



This document has been provided by the International Center for Not-for-Profit Law (ICNL).

ICNL is the leading source for information on the legal environment for civil society and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 90 countries.

Visit ICNL's **Online Library** at
<http://www.icnl.org/knowledge/library/index.php>
for further resources and research from countries all over the world.

Disclaimers

Content. The information provided herein is for general informational and educational purposes only. It is not intended and should not be construed to constitute legal advice. The information contained herein may not be applicable in all situations and may not, after the date of its presentation, even reflect the most current authority. Nothing contained herein should be relied or acted upon without the benefit of legal advice based upon the particular facts and circumstances presented, and nothing herein should be construed otherwise.

Translations. Translations by ICNL of any materials into other languages are intended solely as a convenience. Translation accuracy is not guaranteed nor implied. If any questions arise related to the accuracy of a translation, please refer to the original language official version of the document. Any discrepancies or differences created in the translation are not binding and have no legal effect for compliance or enforcement purposes.

Warranty and Limitation of Liability. Although ICNL uses reasonable efforts to include accurate and up-to-date information herein, ICNL makes no warranties or representations of any kind as to its accuracy, currency or completeness. You agree that access to and use of this document and the content thereof is at your own risk. ICNL disclaims all warranties of any kind, express or implied. Neither ICNL nor any party involved in creating, producing or delivering this document shall be liable for any damages whatsoever arising out of access to, use of or inability to use this document, or any errors or omissions in the content thereof.

THE INSTITUTE OF TAXATION IN IRELAND

**THE LAW & TAXATION
OF CHARITIES**

PAPER PRESENTED BY:

**MR JOHN HICKSON
A & L Goodbody**

While every effort is made to ensure that the information outlined in this article is accurate, the Institute of Taxation and author can accept no responsibility for loss or distress occasioned to any person acting or refraining from acting as a result of the material published herein.



THE INSTITUTE OF TAXATION IN IRELAND

THE LAW AND TAXATION OF CHARITIES

Tuesday 28th February, 1995

LEGAL ASPECTS OF CHARITIES

BY

JOHN H. HICKSON, A & L GOODBODY

Charities have long enjoyed certain privileges under the law, in recognition of the public benefit that they bring to the community. These advantages today are manifested in the form of exemption from taxation in a number of areas, and also in the fact that charitable trusts are not subject to certain legal rules which apply to private trusts.

The origins of the law relating to charities may be traced back to the Statute of Charitable Uses (Ireland), 1634. This provided that dispositions

..... for the erection, maintenance or support of any college, school, lecture in divinity, or in any of the liberal arts or sciences, or for the relief or maintenance of any manner of poor, succourless, distressed or impotent persons, or for the building, re-erecting or maintaining in repair of any church, school or hospital or for the maintenance of any minister and preacher of the holy word of God, or for the erection, building, maintenance or repair of any bridges, causeways, cashes, paces and highways, within this realm, or for any other like, lawful and charitable use and uses, warranted by the laws of this realm, now established in force, are and shall be taken and construed to be good and effectual in law."

While this statute has been repealed, its sentiment nevertheless still pervades the modern law of charities. The other great anchor of the law of charities is the judgement of Lord Macnaghten in the Pemsel Case of 1891, in which charitable trusts were classified in four broad categories:

- advancement of religion,
- advancement of education,
- relief of poverty, and
- other purposes beneficial to the community not falling within the other three categories.

Lord Macnaghten's first three categories are reasonably clear, but the fourth one is somewhat of a catchall and has been the subject of considerable judicial decision. What is essential in connection with all these categories is that there must be an overriding public benefit inherent in a trust before it will be considered charitable.

Advancement of Religion

While a gift to a parish for its general purposes would be within this category, it should be emphasised that religion here is not confined to any particular religion or religious denomination. Assuming the participants in a religion are genuine, there is no reason why a gift for the advancement of that religion should not be properly charitable in law.

The law in Ireland in relation to religious gifts has been extended statutorily by the Charities Acts, 1961 and 1973. Gifts for the purpose of the advancement of religion are conclusively presumed to include the necessary degree of public benefit and such gifts, and in particular gifts for the celebration of Masses, are to be construed in accordance with the laws and canons of the religion concerned. In addition, gifts for the provision, maintenance or improvement of a tomb, vault or grave, a tombstone or other memorial will be charitable, even if without the statutory provision it would otherwise not be. However, this is subject to monetary limits which are now rather out of date, namely that where a gift is of income, it should not exceed £60 per annum, and where the gift is of capital it should not exceed IR£1,000.

Advancement of Education

While one thinks here of the traditional form of school and university, the law is not restricted to academic education and hence vocational or physical education would be capable of qualifying as a charitable purpose, as would cultural purposes in the fields of art, theatre, literature and music.

The Relief of Poverty

This is the easiest of the categories to reconcile in that the relief of poverty would generally be regarded as bringing public benefit.

Other Charitable Purposes

While there is a long list of categories which have qualified under this residual head, such as animal charities, temperance, the benefit of a locality, and the promotion of economic activity, there are some interesting examples which illustrate some of the distinctions and inconsistencies in the area of charities. There is often an overlap of the four Pemsel categories, particularly in the application of the fourth one.

George Bernard Shaw and his wife both contributed in some degree to the law relating to charities. George Bernard Shaw himself left an interesting will containing a clause providing funds for several purposes including the rearrangement and extension of the English alphabet. The trusts were held not to be charitable within the educational character as while it could be said that the purposes could lead to an increase in knowledge, it lacked the necessary teaching or educational purpose. Neither did the trust fall within the fourth category as it was felt that there was not a sufficient degree of public benefit (Re Shaw (1957) 1 W.L.R. 729)

Subsequent cases have softened this approach by indicating that education should be viewed in the widest sense, which would include pure research provided that it will lead to an increase in communicable knowledge in an area which education may cover, and will be of educational value to the researcher.

His wife also left an interesting clause in her will, leaving her residuary estate for the teaching, promotion and encouragement in Ireland of self-control, elocution, oratory, deportment, the arts of personal contact, of social intercourse and the other arts of public, private, professional and social life. Perhaps strangely, this was held to be a valid charitable trust on the basis that the trusts were wholly educational in character. (re: Shaw's Will Trusts (1952) Ch.163)

While trusts for the benefit of animals in general are regarded as charitable, as concern for animal welfare is regarded as leading to the betterment of mankind, a gift for the benefit of the National Vivisection Society in the UK was ultimately held not to be charitable, principally on the ground that the public benefit from vivisection tended to outweigh the suffering of the animals concerned. (National Anti-Vivisection Society v. I.R.C. (1948) A.C. 31)

Within the religious category, a case in the middle of the last century recognised as charitable a trust established for the promotion of the works of Joanna Southcott, a person who was subsequently described by an Irish judge in a case in the 1940s, as a "demented visionary".

As a final example, political purposes will not be regarded as charitable, although the promulgation of particular doctrines, outside the political sphere, can be charitable. The political exception was illustrated in the refusal by the UK courts to recognise Amnesty International as charitable because some of its objects were effectively political, even though it is also committed to the relief of human suffering. (McGovern v. Att. Gen. (1982) 2 W.L.R. 222)

There is one other statutory aspect I would mention. The Charities Act, 1961, provides specifically for the construction of gifts for mixed purposes, between charitable and non-charitable. The non-charitable objects are excluded and this preserves those which are charitable. The law previously would have caused the entire trust to fail if only some of the objects did not qualify as charitable.

Constitution of Charities

Perhaps we could look briefly at the way a charity is constituted. While the law of charities developed as part of trust law, nevertheless the same principles are applied in the context of a body corporate which has charitable objects.

The choice for establishing a charity generally rests between a traditional trust, and a company incorporated under the Companies Acts. Such a company will generally, though need not necessarily, be a company limited by guarantee whereunder all the members agree to contribute a given sum of money, normally £1, in the event of there being a shortfall in the assets of the company on a winding up. The reason why a guarantee company is used is that there are no shares as such, and therefore are no proprietary interests in the company, which reflects the fact that the company's property is to be held and applied only for the charitable purposes which are stated in its objects clause.

A charitable trust has certain advantages in that it is simpler, more flexible and probably cheaper, but it has a disadvantage in that it does not afford limited liability to the trustees. Trustees enjoy an indemnity in that they can reimburse themselves out of the trust fund for expenditure properly incurred, but as everybody knows an indemnity is only as good as the property available to support it. Limited liability may be relevant where a charity is organising fundraising activities such as a shopping bazaar or such like. We are all too well aware of the implications of injury occurring to a member of the public. If an injured party claims against charity trustees, and the claim exceeds the

amount available in the trust fund, the charity trustees may find themselves with a personal difficulty.

On the other hand, a company limited by guarantee enjoys limited liability, although being subject to company law, there are procedural matters to be attended to which can involve expense.

A guarantee company is formed under the Companies Acts by at least seven members subscribing to a Memorandum and Articles of Association. The memorandum will contain the objects of the company which should be divided into main objects which must be legally charitable, and subsidiary objects which are exercisable only in conjunction with the primary charitable objects. The memorandum will also need to contain, for Revenue purposes, prohibitions on trust income or capital being paid to the members or officers of the company, and for the company's property on a dissolution to be applied to some other charitable body. These specific provisions will be dealt with in more detail by the next speaker.

The Articles of Association will contain all the usual provisions, and in particular will provide for the question of additional members being admitted to membership of the company and for termination of membership whether by death, resignation or other means.

Whereas a company limited by guarantee enjoys the structure given to it by company law, a deed of trust has a much less defined statutory background governing its provisions. As a result, it is generally desirable to use a long form trust document containing all the usual standard powers and provisions to enable the trustees to carry out their charitable duties. As with a company, the main charitable purposes require to be stated, and subsidiary powers can be given to the trustees to ensure that they are able to carry out their functions. These will commonly include opening bank accounts, investing trust funds, changing and varying investments, the acquisition of all types of property, the employment of officers and a secretary, the appointment of consultants, the collection of subscriptions and the question of appeals for donations, publication of periodicals etc, power to borrow money, power to raise finance, to make regulations and to take or acquire real property. A charitable trust will likewise have to prohibit the distribution of trust income or capital other than in respect of the charitable objects of the trust although genuine salaries and reimbursement of out of pocket expenses is permitted. Note however that there is a blanket prohibition on the trustees of a charitable trust holding any salaried office. Likewise it must be provided that on a dissolution of the trust, the trust fund must be applied to other charitable objects.

Public Trusts

Charitable trusts are public trusts and are under the overall supervision of the Attorney General. Certain powers are given in respect of charities to the Commissioners of Charitable Donations and Bequests. Broadly speaking these involve the following matters:

- advice to charity trustees, which may be acted upon by the trustees with the benefit of an indemnity
- compromise of claims
- sue for recovery of charity funds
- direct the institution of legal proceedings
- take control of unapplied charity funds
- receive gifts of charitable funds or take over pre-existing charitable funds
- invest charity funds held by the Commissioners
- power to empower charity trustees to invest charity funds
- authorise disposition of lands, and buildings, and improvements thereof and to mortgage charity land for this purpose
- give valid receipts for charity moneys
- the appointment of new charity trustees
- frame a scheme for the incorporation of a charitable trust
- frame a cy-près scheme where the value of the trust fund is no greater than £25,000.

Cy-près *Scheme*

The application of charity funds cy-près will occur where the original charitable purposes have in some way failed or become exhausted, and there is a surplus of funds left over. Where the value is in excess of £25,000, which is now a rather outdated limit, the application must be made to the High Court. Provided there is a general charitable intent in the original charitable trust, which will generally be the case, it is possible for the funds to be applied to as near a charitable purpose as possible by means of a scheme framed by the court or where relevant, the Commissioners of Charitable Donations and Bequests.

Consequences of Charitable Status

I indicated at the outset that there were tax advantages and legal advantages accruing to charities.

(i) Tax Advantages

The tax advantages will be dealt with in more detail by the following speakers but I would merely mention that charities enjoy certain exemptions from income tax, corporation tax in the case of a company, capital gains tax, capital acquisitions tax and stamp duty. However, as will be indicated later, the exemptions all assume that the funds which enjoy exemption from taxation are held or applied for the charitable purposes which are relevant. This means, for instance, that the income of a charitable body, be it a trust or a company, should be applied for the purposes of that charity, and cannot be accumulated ad infinitum and continue to enjoy tax exemption. A charitable body which attempts to do so can expect to receive enquiries from the Revenue Commissioners as to how the income has been or will be expended for its charitable purposes.

There is one tax which I specifically mention and that is VAT. There is no general VAT exemption for charities and while it may be felt that charities are unlikely to be involved in VATable activities, this is not necessarily so. For instance, the income tax exemption anticipates trustees being involved in business activities. If the business activities involve a sufficient level of turnover, those activities will entail the trustees in registering and accounting for VAT. In fact, that is often advantageous to a charity, as it can then reclaim its input credits. The need for a general charitable exemption from VAT is for one which would enable all charities to reclaim their input credits, regardless of whether they carry on a taxable activity.

The following speakers will also be dealing with tax reliefs for contributions to charities. While it may be outside the question of charities on a strict analysis, there are however one or two cases where a tax deduction can be obtained for a contribution to certain bodies.

Under S.32 of the Finance Act, 1984 relief is available to a donor, whether an individual, a company or other person in respect of a gift to an approved body for the promotion of education in architecture, art and design, music and musical competition, the theatre arts, and the film arts, or any subjects specifically approved for this purpose by the Minister for Finance. The recipient must effectively be a recognised school or third level educational establishment providing educational services in the State. The gift must be a once-off gift and must not otherwise qualify as a trading deduction or a charge

on income, in circumstances where there would be a double deduction.

No relief is given for amounts under £100, nor for amounts in excess of £10,000 in respect of any year of assessment or accounting period as the case may be.

Under S.8 of the Finance Act, 1986, a similar relief applies in respect of gifts for the National Sports Council, again with the same minimum and maximum limits of £100 and £10,000 in any year.

Under S.16 of the Finance Act, 1985, gifts to the President's Award Scheme used to enjoy a similar deduction for the donor, with similar minimum and maximum amounts for any year, £100 and £10,000. However, this relief was originally introduced for one year only in 1985, and was extended in 1986 but has not been continued since, and so is no longer relevant.

A corporation tax relief exists in respect of gifts to First Step Limited in the period 1st June, 1993 to 1st June, 1995, which was introduced by Section 51 of the Finance Act, 1993.

This applies to gifts made during the period 1st June, 1993 to 31st May, 1995, with a minimum of £500 and a maximum of £100,000 in an accounting period, but subject to a restriction on total amounts received by way of contribution of £1,500,000 for each of the two years involved.

(ii) Legal Advantages

While a charitable company is regulated by company law, a charitable trust is regulated by the law of trusts. Charitable trusts are not subject to the rules against remoteness and inalienability, nor to the rule requiring certainty of objects. As a result, charitable trusts can be purpose trusts which can exist without limit of time or of defined beneficiaries. It is vitally important that a trust which is designed to benefit a charitable purpose, achieves charitable status in law. If it does not do so, it does not enjoy exemption from these legal rules and hence the trusts will probably fail for remoteness or uncertainty and the trust property will be held on a resulting trust for the settlor, or his estate as the case may be. As the following speakers will indicate, there is no provision for registration of charitable trusts in Ireland, and thus no way of pre-determining whether the objects of a particular trust qualify as charitable. The Revenue Commissioners will allocate a charity number to a trust if they regard the objects as properly charitable, but the final arbiter of this can only be the Courts.