibly described as in poverty (and even the description temporary poverty would be too great a stretch) have nevertheless been left in need from financial hardship, on a straightforward understanding of those words. It is all too evident that many, after losing their incomes for months, have been left making very painful choices to get by. Recognising that such people could be the objects of charity would admittedly be a long way from the popular idea of "charity". But the legal concept of charity is obviously a long way from the popular idea.[13] There are many charities that primarily benefit the middle class and even the well-to-do – from elite fee-charging schools to opera houses. Given that context, it seems eminently reasonable to suggest that those in real financial distress, such as economic casualties of the current pandemic, can be seen as legitimate objects of charity, even if, for example, comfortably within the middle class.

It is suggested that the natural meaning of the phrase "in need because of financial hardship", in its statutory context, goes significantly beyond those in "poverty" (even given its liberal legal interpretation) and that extension should be understood as the purpose of the words in the Act.

Public benefit

The House of Lords affirmed in *Dingle v Turner*[14] that a relief of poverty can satisfy the public benefit requirement even if the provision is for a relatively small group and even if they all have a personal nexus; for example, they are all relatives, or employees. The law only requires in this regard that the relief be amongst a class of poor people and not be for particular beneficiaries. By contrast, the House of Lords laid down in *Oppenheim v Tobacco Securities Trust Co. Ltd*[15] that, outside the relief of poverty, to satisfy the public benefit requirement those who can benefit from a charitable purpose must not be "numerically negligible".[16] And that as a general rule of charity law, there is only private – not public – benefit if those who can benefit are all defined by a "personal nexus":[17] that is, they are all linked to one person, or to several people – equally to one company or several companies. Links mentioned were being family members or employees.

However, it is suggested there is a respectable argument that financial hardship, like poverty, is not affected by either the "not numerically negligible" proposition or the "no personal nexus" proposition.

Not numerically negligible

The relief of poverty can satisfy the public benefit requirement despite being for small numbers. Relieving poverty amongst 50 relatives has been held charitable;[18] and among a smaller class of 26 relatives, plus issue born during a 21-year period.[19] A possible justification for the minimal numbers that need to be helped when relieving poverty in order to satisfy the public benefit requirement is that all relief benefits the general public, by reducing the burden on the

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[13] Mary Synge, *The "New" Public Benefit Requirement: Making Sense of Charity Law?* (Bloomsbury 2015), esp. 29-32.

[14] [1972] A.C. 601 (H.L.). The law has not been changed by the Charities Act: *A.-G. v Charity Commission for England and Wales* [2012] UKUT 420 (TCC), [2012] W.T.L.R. 977, [39] (although that case probably did not correctly state the prior law: see Jonathan Garton, *Public Benefit in Charity Law* (O.U.P. 2013), para. 5.280).

[15] [1951] A.C. 297 (H.L.).

[16] ibid., 305-6 (Lord Simonds, delivering the leading judgment).

[17] ibid.

[18] *Re Cohen* [1973] 1 W.L.R. 415 (Ch.).

[19] *Re Segelman* [1996] Ch. 171 (Ch.).

state – the taxpayer.[20] Outside the relief of poverty, the "not numerically negligible" test for satisfying the public benefit requirement is more usually stated as it was in the leading case of *Verge v Somerville*:[21] the benefits must be for the whole public, or a sufficiently large section of it – examples given were the inhabitants of a town or parish – it must not be for a set of private individuals. But a sufficiently large section of the public does not have a precise meaning; it has been judicially recognised that it varies widely with the context.[22]

It is arguable that the relief of need from financial hardship only has the same public benefit requirement in this respect as the relief of poverty. Seemingly the most helpful authority regarding minimum numbers when it comes to relief of need from financial hardship is *Cross v Lloyd-Greame*.[23] Eve J. treated the dependants of six victims killed in a disaster as a sufficient section of the public.[24] Professor Peter Luxton specifically views the case as, "Outside the relief of poverty".[25] And considering other "need" cases within Charities Act 2011, s. 3(1)(j) – other than need due to financial hardship – a gift to 10 blind girls and 10 blind boys was held a charitable relief of the needs of the disabled in *Re Lewis*.[26] (No doubt the wider public also benefitted through their care and education. However, a case for indirect benefit to society could equally be made for relieving need due to financial hardship: that it reduces suicide, mental illness, family break-up, domestic abuse, and a range of other serious societal ills associated with hardship.)

So, it appears that only comparably small numbers need to benefit in either the relief of poverty or the relief of financial hardship categories. (However, this is not entirely free from doubt. Contrast a decision that 33 residents of an old people's home were not a sufficient section of the public for a relief of need due to age.[27] But this case was criticised at length by Dr Mary Synge and appears to be wrong on the point.[28])

No personal nexus

The relief of poverty was stated to be the sole established exception from the rule that there must be "no personal nexus" for the public benefit requirement to be satisfied in *Oppenheim v Tobacco Securities*.[29] Nevertheless, it is suggested that, outside the relief of poverty, the "no personal nexus" proposition is probably less absolute than is generally thought. It was only put

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[20] Alison Dunn "As 'Cold as Charity'?: Poverty, Equity and the Charitable Trust" (2000) 20 L.S. 222, esp 222 and 233-34.

[21] [1924] A.C. 496 (P.C.).

[22] For the very highest judicial recognition of this, see the citations in William Henderson, Jonathan Fowles and Julian Smith (eds), *Tudor on Charities* (10th edn, Sweet & Maxwell 2015), para. 1.144.

[23] (1909) 102 L.T. 163 (Ch.).

[24] After two fishing boats were lost, an appeal for "relief" of the crew's dependants was made. There is no mention that they were reduced to immediate or imminent poverty – although that might be speculated on. The appeal raised more than the trustees believed the dependants should receive and they planned application of the surplus to similar future disasters. Despite an admission by counsel for one widow that the fund would place her (164) 'in a position of affluence' Eve J. was not persuaded there was a surplus in the charitable fund to be applied cy-près – although he referred the matter for consideration by a judge in chambers. So, it is not clear that the trust was a response to poverty; and it is tolerably clear that the dependants were not restricted to what was necessary to relieve poverty. In modern terms, this looks like a relief of need from the financial hardship of losing a breadwinner.

[25] Peter Luxton, *The Law of Charities* (O.U.P. 2001), para. 5.03.

[26] [1955] Ch. 104 (Ch.). It could be argued that *all blind children* were the class to benefit, with individuals to be selected. But it is arguably disingenuous to speak about a larger class when it is clear that the benefits will go to only a few individuals: Joseph Jaconelli, "Adjudicating on Charitable Status - a Reconsideration of the Elements" [2013] Conv. 96, 105-6.

[27] *Re Duffy* [2013] EWHC 2395 (Ch).

[28] Mary Synge, "Charitable Status: not a negligible matter" (2016) 132 L.Q.R. 303. (Note also *Re Gillingham Bus Disaster Fund* [1958] Ch. 300 (Ch.) (affd [1959] Ch. 62 (C.A.)), 305, where it was believed, without argument or decision, that around 30 disaster victims were not a sufficient section of the public.)

[29] [1951] A.C. 297 (H.L.), 305, 308-9 (Lord Simonds, delivering the leading judgment).

forward in *Oppenheim v Tobacco Securities* as a *general rule*: it was recognised that there might be exceptions (in addition to the exception necessarily recognised for the relief of poverty).[30] And it was strongly questioned by high authority whether the personal nexus rule was correct at all (although such criticism may have stemmed from a failure to recognise it is *subject to reasoned exceptions*).[31] Against that background, the House of Lords has since suggested, albeit obiter, in *Dingle v Turner*,[32] that the personal nexus rule *is* subject to exceptions: indeed, they suggested it is a rule that should only apply where there is a justification for it – as in the *Oppenheim v Tobacco Securities* case, thwarting an attempt to finance employee perks at the expense of the taxpayer, under the guise of charity, for the benefit of the companies.[33] Professor Michael Chesterman provided the best rationalisation of the "no personal nexus" rule: it should negative charitable status only where a settlor is self-interested; an exception from the general rule should operate where they are altruistic.[34] If this is correct, relieving need due to financial hardship, even for those with a personal nexus – for example employees – should not violate the personal nexus rule any more than relief of poverty does.

Furthermore, we may have authority that need from financial hardship *is* an exception to the "no personal nexus" rule. The supposed foundation of the "poor employees" line of cases – showing that relieving poverty amongst employees is outside the "no personal nexus" rule – *Re Gosling*[35] seems not to have been a poverty case at all. That was the view of one of our most eminent academic jurists, Professor Patrick Atiyah.[36] A trust "for the purpose of pensioning off the old and worn-out clerks of the firm of Goslings and Sharpe" was held to be for a sufficient section of the public and charitable, despite those able to benefit all sharing a common employer. Byrne J. said the trust came within relief of the aged and the impotent; [37] or – in the wording of the current Charities Act – the relief of those in need because of age or ill-health.[38] He added[39] that he believed "poor clerks of the firm and those unable to properly provide for themselves and their families are intended to be benefited". Overall, this appears to view the trust (correctly, it is suggested, given its wording) as including the relief of poverty, but as

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[30] [1951] A.C. 297 (H.L.), 307-8. Lord Simonds, delivering the leading judgment spoke about government employees, all linked to the same employer: such a case, he said, would be dealt with "on its merits" – recognising that a trust for all the employees in an industry, with various employers, can be of public benefit; so it might be anomalous if it could not be where it was a nationalised industry, all with a single employer.

[31] In particular, Lord MacDermott, dissenting in the *Oppenheim v Tobacco Securities* case itself, 317-18; Lord Denning M.R. in *I.R.C. v Educational Grants Association Ltd* [1967] Ch. 993 (C.A.), 1009; and Lord Cross – writing extrajudicially – Geoffrey Cross, "Some Recent Developments in the Law of Charity" (1956) 72 L.Q.R. 187, 190.

[32] [1972] A.C. 601 (H.L.), 623-25, Lord Cross – now acting judicially – delivering the leading judgment.

[33] The "no personal nexus" rule had previously been side-stepped in a case where it appeared to make no sense. In *Re White's Will Trusts* [1951] 1 All E.R. 528 (Ch.) providing a rest home for working nurses was held charitable as an advancement of the efficiency of their hospital. Any "personal nexus" problem, due to the nurses all having the same employer, was avoided by interpreting the trust as being to benefit the hospital, not to benefit the nurses.

[34] Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson 1979), 317-19. (See similarly A.L. Goodhart, "*Oppenheim v Tobacco Securities*" (1951) 67 L.Q.R. 164 (note).) Contrast Thomas Glyn Watkin, "Charity: the Purport of 'Purpose'" [1978] Conv. 277, 281-83, arguing the terms of an instrument should decide charitable status, not the settlor's motives – the altruism test would mean the same instrument would be charitable, or not, depending on who declared it. However, it could be said in response that the law does take account of such subjective intentions: for example, the same instrument might be a valid trust or a sham. And, helpfully, we have a trigger to prompt investigation here: the mention of a personal nexus.

[35] (1900) 48 W.R. 300 (Ch.).

[36] P.S. Atiyah, "Public Benefit in Charities" (1958) 21 M.L.R. 138, 144-45.

[37] At the time of *Re Gosling*, courts tended to determine charitable status by reference to the charitable purposes listed in the Preamble to the Charitable Uses Act 1601 (or "Statute of Elizabeth" – later repealed by Charities Act 1960, s. 38(1)). The list began (put into modern English), "The relief of aged, impotent and poor people…" The words aged, impotent, and poor were treated disjunctively: each was seen as an independent charitable purpose.

[38] (1900) 48 W.R. 300 (Ch.), 301.

[39] ibid.

going beyond that into – in the wording of the current Charities Act – the relief of those in need because of age and ill-health. Relief of need from age and ill-health now stand alongside relief of need from financial hardship in Charities Act 2011, s. 3(1)(j); and it is clear that the trust was seen as, in effect, to relieve *financial hardship arising from* their age and ill-health. Furthermore, in *Dingle v Turner*[40] Lord Cross, delivering the leading judgment, said of Byrne J.'s rejection of any "personal nexus" problem in *Re Gosling*, "It is to be observed that he does not confine what he says there to trusts for the relief of poverty as opposed to other forms of charitable trust".

Unfortunately, the Charity Commission's position is that a personal nexus among those to benefit necessarily means a relief of need – as opposed to poverty – does not satisfy the public benefit test.[41] But this does not seem correct on the authorities. And there are other arguments that could perhaps persuade them to revise their view – or persuade the courts to state the law differently – arguments based on the desirability of updating the law.

An argument for updating the law

Historically, settlors have been allowed and in turn encouraged to provide for the relief of poverty among those associated with their businesses, particularly employees, with the fiscal benefits charitable giving brings. However, today it is increasingly unattractive for anyone in business to establish a fund for the relief of "poverty" amongst employees. This exposes the business to accusations that its pay and conditions have left workers in "poverty". "Poverty pay" is a toxic label to attract – no matter how prevalent in-work poverty may in fact be;[42] and no matter what explanations are proffered that a fund contemplates workers in adverse circumstances due to outside factors. Such attacks can be partially deflected by including ex-employees, relatives, dependants, or others, in the class to benefit. But, in the age of the start-up, many businesses have no significant body of long-serving ex-employees to make credible a claim that those who have left and since fallen on hard times are the real concern. Euphemisms can be used in place of "poverty", but this runs the risk that they may be interpreted as going outside the legal meaning of "poverty".

A further problem with use of the word "poverty" in such funds today is that applicants may be more likely to apply, and more comfortable applying, if the potentially stigmatising label "poverty" was not associated with the funds.

The words "financial hardship" would probably be much more acceptable to all. But these words will only confer charitable status if they receive the same special public benefit treatment as "poverty". It is suggested that modernising charity law to match contemporary social circumstances requires the law to adopt the same public benefit approach now to financial hardship as has been taken in the past to poverty.

Exclusively charitable

If the suggestion made here is to be pursued in practice, care will be needed when drafting objects. First, they must not stray outside the stipulated purpose, "relief of those in need because of financial hardship". It is important to note that "relief" does not mean the same as simply "benefit": it means a "need" arising from their condition "financial hardship" is being

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[40] [1972] A.C. 601 (H.L.), 618.

[41] Charity Commission, *Public Benefit: analysis of the law relating to public benefit* (September 2013), para. 71. They cite *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch. 194 (C.A.), which was, in fact, a decision applying the distinct rule that mutual benefit or self-help funds do not (at least usually) satisfy the public benefit test: the observations about personal nexus were obiter, and were made at a time when the personal nexus rule was less understood.

[42] The Joseph Rowntree Foundation indicates 13% of workers are in poverty, rising from 10% 20 years ago, with more people in poverty now living in a working household than a non-working household (*UK Poverty 2019/20*, JRF Annual Report).

remedied.[43] The scheme of provision must therefore be appropriately targeted. Secondly, while objects can be of "public benefit", rather than private benefit, even where they will result in conferring private benefits on individuals, conferring these must be merely an incidental effect of benefitting the public – and not a substantial purpose in its own right.[44] The relief of poverty shows probably more clearly than any other charitable purpose that "some trusts for charitable purposes cannot help but confer incidental benefits on individuals";[45] and the same must be true of relief of need from financial hardship. But the private benefits to be conferred must not go so far that they would be deemed a purpose. They must remain limited to what can be said to serve the public benefit. For example, if the relatively affluent are to be helped through a difficult period, it may be that in some contexts a scheme of interest-free loans rather than outright grants would be appropriate.

Conclusion

What is said here is inevitably speculative: we currently have no guidance on the meaning of "the relief of those in need because of financial hardship" in Charities Act 2011, s. 3(1)(j). But we have sought to suggest there is a respectable argument that this newly-listed charitable purpose is significantly wider than the relief of poverty in the range of those who may be helped, extending even to those solidly in the middle class, but facing challenging circumstances; and that it should enjoy the same public benefit treatment as poverty does, meaning it would charitable to assist only relatively modest numbers and only those with a personal nexus like common employment.[46]

[43] *Joseph Rowntree Memorial Trust Housing Association Ltd v A.-G.* [1983] Ch. 159 (Ch.), 171.
[44] *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [2004] 1 W.L.R. 1466, [32]-[36].
[45] ibid. [35] (Lord Millett, delivering the judgment).
[46] Wider issues for charity law arising from the argument here are addressed in David Wilde and Imogen Moore, "Charity Law's Transition from 'Poverty' to 'Financial Hardship'" (2021) 34 T.L.I. (forthcoming).