

Recent Case Law

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RADCLIFFE CHAMBERS RESOURCE—CHARITIES SEMINAR

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RECENT CASE LAW—JOSHUA WINFIELD

- 1 The effect of mergers on testamentary gifts to charities: *Re Longman deceased, Berry v IBS-STL (UK) Ltd* [2012] EWHC 666 (Ch); [2012] PTSR 1619

Charities Act 2011 s.311

- 2 Leave by court to bring charity proceedings under s.115(5) of the Charities Act 2011: *Rai v Charity Commission for England & Wales* [2012] EWHC 1111 (Ch)

Rai v Charity Commission for England & Wales [2013] EWHC 1425 (Ch)

- 3 Costs in charity proceedings: *Hirani v Hirani* [2012] EWHC 1645 (Ch)

- 4 Improper amendments to constitution: *Cifci v Erbil* [2012] EWHC 3170 (Ch) and *Marwaha v Singh* [2013] PTSR D14

Abbatt v Treasury Solicitor [1961] 1 WLR 1525 (CA)

Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 (CA)

The Vistafjord [1988] 2 LLR 343

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Reviewing Charity Law

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REVIEWING CHARITY LAW

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The reform of charity law has been subject to exceptionally close and continuing scrutiny. The Bill that preceded the Charities Act 2006 was widely discussed in the charity sector and by the Scrutiny Committee of the House of Lords. The Charity Commission's guidance on Public Benefit was scrutinised by the Upper Tribunal, found wanting and is being rewritten. At the end of 2011 Lord Hodgson of Astley Abbots was appointed official Reviewer of the 2006 Act under a specific provision which required a report to Parliament after 5 years, and he published his report in 2012. Late in 2012 The Public Administration Select Committee of the House of Commons took evidence from Lord Hodgson and many others on the way the Charity Commission and charity law works in practice, and is due to report shortly. Francesca Quint will look at the Hodgson and PASC reports, the Government response and what is next on the Agenda for charities and their advisers.

A LORD HODGSON'S REVIEW & *Government Response Sept 2013*

- 1 Legislative history made by Charities Act 2006¹
 - official review
 - after 5 years
 - of its
 - o operation and
 - o effectiveness, and
 - o what further reforms were desirable.
 - report to Parliament

- 2 Lord Hodgson of Astley Abbots
 - Appointed November 2011
 - Written evidence
 - Public and private meetings
 - Parallel review by NCVO (chaired by Lady Howe)
 - Report published July 2012
 - **'Trusted and Independent: giving charity back to charities'**.

- 3 Recommendations on 'Fundamentals':

¹ Section 73.

3.1 Public benefit:

- Guidance on each type of charitable purpose – *Government accepts (a matter for CC)*
- More model objects - *Ditto*
- Distinguish legal requirements and best practice – *CC has accepted this*
- No statutory definition of public benefit – *Government agrees*
- Tribunal to keep law in line with social mores – *Government does not propose any change*

- Underline importance of public benefit reporting – *Government and CC support this*
 - o For public
 - o For charities

- Identify indicators of failing charities – *A matter for the CC, which will consider feasibility*
- Intervention by CC - *ditto*

3.2 Charitable purposes:

- Should not be changed – *Government agrees*
 - o Encourage debate on what a charity is
 - o Public
 - o Charity sector
- *Government believes there is already such a debate*

- Long term desirability of harmonising UK laws on charitable status²
- *Government agrees no action at present*

3.3 Trustees

- ***All large charities to be permitted to pay trustees*** – *Government rejects this : status quo to remain*
- All charities to consider reimbursing expenses – *Government supports: they already can*
- Reduction in regulation³ - *Government supports: already in progress*
- Best practice - *Ditto, in general*
 - o Advice from umbrella bodies on recruitment
 - o Guidance from Government for employers
 - o Government to encourages its staff to act as trustees
 - o Three terms of three years maximum in model constitutions

² As recommended by Calman report.

³ Through the Civil Society Red Tape Challenge

- Centralised portal for trustee vacancies – *Government supports: and welcomed www.icaewvolunteers.com in June 2013*
- Recognising trustee's 'right to know' – *Government to consult on whether an express right is required*
- Disqualifications for more types of criminal conviction – *Government agrees: Law Commission considering it but an earlier legislative opportunity may arise*

4 Recommendations on the Charity Commission

4.1 Status

- Remain independent, non-ministerial department – *Government agrees*

4.2 Functions

- Priority for core functions – *Government agrees and Charity Commission already doing so*
 - Registration
 - Dealing with abuse
 - Provide information for
 - public and
 - charities
- Greater focus on regulation – *Government and CC considering scope to strengthen proactive monitoring and risk assessment*
- Concentrate on charity law – *A matter for the CC, which is already doing so*

4.3 Funding

- **Must be adequate** – *Government believes CC already has sufficient resources*

4.4 Name

- **'The Charity Authority'**?- *Government rejects this*

4.5 Streamline regulation

- De-regulation
 - some functions to be removed or moved elsewhere – *Government and CC support deregulation enabling more decisions by trustees: Law Commission Project*
 - **Raise threshold for registration to £25,000** – *Government rejects this*
 - **Lower registration threshold for excepted charities to £25,000 over three years** – *Government rejects this*
- Reintroduce voluntary registration later – *Government agrees and will work with CC; online registration the default process*
- Single process to register and get tax relief – *HMRC and CC are working on this*

- *Disclose unregistered status – Government rejects this*
- Single reporting system for charitable companies – CC agrees in principle and will explore it

5 Recommendations on charity regulation

5.1 CC role

- CC to remain main regulator – *Government agrees*
- Partnerships with umbrella bodies – *CC agrees and will report*
 - o Review
 - o Report
- Maybe Homes and Community Agency to regulate social housing charities in England ? – *Government and CC agree; discussions are ongoing for both England and Wales*
- CC power to delegate functions to ‘co-regulators’ – *Government and CC agree*
- **‘Principal regulator’ to be called ‘co-regulator’** – *Government rejects this legislative change*

5.2 Accounts, returns and reports

- Universal requirement for those over £25,000 - *Government reluctant to impose new burdens but will explore voluntary options with CC*
- All compulsorily registered charities to submit annual accounts - *Ditto*
- **All charities under £25000 to be called ‘small charities’** – *Government rejects this: Lord Hodgson is unrepentant*
- Abolish the ‘SIR’ – *CC is consulting on this*
- CC to simplify improve SORP – *CC has accepted the recommendation – new draft SORP*
- Raise audit threshold to £1m or assets of £3.26m – *Government partially accepts this: consulting*
- CC to investigate technology for validating data - - *CC accepts in principle*
- All information in a single document – *CC to explore in more detail; may not be deliverable*
- Withdraw Gift Aid and consider fines for failure to file on time – *Government and CC to consider penalties for late filing (legislation required) and HMRC already able to withhold Gift Aid for lack of accounts*

5.3 Charging by CC

- **For filing annual reports etc**
- **For registration**
- **For bespoke legal advice**
- *Government has no plans and would in any case consult the public first*

6 Recommendations about the Tribunal

6.1 Charities Ombudsman

- No – *Government agrees*

6.2 Internal disputes

- Umbrella bodies to recommend procedures for charities – *Government and CC agree*

6.3 Tribunal functions

- Remove limits on jurisdiction
 - appeal any legal decision
 - review any other decision

– *Government agrees to rationalisation so long as CC is not to be challenged for non-intervention in any case and no significant new burdens on Tribunal*
- Locus standi for
 - charity
 - trustees
 - anyone affected by decision
- Joint CC/Tribunal guidance on jurisdiction – *Government supports this: a matter for the Tribunal Service, and NCVO guidance welcomed*
- Extend time limit to 4 months – *Extension of time already possible under Tribunal Rules*
- Enable Tribunal to make ‘Beddoe’ type order – *To be considered as part of Law Commission’s Charity Project*
- References by CC merely notifying AG – *Government has asked Law Commission to consider this*

6.4 Tribunal process

- Simpler procedures, less adversarial – *Referred to Tribunal Procedure Committee*
- Plain English summaries – *Already done for Upper Tribunal; a matter for the judges*
- ***Take account of changing social and economic circumstances*** – *Government rejects any change in the law*

7 Recommendations on Fundraising

7.1 Self regulation

- Rationalise and clarify various functions in 6 months – *Government supports this. Cabinet Office is funding exploration of possibilities for rationalisation*

- CC to support FRSB - *Agreed*
- FRSB tick box logo to remain and be used - *Agreed*
- All to promote FRSB membership - *Agreed*
- Promote FRSB rulings more widely - *Agreed*
- FRSB to move to auditing members' compliance - *Agreed*
- Large charities to be expected (not compelled) to join - *Agreed*
- Review in 5 years - *Review to take place in 2017 and report to Parliament*
- Simple guidance on solicitation – *Government will work with charity sector and others to develop this*

7.2 Public Charitable Collections

- National guidelines/model regulations -
- Freedom for local authorities within that framework
- Power to delegate licensing
- Face to face collections to come within scheme
- Collections on private property for the owner/occupier to decide
- License all types of house to house textile collections?
- **Abolish National Exemption Orders**
- Appeal re licences to the Tribunal
- London licensing authorities to take over from Met Police maybe?
- *Government accepts the need for reform and supports most of these recommendations and will encourage licensing authorities to work with PFRA but will not abolish National Exemption Orders*

7.3 Implementing and monitoring

- Standing committee to be established
 - Cabinet Office chair
 - CC, FRSB and IoF members
 - Other members for public charitable collections
- *Government accepts this; meetings have already started*

8 Recommendations on Social Investment

8.1 Amend Trustee Act

- Permit charities to consider totality of benefit in relation to their purposes
- Investment redefined to involve
 - any financial return but
 - not necessarily the main purpose
- Standard criteria, advice requirement etc still apply

- ***Stress duties of charity trustees as opposed to others re purpose of charity***
- Mixed purpose investment OK for permanent endowment
 - if capital value restored in due course
 - *Government rejects any change to trustees' statutory duties but has prompted discussion between Cabinet Offices and Law Commission regarding a review of social investment issues – announcement expected shortly*

8.2 Standard social investment vehicle

- *Government agrees: Cabinet Office working on this*

8.3 **Modify permissible private benefit**

- ***‘necessary and proportionate’*** – *Government rejects this*

8.4 Developing social impact measurement

- not to be regarded as a charitable purpose – *Government agrees: measuring it is already charitable*

8.5 SORP

- Revise re social investment reporting – *CC already dealing with this in new SORP*

8.6 Possible statutory underpinning for social investment regulation

- *Financial Services Act 2012 recognises possible non-financial goals of investors*

8.7 HMRC

- Prior clearance on tax treatment
- Guidance
- Specialist unit?
- *HMRC to explore this with charity sector stakeholders*

8.8 Financial promotion rules –

- To facilitate social investment advice
- FSA (now FCA) to consider specialist unit
- *‘Social investor exemption’ in Financial Promotions rules currently under consideration by Government*

8.9 ‘Mixed motive investment’

- ***Rename ‘mixed purpose investment’*** – *Government rejects this*

9 Recommendations on technical issues

9.1 Mergers

- All bequests to take effect in favour of new charity to save gift- *Law Commission considering this as part of Charity Project*
- Professionals to work on standard form of bequest –*Government supports this and will consult Law Society and Institute of Professional Will Writers and Institute of Legacy Management*
- Newly incorporated charity to keep original registration number – *to be explored by CC and HMRC*
- Ditto with bank accounts – *Government will draw this to the attention of the British Banking Association*

9.2 Charity land

- Deregulation of disposals, mortgages etc - *Government and CC support this: to be considered as part of the Law Commission's Charity Project*
- Guidance from CC consulting professionals – *CC will consider this in light of Law Commission changes*
- CC must still approve disposals to 'connected persons' - *Government and CC support this: to be considered as part of the Law Commission's Charity Project*

9.2 Legal forms of charity

- ***IPs to register or resign charitable status*** – *Government rejects any choice about charity status but will consider alternative principal regulator for IPs*
- International Financial Reporting Standard should apply to charities in proportionate manner – *Government welcomes Financial Reporting Council's consultative approach*
- Assess CIOs after three years – *Government agrees*
- CIOs should be able to convert to charitable companies - *Government support this but it will require a suitable legislative vehicle*

B THE PASC REVIEW & *Government Response Sept 2013*

1 House of Commons Public Administration Select Committee

- Evidence taken Autumn 2012
 - written
 - oral

- Report published May 2013
 - **'The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006'**

- 2 Introduction: the 2006 Act 'critically flawed' on public benefit
 - 'Removal' of presumption
 - Failure to define public benefit
 - 'Impossible' requirement for CC to provide guidance
 - Need for Parliament to revisit, and deal with question

- 3 Charity Commission

- 3.1 Core role must be regulation - *Government agrees and awaits National Audit Office's Report on the CC to the Public Accounts Committee later in 2013*
 - Shortcomings in regulation of 'tax evasion' involving charities
 - CC does not have resources to investigate tax fraud – HMRC's role
 - Limitations on CC power to deregister charities
 - Cup Trust lessons
 - Abuse of charitable tax reliefs unacceptable

- 3.2 CC's functions – *Government supports conclusions, welcomes CC's strategic approach, thinks legislation o objectives unnecessary, wants to encourage CC's working in partnership with others and investigate reduction/removal of CC's resource intensive functions*
 - Objectives too vague and aspirational
 - 2006 Act too ambitious, even before budget cuts
 - Conflict between promoting trust and confidence in charities and championing the charity sector
 - Need to prioritise functions

- 3.3 Charging by CC - *Agreed*
 - impractical (PASC disagrees with Hidgson);
 - maybe fines for late accounts

- 4 Regulation

- 4.1 Registration - *Agreed*
 - Threshold should not be raised (PASC disagrees with Hidgson)

4.2 Charitable companies – Agreed – CC and Companies House to consult

- Avoid duplication in accounting

4.3 UK harmonisation - Renew efforts e.g. a 'passporting' system – Agreed. Government and CC will work proactively with devolved administrations to minimise cross border regulatory burdens for UK wide charities, whilst respecting their different charity jurisdictions

5 Public Benefit

5.1 Complex and expensive legal disputes

- unfair to all
- **Parliament should resolve relevant matters**
- 2006 Act 'an administrative and financial disaster'

Government accepts there has been uncertainty but rejects the possibility of further legislation and suggests consulting Ministerial statements on the original Bill

5.2 Amend the 2006 Act

- **repeal removal of presumption**
- **repeal CC public benefit objective**
- Government rejects this, and there is no presumption to restore

6 The Tribunal

- **CC 'abdicating responsibility'**
- **Expensive, time-wasting and unjust**
- CC should introduce informal dispute resolution procedures
- Tribunal to determine the law only as a last resort

Government notes CC internal decision review system and encourages CC to be clear on reasons for decisions and review internal processes to minimise delay. Government recognises the Tribunal an independent judicial body and it is up to parties whether to have paid representatives.

7 Complaints - Agreed

- No ombudsman
- Sector should bear cost of resolving complaints

8 Fundraising - Agreed

- Self- regulation to remain for now but 'on notice'
- National Exemption Orders should not be abolished (PSADSC disagrees with Hodgson)

10 Payment of Trustees - Agreed

- No. PASC disagrees with Hodgson.

11 Political Campaigning - *Agreed*

- No change recommended
- Greater transparency by charities
- Disclosure of reasons for public funding for charities involved in political campaigning
- Think tanks can be charities if CC is objective and impartial

C OTHER DEVELOPMENTS

- 1 Public Accounts Committee (PAC) Report
 - **'Charity Commission: the Cup Trust and Tax Avoidance'**
 - Highly critical of CC
 - National Audit Office due to report to PAC later in 2013
- 2 Law Commission Charity Project
 - Technical changes only
 - Public consultation spring/summer 2014 (maybe with some provisional proposals)
 - Draft Bill March 2016
 - Legislation 2018/19?
- 3 Charities Act 2013 (Northern Ireland):
 - Same public benefit test as England and Wales
- 4 Republic of Ireland proposals
 - Retention of presumption of public benefit

D CONCLUSIONS AND QUESTIONS

Continuing debate; continuing reform; continuing interest

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