Charitable Trusts for Religious Purposes: Earthly Tests and Ethereal Matters

In order for a trust to be recognised as charitable in law, it must meet the following criteria (Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009) at 273):

i) Under law be deemed charitable;
ii) Satisfy the public benefit test;
iii) Be beneficial, not detrimental;
iv) Be for charitable purposes.

It is on the issue of the public benefit test that this paper focuses, specifically in relation to those trusts that fall into the category of the advancement of religion. Before turning to the issues associated with such matters, it is worthwhile considering briefly the jurisprudential evolution of the charitable purpose requirement to contextualise the contemporary position of trusts that fall into the class of the advancement of religion.

The origin of "charitable" is to be found in the preamble to the Elizabethan *Statute of Charitable Uses 1601*, which contained a list of purposes legally recognised as charitable, including: relief of poor; maintenance of schools; marriage of poor maids; repair of churches; and support and help of young tradesmen, handicraftsmen and persons decayed. This list was not exhaustive however as "those purposes are charitable which that statute enumerates or which by analogies are deemed within its spirit and intendment." (*Morice v Bishop of Durham* (1805) 9 Ves 399 at 405 per Sir William Grant MR) The concept therefore of the advancement of religion began its life in this preamble, (E H Burn and G J Virgo *Maudsley & Burn's Trusts and Trustees Cases & Materials* (7th ed, Oxford University Press, 2008) at 464) but the principle of the advancement of religion began its evolution when Lord Macnaghten, in the case of *Commissioner for Special Purposes of the Income Tax v Pemsel Commissioner for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, considered the list of charitable purposes as set out in the preamble and summarised the purposes into four categories:

a) Trusts for the relief of poverty;
b) Trusts for the advancement of education;
c) Trusts for the advancement of religion;
d) Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Lord Macnaghten's categorisation then formed the framework for statutory recognition of charitable purpose, as recognised in section 5(1) *Charities Act 2005* in New Zealand and in England and Wales, the *Charities Act 2006*.

Religion is construed widely by the courts and religion and has been defined in law as (*Church of the New Faith v Commissioner of Pay-roll Tax* (Vic) (1983) 154 CLR 120 at 136):

> ...the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their

> comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to prove and exercise the religion of his, or their, choice.

This definition was approved by Thompkins J in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 at 693, who referred to the "particularly helpful judgment of the High Court of Australia" when accepting the tests "so persuasively set out" (*Centrepoint Community Growth Trust v Commissioner of Inland Revenue* at 695) in that judgment in the *Church of New Faith* case in order to determine that the trust in the *Centrepoint Community* case "has as one of its principal purposes the advancement of religion." (*Centrepoint Community Growth Trust v Commissioner of Inland Revenue* at 698) As a result of this wide construction of the concept of religious purpose, courts will not distinguish between religions, (*Neville v Madden* [1962] 1 Ch 832 at 853) and the "question of whether or not something is a religion turns on its beliefs, practices and observances, not on the verity or meaning of its writings." (G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia* (4th ed, Sydney: Thomson Lawbook Co, 2007) at 757)

If gifts for the purposes of religion are to be found as charitable trusts, at their core they must advance religion, which means "the promotion of spiritual teaching in a broad sense, and involves spreading the religious message through taking positive steps such as pastoral activities." (Juliet Chevalier-Watts "Under the Law of Charity, is the Principle of 'Public Benefit' Being Hindered by the Doctrinal Rule of Precedent?" (2008) 16 Waikato Law Review at 200) The first case to offer a concise interpretation of the notion of advancement of religion was *Keren Kayemeth le Jisroel Ltd v Inland Revenue Commissioners* [1931] 2 KB 465, CA, at 477 where Lord Hanworth MR commented that:

> The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it.

Such a view finds support in Donavan J's judgment in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holburn Borough Council* [1957] 3 All ER 28 at 1090 where it was noted that:

> [t]o advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.

As a result, Donavan J (at 1090) could find no evidence to support the argument that freemasonry reflected these elements because there is nothing in the freemasonry constitution, nor in the evidence tendered to the Court, that freemasonry promotes any form of religious instruction, nor follows a religious programme to persuade non-believers, nor requires religious supervision to ensure that its followers remain religiously active and provides no form of pastoral activity or missionary work. As a result, the Court (at 1090) was of "the view that [Freemasonry's] main object is clearly not the advancement of religion."

Gifts for the advancement of religion will be valid if the element of public benefit is present, however, if "the purposes are found to be of a religious nature, the court will generally assume a public a benefit unless the contrary is shown." (Dal Pont et al at 761) It is this assumption of public benefit that has raised concerns as to the manner in which courts address this purported presumption and how the courts address the situations where the presumption is rebutted. This paper now considers the veracity of the presumption of the public benefit.

The Presumption of Public Benefit Requirement

Harding opines that the presumption of public benefit has existed implicitly in trusts for religious purposes for centuries although there appears to be little historical reason for such an association to exist. (Matthew Harding "Trusts for Religious Purposes and the Question of Public Benefit" (2008) The Modern Law Review 71 March 2 at 161) However, the author respectfully submits that perhaps the association was not so much with religion and public benefit, rather it was the courts recognising the natural association between religion and charity. Indeed, regardless of the lack of any mention of religion specifically in the preamble of the *Statute of Charitable Uses*, from the outset the courts have associated religion as a charitable purpose. (Miguel Rodriguez Blanco "Religion and the Law of Charities" (2005) Ecclesiastical Law Journal (8) 38 at 5) The case of *Pember v Kington Inhabitants* (1639) Toth 34 reflects this sentiment clearly, where despite religion not being mentioned in the *Statute*, the Court understood that religion and charitable status were within the equity of the Act. This approach is supported by the findings of the seventeenth century case of *Attorney-General v Baxter* (1684) 1 Vern 248. In this case, Sir Francis North struck down a trust for the maintenance of non-conformist clergymen as being for superstitious use, although it was noted that the trust had charitable intent and that a trust for religious purposes is a trust for charitable purposes. There was no consideration as to whether the public would benefit from such a charitable trust thus suggesting that whilst religion and charity were natural bedfellows, religion and the notion of public benefit were not yet contemplated.

Evidence does suggest that the courts have impliedly presumed a presumption of public benefit when considering trusts for religious purposes, however, case law also suggests that such an assumption was not without boundaries. The seminal case of *Gilmour v Coats* [1949] AC 426 offers support to such a notion. In this case, the House of Lords addressed "the validity of a trust for a community of cloistered Catholic nuns who devoted their lives solely to prayer, contemplation, penance and intercessory prayer." (Dal Pont et al at 761) Their Lordships upheld the decision of the Court of Appeal and found that the purposes of the priory were not charitable. In doing so, their Lordships approved the case of *Cocks v Manners* (1871) LR 12 Esq 574. In *Gilmour*, Lord Reid noted (at 461) that English law had always favoured gifts for religious purposes, thus embedding the notion that the law implicitly recognises religion as a positive action, however, relying on arguments presented in the case of *Cocks*, Lord Reid commented that the public benefit test is limited and if the public benefit is too remote, then the trust will fail for not being for the benefit of the public. Lord Reid further commented (at 461)that the test laid down in *Cocks*, which had stood, at that time, for three-quarters of a century, ought not to be reversed when the question of degree of public benefit is so limited in this case. In the later case of *National Deposit Friendly Society Trustees v Skegness Urban District Council* [1959] AC 293 at 321-322 Lord Denning was clear where religion may or may not be seen to be advanced and thus for the public benefit:

> The one thing that distinguishes charitable objects from all others is that they are for the good of the community, that is, for public rather than for private benefit...[t]he "advancement of religion" connotes the promotion of religion by spiritual teaching or by pastoral or missionary work among others outside one's circle. When a man says his prayers in the privacy of his bedroom, he may truly be said to be considered with religion but not with the advancement of religion.

Thus it is clear that although there may be a presumption that trusts for religious purposes do fulfil the public benefit requirement, courts are still willing to test that presumption. However, the issue then for the courts is what actually constitutes a public benefit, and on that basis, the courts are in the unenviable position of having to determine what constitutes sufficient evidence of public benefit. It is to this issue that the paper now turns.

Evaluating Public Benefit

In cases where there are obvious tangible benefits to the public, then there should be little difficulty in finding public benefit but the actual requirement of benefit for a community is problematic because this requirement refers to a legal concept that has no clear definition. Certainly there is no statutory definition and "its determination corresponds to the courts on the basis of the circumstances of the particular case in point." (Miguel Rodriguez Blanco at 13) Since this requirement is so imprecise, it is perhaps easier to outline circumstances where trusts for religious purposes would not be beneficial to the public. If a religion encourages followers to use violence against the public, or against non-followers, then this clearly would be contrary to the notion of public benefit. However, care must be taken with such a principle because charitable status does not necessarily depend on public favour or opinion, thus a religion may not have public favour, but it may still fall within the concept of being beneficial publically. Indeed, the Charity Commission for England and Wales noted that the existence of harm or detriment does not automatically render an organisation uncharitable as it is a question of balancing the benefits against the possible harm or detriment. (The Charity Commission "Charities and Public Benefit, The Charity Commission's General Guidance on Public Benefit" (2008) [E4] <www.charitycommission.gov.uk/Library/publicbenefit/pdfs/publicbenefittext.pdf>)

Therefore if the harm or detriment outweighs the benefit, then the purpose would fail as a charity. Mere disagreement would not be adequate evidence as to whether a purpose is beneficial or not, and where benefits are overwhelming, then inconsequential detriment would not affect the requirement to fulfil public benefit. (The Charity Commission)

Common law appears clear that public benefit cannot be demonstrated where the benefits are essentially private and thus without evidence of tangible benefits. (F Cranmer "Religion and Public Benefit" (2009) Ecclesiastical Law Journal 11(2) at 2) This has been the position since the case of *Cocks v Manners*, which was approved without hesitation in *Gilmour v Coats*. Nonetheless, such an approach has not been without issue.

In the case of *Gilmour*, it was the lack of evidence of spiritual benefit that was the key issue in this "high water mark of the judicial refusal to uphold trusts for religious purposes in the absence of tangible benefit". (Harding at 172) The case arose as a result of an attempt to create a trust for the purposes of a nunnery in London. The religious order had two purposes: the contemplation of divine things and intercession for the souls of others. The order was also a closed order. The Court was asked to make two findings of fact: (Harding at 172)

> First, that the nuns' intercessory prayers caused the grace of God to be bestowed on those for whom the nuns prayed; and secondly, that the nuns' pious lives were a source of edification to others. It was hoped that…the purposes of the Carmelite nunnery were for the public benefit and therefore charitable.

It is questionable how a court may make findings of facts on the ethereal subject of the effect of prayer. Indeed, Lord Simonds (at 446) expressed such a concern:

> …whether I affirm or deny, whether I believe or disbelieve, what has that do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof.

Regardless of the lack of susceptible proof, the burden is however on the court to make such a finding. Prima facie such an undertaking may appear futile, however, the Court in the instant case had already noted that "[n]owhere has the court laid down that the benefit to the public of religious charities must be of any particular kind or must proved in anyway", (*Gilmour v Coats* at 437) thus the Court has already given itself free rein to determine the public benefit as appropriate.

Lord Simonds was careful to separate the values of a church and the requirements of the court. His Lordship (at 446) noted that the religiously minded embrace a faith that is intangible, and although the advancement of religion is a head of charity, it does not follow that a court must accept as proved that which a church would believe. As a result, his Lordship (at 446) was able to entrench the notion that a court is not bound by intangible concepts and therefore "the court can only act on proof." Unfortunately, his Lordship failed to clarify exactly what that proof may entail, although he added (at 446) that the alleged elements of public benefit to be found in edification is too vague and intangible to satisfy the prescribed test. It is unfortunate that his Lordship was able to express so coherently the requirement that the court must be presented with tangible proof that the advancement of religion benefits the public in some fashion, but yet failed to address the very key issue as to what *would* actually satisfy that prescribed test. The later case of *re Warre's Wills Trusts* [1953] 1 WLR 725 also considered this very issue, but it is opined that although the instant case entrenched the concept of public benefit and the advancement of religion, it added little to the substantive issue of how one should satisfy that test.

In this case, a testatrix gave the residue of her estate to the Salisbury Diocesan Board of Finance to, inter alia, provide and maintain a retreat house. This retreat house was devoted to a form of religious exercise whereby individuals may enter the retreat house for a period of time for religious contemplation and cleansing of the soul. The Court was invited to determine whether, inter alia, such a scheme constituted a valid charitable trust. Harman J, referring to *Gilmour v Coats*, noted that such an activity was undoubtedly beneficial for those who wished to undertake such pursuits, but that would not necessarily be recognised under law as being charitable. Harman J reiterated (at 728-729) the House of Lords' requirement in *Gilmour* that the test of public benefit must do more than edify an individual or a small group of individuals, and thus any religious activity which does not affect the public, or any section of it is not charitable. As a result, the purpose of the trust in the instant case was not charitable. However, the author respectfully submits that Harman J actually did little to clarify what constitutes a public benefit. It is noted clearly (at 729) that "activities which do not in any affect the public or any section of it are not charitable", yet at no stage did the Court answer whether the retreat house was available to members of the public, and if so,

how many. Therefore it remained unclear as to what constituted a section of the public, and in what circumstances the public benefit test could be satisfied.

An answer to this question of uncertainty may be found in the judgment provided by Cross J in the case of *Neville Estates Ltd v Madden and Others* [1962] 1 Ch 832. In this case, Cross J expressed his concern about the burden placed on courts to determine whether a religious purpose confers a public benefit. He noted (at 852) that even assuming that such a question can be answered, judges are "generally ill equipped to answer them and their endeavours to do so apt to cause distress to the faithful and amusement to the cynical." This sentiment no doubt has its origins in the judgment of Lord Simonds in the case of *Gilmour*, to which this paper referred earlier. In that case, his Lordship separated the differing values of churches and the requirements of the courts, and in doing so, created a chasm between the two institutes without providing an adequate method of reconciling the differences. Cross J (at 852) in *Neville Estate* appeared to recognise this chasm between the two bodies but reluctantly admitted that "the decision of *Gilmour v Coats* has made it clear that a trust for a religious purpose must be shown to have some element of public benefit in order to qualify as a charitable trust." His Honour then endeavoured to quantify how the test of public benefit may be satisfied. His Honour noted that similarities may be drawn between *Gilmour* and the present case, in that in the case of *Neville*, those of the Jewish faith living in a specific area may constitute a section of the public, but they are no more a section of the public than the members of the Carmelite order in the case of *Gilmour*. However, his Honour opined that that is where the similarities may end, as the members of the Synagogue in the present case are not separated from the rest of the world, which distinguished it from the members of the Carmelite order, whose members are required to live in seclusion from the rest of the world. Therefore his Honour concluded that the Carmelite order can confer no public benefit because the order is not permitted to live among or socialise with the rest of the world and thus cannot have any discernible affect on the outside world. Once his Honour had distinguished the two situations, he was then able to provide some clarity as to that which may constitute a public benefit. It was presumed that some benefit is disseminated to the public from the attendance of a place of worship by those who live in this world and mix with the public. (*Neville Estates Ltd v Madden and Others* at 852-853) Certainly this goes someway to providing some benchmark as to how the test may be satisfied, however, it is still unclear how such a benefit accrues to the public by worshippers at a specific place of worship. Cross J did not address this issue but did note (at 854) that the "law of charity has been built up not logically by empirically, and there is a political background peculiar to religious trusts which may well have influenced the developed of the law." Such discourse reflects the discomfort of the courts in having to address such matters and perhaps goes some way to explain the vague jurisprudence of the law relating to public benefit and religious advancement.

The case of *re Banfield, Decd. Lloyds Bank Ltd v Smith and Others* [1968] 1 WLR 846 however does provide some link to bridge the chasm between worship and the requirement of public benefit. Goff J confirmed (at 850) that in the case of *Gilmour*, the cloistered nuns were an introspective community thus the benefit to the public was too "intangible to be recognised and evaluated by a court of law." In the instant case however the testatrix gifted some of her estate to the Pilsdon Community House, which was a religious community whose members carried out prayer and work in the community. The House also received members of the public who needed help and support. Goff J noted that this clearly showed that the work was for the public benefit, but he added the caveat that that alone was not sufficient, and the work must be shown to be in the spirit and intendment of the *Statute of*

Elizabeth. In his Honour's opinion, (at 851-852) that test is satisfied by considering the work, not in isolation, but by looking at the work of the trust as a whole and therefore in that situation, it fell fully within the principle. Thus Goff J has provided some measure of how the advancement of religion may satisfy the public benefit test, albeit in a very broad fashion.

However, applying such measures is a double-edged sword. On the one hand, the courts are providing some measure of clarity to a problematic area of law. On the other hand, it is difficult to reconcile how earthly tests can possibly measure the benefits of ethereal beliefs. Such a sentiment finds support in the judgment of Hutley JA in the Australian case *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744. In this case, his Honour opined concern (at 259) about subjecting religious activities to scrutiny by the courts of the public benefit of such activities, noting that such scrutiny "could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of all religious practices", which is inconsistent with the judicial notion that religious matters are incapable of objective proof. (G E Dal Pont and D R C Chalmers *Equity and Trusts in Australia* (4th ed Sydney: Lawbook Co) at 761) Nonetheless, the case of *Gilmour v Coats* established clearly that whilst belief or faith "is manifestly not susceptible of proof...the court can act only on proof". (*Gilmour v Coats* at 446) Therefore earthly tests must be applied to establish the public benefit of ethereal matters. Hutley JA's concerns certainly have validity however his Honour has perhaps gone someway to limiting the applicability of the test in *Gilmour v Coats* by noting that that case "must be confined to those religious bodies who take no part in the secular world." (*Joyce v Ashfield Municipal Council* at 261) His Honour affirmed this notion by referring to Lord Reid's dissenting judgment in *Inland Revenue Commissioners v Baddeley* [1955] AC 572 at 612 where his Lordship commented that:

> ...if members of a religious denomination do not constitute a section of the public (or the community) then a trust solely for the advancement of religion...would not be a charitable trust if limited to members of a particular church.

Hutley JA acknowledged (at 261) that although this is a dissenting judgment, "it is obviously correct on this issue" therefore confirming that those religious orders whose activities are confined to non-secular dissemination cannot be construed as satisfying the public benefit test. In such circumstances the law then is clear. However, in cases where facts are not quite so unambiguous, then there is little guidance on how to deal with questions of public benefit except perhaps to apply the broad test as outlined by Goff J in the case of *Banfield*, as discussed earlier in the paper.

This broad test has been echoed recently by the England and Wales Charity Commission in its 2008 draft supplemental guidance on public benefit and the advancement of religion. (Charity Commission, England and Wales "Analysis of the Law Underpinning the Advancement of Religion for the Public Benefit" December 2008 <www.charity-commission.gov.uk/Library/publicbenefit/pdfs/lawrel1208.pdf>) The draft guidance confirms that the Charity Commission will adopt a flexible approach with regard to charities that advance religion. (Charity Commission "Analysis of the Law Underpinning the Advancement of Religion for the Public Benefit" [2.1]-[2.3])

The guidance suggests that the public benefit requirement will be satisfied "if the beliefs and practices, reflected in the religion's doctrines and codes, tend towards a moral or spiritual welfare or improvement of society and the benefits extend to the public or a sufficient section of the public." (Helen Palmer "Trustees' Responsibilities and Public Benefit (2008) 6 Private

Client Business at 420) The guidance (at [3.7]) is clear however that moral and spiritual improving of religious purpose on the public must be capable of being demonstrated, thus echoing the requirements of *Gilmour*, but the guidance (at [3.8]) explicitly provides examples of how this can be measured, for instance by the consequential effect that the beliefs and practices being promoted by the teachings has on its followers or others such as promoting trust, community engagement or civil engagement. The guidance (at [3.12]) is also clear that the benefits must be related to the aims of the organisation so this can be determined by ensuring that the "core tenets and practices of the religion are beneficial and essentially public." The guidance therefore reflects the requirements established by case law, but provides some certainty as to how the benefits may extend to the public, or at least a sufficient section of the public.

Conclusion

The jurisprudence of the public benefit element of the advancement of religion has been problematic because the courts have been required to impose worldly tests on matters of spirituality, which will inherently be fraught with difficulties. Australia "at least has addressed this particular issue" (Chevalier-Watts at 201) where section 5(1)(b) of the *Extension of Charitable Purposes Act 2004* (Cth) states that an institution has a purpose for the public benefit to the extent that it is either:

> ...a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public...or an open and non-discriminatory self-help group.

New Zealand has yet to be provided with such clarity although the information offered by the Charity Commission of England and Wales may provide useful guidance should future cases fall outside of the limited clarity that case law has provided to date.