PUBLIC BENEFIT IN TRUSTS FOR THE ADVANCEMENT OF RELIGION

The article considers the law governing the element of public benefit in charitable trusts established for the advancement of religion, with particular reference to trusts providing for the performance of religious rites in public. The recent English decision in *Re Hetherington (deceased)* [1989] 2 All E.R. 129 is considered in the light of the previous authorities and the judgment commented on. The impact which the case might have on the existing Singapore law in the field is evaluated, and the suggestion made that some judicial reappraisal of the previous Singaporean cases might now be appropriate.

Every student of trusts law knows that trusts established for the advancement of religion can have charitable status provided the necessary element of public benefit is satisfied.[1] But the truism begs many questions. What is "religion"? How can it "be advanced"? What is meant by "public benefit" and how can a trust be shown to have satisfied this requirement? To these questions the cases provide some imperfect guidance and some inconsistency of approach and attitude. So much so, that Murray Aynsley C.J., when considering some of these issues, commented "However the courts have not been logical in the past and I do not suppose that they will be so in the future."[2]

If a trust fails to satisfy the criteria for charitable status then it must either fail or take its place amongst that small group of anomalous, valid but unenforceable, trusts, analogous to gifts for the maintenance of individual animals and for the provision and maintenance of graves and tombstones, As such they would lose the privileged fiscal position enjoyed by charitable trusts in England, a factor of less importance in Singapore. Of more serious note in both jurisdictions, is that non-charitable trusts must be limited within the perpetuity period to be valid. A serious consideration in trusts providing for Sin Chew ceremonies since it raises the spectre of the deceased becoming a hungry ghost once the twenty one year period has elapsed!

A recently reported English decision *Re Hetherington (deceased), Gibbs* v. *McDonnell*[3] has re-opened the debate by holding that a gift for

[1] *Commissioners of Special Income Tax v. Pemsel* [1891] AC 531 at p. 583.
[2] In *Re Alsagoff Trusts* [1956] 22 MLJ 244 at p.245. The response to which is no doubt Lord Simmonds' aphorism in *Gilmour* v. *Coats* [1949| 1 All ER 848 at p.856, that "the law is life not logic."
[3] [1989] 2 All ER 129.

the saying of public masses can take effect as a valid charitable trust and does contain the necessary public benefit. The earlier decision in *Re Caus, Lindeboom* v. *Camille*[4] was followed, despite the adverse judicial comment on that case in the celebrated decision in *Gilmour* v. *Coats.*[5] The latter case although not strictly concerned with a gift for the performance of religious rites in public adopted a strict view of the public benefit requirement in religious trusts and tended to restrict the scope of such trusts. This case has been influential in Malaysian and Singaporean decisions leading the courts to deny charitable status for trusts for Sin Chew[6] or Chin Sheng[7] or Muslim ceremonies.[8] The new English case provides an opportunity to review this area of law and to ask whether a reappraisal of traditional attitudes to such trusts should follow in Singapore.[9]

THE ADVANCEMENT OF RELATION

There have been many cases which have explored the meaning of the phrase "advancement of religion" and the search for the necessary criteria has been a difficult one. It seems that the law is happier when dealing with the practical and tangible than when considering the spiritual. Thus gifts for the provision and support of the clergy[10] and for the building and repair of buildings used for religious purposes,[11] have readily been accepted as charitable. But gifts concerned with the promotion of religious activities *per se,* such as the promulgation of religious belief or the furtherance of a religious life or the performance of religious rites, have caused more difficulties. The established religions, whether Christian, Jewish, Islamic, Buddhist etc. have been accepted without distinction as charitable. See Cross J's comment in *Neville Estates Ltd.* v. *Madden*[12] that "As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none." But more modern and seemingly esoteric and unusual groupings such as the Church of Scientology have

4 [1934] Ch 162.
5 *Supra.*
6 The leading cases include: *Choa Choon Neoh v. Spottiswoode* (1869) 1 Ky 216 (not charitable and void as offending the rule against perpetuities); *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) LR 6 PC 381 *(ibid); Re Khoo Cheng Teow* (1933) 2MLJ 119 (within perpetuity period, valid non-charitable purpose); *Tan Chin Ngoh* v. *Tan Chin Teat* (1946) 12 MLJ 159 *(ibid).*
7 *Low Cheng Soon* v. *Low Chin Piow* (1932) 1 MLJ 15 (void as tending to a perpetuity and also as a superstitious use); *Phan Kin Thin v. Phan Kuon Yung* [1940] 9 MLJ 44 (valid non-charitable purpose); Sir *Han Hoe Lim* v. *Lim Kim Seng* (1956) 22 MLJ 142 (void as infringing perpetuities and not charitable).
8 *Re Abdul Guny Abdullasa* (1936) 5 MLJ 174 (valid charity); *Re Alsagoff Trusts* (1956) 22 MLJ 245 (not charitable but valid purpose trust).
9 This area of law was last reviewed in 1969, 1970 by Then Bee Lian: "The Meaning of "Charity" in Malaya - A Comparative study," 11 Mal. L.R. 220, and 12 Mal. L.R. 1. An excellent full discussion of the relevant cases to date, to which this writer is indebted and the reader referred.
10 *Re Maguire* (1870) L.R. 9 Eq. 632; *Re Macnamara. Hewitt* v. *Jeans* (1911) 104 LT 771; *Re Williams, Public Trustee* v. *Williams* [1927] 2 Ch 283.
11 *Re Church Estate Charity, Wandsworth* (1871) 6 Ch. Ap. 296; *A.C.* v. *Dartmouth Corporation* (1883) 48 LT 933; *Re St. Alphage. London Wall,* (1888) 59 LT 614; *Maguire* v. *A.G.* [1943] I.R. 238.
12 [1962] Ch 832, 853.

caused consternation and confusion.[13] Thus the search must be for some criteria or definition that will distinguish religious from non-religious activities. There are some helpful judicial comments. It has been said that the words "advancement of religion" mean the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and of the observances that serve to promote and manifest it.[14] Lord Parker of Waddington in a judgment giving a very clear and valuable summary of the history of the approach of the law to religious charitable trusts made the often quoted remark: "It would seem to follow that a trust for the purpose of any kind of monotheistic theism would be a good charitable trust."[15]

In a modern English case[16] where the issue was debated, Dillon J referred to the above case and to various American authorities and concluded:[17]

> "In a free country, and I have no reason to suppose that this country is less free than the United States, it is natural that the court should desire not to discriminate between beliefs deeply and sincerely held, whether they are beliefs in God or in the excellence of man or in ethical principle or in Platonism or some other scheme of philosophy. But I do not see that that warrants extending the meaning of the word 'religion' so as to embrace all other beliefs and philosophies. Religion, as I see it, is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere inquiry into the question, what is God?. If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of qualities such as truth, beauty and love, or believe in the Platonic concept of the ideal, their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion. The ground of the opinion of the Supreme Court in *Seeger's* case, that any belief occupying in the life of its possessor a place parallel to that occupied by belief in God in the minds of theists is religion, prompts the comment that parallels, by definition, never meet."

Thus simply put, a religion is concerned with man's relations with God and involves faith in a God and worship of that God.[18]

13 Not accepted as charitable in England, *R* v. *Registrar General exp. Segerdal* [1970] 2 QB. 697: but accepted as charitable in Australia, *Church of The New Faith* v. *Pay Roll Tax Commissioners* (1983) 57 ALJR 785.
14 *Keren Kayemeth Le Jisroel, Ltd* v. *Inland Revenue Commissioners* [1931] 2 KB 465, at p.477, affirmed [1932] AC 650.
15 *Bowman* v. *Secular Society Ltd* [1917] AC 406 at p.448 - 450.
16 *Barralet* v. *An. Gen.* [1980] 3 All ER 918.
17 *Supra,* at p.924.
18 *Ibid.*

On this basis the Secular Society in the *Bowman* case was not charitable;[19] nor were the United Grand Lodge of Ancient, Free and Accepted Masons of England;[20] nor was the ethical society in *Barralet's* case[21].

In contrast two quite extraordinary cases. In *Thornton* v. *Howe*[22] a trust for the publication of Joanna Southcott's works was held charitable although it is difficult to see how the criteria of religion was satisfied and impossible to ascertain the necessary public benefit. This case prompted the equally questionable decision in *Re Watson*[23] where a trust to distribute and promulgate the free distribution of tracts which were declared to have no intrinsic merit, but disclosed a religious tendency, was held to be charitable. The judge explained his decision as follows:[24]

> "Now the result of those cases, including the *Anti-Vivisection* case[25] to which counsel for the next-of-kin referred, in my judgment, is this. First of all, as Romilly MR said in *Thornton* v. *Howe,*[26] the court does not prefer one religion to another and it does not prefer one sect to another. Secondly, where the purposes in question are of a religious nature – and, in my opinion, they clearly are here – then the court assumes a public benefit unless the contrary is shown. And thirdly, that having regard to the fact that the court does not draw a distinction between one religion and another or one sect and another, the only way of disproving a public benefit is to show, in the words of Romilly MR in *Thornton* v. *Howe,*[27] that the doctrines inculcated are-'adverse to the very foundation of all religion, and that they are subversive of all morality'. And that in my judgment, as I have said already, is clearly not the case here, and I therefore conclude that this case is really on all fours with *Thornton* v. *Howe*[28] and for that reason is a valid charitable trust."

This approach can be contrasted with that of the House of Lords in *Gilmour* v. *Coats,*[29] which will be considered later.

19 [1917] AC 406: "It is not a religious trust for it relegates religion to a region in which it is to have no influence on human conduct", *per* Lord Parker, at p.445.
20 *United Grand Lodge of Ancient Free and Accepted Masons of England v.Holhorn Borough Council* [1957] 3 All E.R. 281 "Admirable though these objects are, it seems to me impossible to say that they add up to the advancement of religion", Donovan J. at p.285.
21 *Supra.* But since the whole of the society's objectives were for the mental and moral improvement of man they were charitable as being for purposes beneficial to the community and the activities could also be classified as charitable as being for the advancement of education.
22 (1862) 31 Beav. 14. She claimed that she was with child by The Holy Ghost and would give birth to a Second Messiah.
23 *Hobbs* v. *Smith,* [1973] 3 AH ER 678.
24 At p.688.
25 *National Anti - Vivisection Society* v. *I.R.C.* [1948] AC 31.
26 *Supra.*
27 *Supra.*
28 *Supra.*
29 [1949] All E.R. 848.

More recently, the advancement of religion was the subject of comment in the New Zealand decision in *Centrepoint Community Growth Trust* v. *CIR*.[30] That case emphasised the element of promotion and manifestation of spiritual teaching and the maintenance of the doctrines on which it rests.[31] Likewise it was thought that to advance religion means to promote it, to spread its messages ever wider and to take some positive steps to sustain and increase religious belief.[32] This missionary element based on an outward looking mentality and public face implicit in the meaning of religious purposes has implication for the complementary requirement of public benefit. It is the latter element which causes the difficulties in the charitable status particularly for trusts for the performance of religious rites.

PUBLIC BENEFIT

The requirement of public benefit has assumed greater prominence in the modern law and in trusts other than for the relief of poverty the courts have demanded that this element be manifest and proved by the trust. The extent or degree of the requirement is not constant to all charitable trusts but depends on the nature of the trust.[33] Thus the exemption in favour of trusts for "poor relations" is established and was extended to "poor employees" in *Dingle* v. *Turner*.[34] A high degree of public benefit is demanded for trusts for the advancement of education as the law is suspicious of attempts to attract the tax advantages to trusts for the provision of educational scholarships, which could be used for payment of school or university fees for too restricted a class of possible beneficiaries. In other words to provide tax free perquisites for management or employees of public companies.[35] Similarly a high degree of public benefit is demanded for trusts which seek charitable status as being beneficial to the community.[36]

The attitude to trusts for the advancement of religion has not been consistent. It has been pointed out that the courts have sometimes been

30 [1985] 1 NZLR 673, at p.691.
31 Citing Lord Hanworth MR in *Keren Kayemeth Le Jisroel Ltd* v. *Inland Revenue Commissioners* [1931] 2 KB 465, at p.477.
32 Citing *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council* [1957] 3 All ER 281. The same criteria can provide some explanation for the high water mark cases of *Thornton* v. *Howe* and *Re Watson,* previously referred to.
33 *Per Lord Simmonds* in *Gilmour v. Coats, supra,* at p.856.
34 [1972] AC 601. The discussion in this important case on public benefit centred mainly on trusts for the relief of poverty and contains little of direct relevance to the discussion here. However Lord Cross did comment, at p.625 that "a trust to promote some religion among the employees of a company might perhaps safely be held to be charitable provided that the benefits were to be purely spiritual." A comment over influenced perhaps, by the fiscal advantages enjoyed by charitable trusts in England which is difficult to reconcile with the more exacting approach in *Gilmour* v. *Coats, supra.*
35 See *Oppenheim v. Tobacco Securities Trust Co Ltd.* [1951] AC 297, and *I.R.C.* v. *Educational Grants Association Ltd.* [1967] Ch 123.
36 See *I.R.C.* v. *Baddeley* [1955] AC 572 and *National Anti - Vivisection Societv* v. *l.R.C.* [1948] AC 31.

content with a very small element of public benefit.[37] However the House of Lords decision in *Gilmour* v. *Coats*[38] demanded a rather stricter requirement and this important case has been regarded as the leading modern authority. The income of a trust fund was directed to be held "upon trust if the purposes of the Roman Catholic community situate and known as the Carmelite Priory, St. Charles Square, Notting Hill, in the country of London, are charitable, to apply the income of the trust fund to all or any such purposes with power to pay the same to the prioress for the time being of the said community for the purposes aforesaid without seeing to the application thereof." The question raised for the court's determination was whether the trust was charitable. The evidence established that the convent comprised an association of strictly cloistered and purely contemplative nuns who devoted themselves entirely to worship, prayers and meditation within the four walls of the cloister and performed no works and engaged in no activities whatever for the benefit of anyone outside their own association. The Catholic Church regarded their activities as causing the intervention of God to bring about the spiritual improvement of members of the public and as tending by example to the spiritual edification of the public. Jenkins J. ruled against the trust as charitable as lacking the required element of public benefit[39] and his decision was upheld by the Court of Appeal[40] and the House of Lords.[41]

Lord Greene M.R. in the Court of the Appeal restated the proposition, established by *National Anti-Vivisection Society* v. *I.R.C.*[42] that public benefit is a necessary element in religious, as it is in other, charitable trusts. So it is possible for a trust to be undoubtedly religious but not charitable, for example a gift for the religious instruction of a man's grandchildren, or a gift to endow a private chapel in a country house. The trust must have a public not merely a private benefit by proof of works which have a demonstrable impact on the community or a section of it. In assessing this impact the court is not concerned with the truth or otherwise of the religious beliefs entertained by particular religions which it recognises as such, but a subjective belief by adherents of that religion that the religious activities in question do have a public benefit, is not enough. The belief must be subject to evidence and proof in a court of law.[43] Lord Simmonds in the House of Lords expressed the same thought:[44]

> "My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in

[37] See Hayton and Marshall, *Cases and Commentary on the Law of Trusts* (8th Ed) at p.326. Citing *ReWatson* [1973] 1 WLR 1472; *Thornton v. Howe* [1892] 31 Beav. 14 *Neville Estates Ltd.* v. *Madden* [1962] Ch 832.
[38] *Supra.*
[39] [1947] 2 All ER 422.
[40] [1948] 1 All ER 521.
[41] [1949] 1 All ER 848.
[42] [1948] AC 31.
[43] *Supra,* at p.526.
[44] *Supra,* at p.854.

> His wisdom think fit to answer them? But, my Lords whether I affirm or deny, whether I believe or disbelieve, what has that to do with 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 to proof."

Further,[45]

> "I turn to the second of the alleged elements of public benefit, edification by example, and I think that this argument can be dealt with very shortly. It is, in my opinion, sufficient to say that this is something too vague and intangible to satisfy the prescribed test."

The other useful modern authority to refer to is Cross J.'s decision in *Neville Estates Ltd.* v. *Madden*[46] where members of the Catford Synagogue were held to constitute a sufficient section of the public to satisfy the public benefit test. Cross J. dealt with the argument advanced by counsel that this was a private, not a public trust as follows:[47]

> "The trust with which I am concerned resembles that in *Gilmour v. Coats*[48] in this, that the persons immediately benefited by it are not a section of the public but the members of a private body. All persons of the Jewish faith living in or about Catford might well constitute a section of the public, but the members for the time being of the Catford Synagogue are no more a section of the public than the members of a Carmelite Priory. The two cases, however, differ from one another in that the members of the Carmelite Priory live secluded from the world. If once one refuses to pay any regard – as the courts refused to pay any regard – to the influence which these nuns living in seclusion might have on the outside world, then it must follow that no public benefit is involved in a trust to support a Carmelite Priory. As Lord Greene said in the Court of Appeal: "Having regard to the way in which the lives of the members are spent, the benefit is a purely private one." But the court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens."

Whilst accepting the differences identified, it is still difficult to be convinced that the factual contrast provides sufficient reason for a fundamentally different result. In both *Gilmour* v. *Coats*[50] and in *Neville Estates Ltd.*[51] the essential subject matter of the trusts was religious and both enabled the adherents and participants of that religion to practice it in their own way. No doubt the doors of the Catford Synagogue were open

45 *Supra,* at p.855.
46 [1962]Ch832.
47 *Supra* at p.852. The judge referred to Professor Newark's article (1946) 62 LQR 234.
48 *Supra.*
49 *Supra,* at p.525.
50 *Supra.*
51 *Supra.*

to all but so also were the doors of the Carmelite Priory, not to mere casual passers by, but to any Catholic woman who was prepared to join the religious community and share in, and practise the life therein. The crucial difference identified in these cases is, of course, that in the earlier case the activities were conducted in private, in the latter in public. But should this really be the criteria for determining public benefit?

It would seem from the House of Lords' conclusions in *Gilmour* v. *Coats*[52] that the quality of public benefit must be tangible and objective and capable of proof in court. It will be recalled that the court specifically rejected an argument that edification by example by the observance of a strict religious life in private, could constitute sufficient public benefit. Thus the test is objective, not subjective and therein of course lies the essential dilemma because religion is almost by definition concerned with faith and belief, and not with proof and often the impossibility of the latter strengthens the former for the religion's adherents. But it cannot have been the intention in *Gilmour* v. *Coats*[53] to deny charitable status to all purely religious trusts, admitting only those whose activities, conducted under the umbrella of religion, have social, medical, or educational benefits to the public.[54] Certainly trusts providing endowments for the saying of masses or for the performance of Sin Chew ceremonies do not appear able to pass this test. Indeed such trusts often have another inherent difficulty, namely that even if the activity is performed in public, it is often expressed to be for the benefit of a specified deceased individual or individuals, and not for the benefit of the public at large. The only demonstrable benefit the public can obtain by participating or attending or observing such ceremonies is surely the edification by example of pious belief in the benefit of divine worship - which is precisely what was rejected in *Gilmour* v. *Coats*[55] Furthermore, it is submitted that the criteria for proof of public benefit should depend not on whether the activity is performed in the public view but on the intrinsic nature of the activity itself.

ENGLISH AND IRISH CASES

Turning now to the specific issue of the performance of religious rites in public, in the Republic of Ireland, the Courts have long accepted the charitable status of trusts for the saying of masses. The leading case is perhaps *O'Hanlon* v. *Logue*[56] where it was held that if the gift contained a direction to celebrate the mass in public then it was charitable. The public benefit was expressed as follows in that case by Walker L.C.

[52] *Supra.*
[53] *Supra.*
[54] See Murray Aynsley CJ. in *Re Alsagoff* (1956) 22 MLJ 244.
[55] *Supra.*
[56] [1906] 1 IR 261. See also the other relevant Irish decisions. *Att. Gen.* v. *Delaney* (1875) IR 10CL 104; *Att. Gen.* v. *Hall* [1897] 2 IR 426; *Munster and Leinster Bank* v. *Att. Gen.* (1940) 1 IR 19; *Re Keogh* [1945] IR 13; *Re Cranston* [1898J 1 IR 431 and *Charity Commission* v. *M'Cartan* [1917] 1 IR 388.

> "What makes it charitable is the performance of an act of the church of the most solemn kind, which results in benefit to the whole body of the faithful, and the results of that benefit cannot depend upon the presence or absence of a congregation."

The matter has now been put beyond doubt in Ireland by an express statutory provision, S. 45 Charities Act 1961 Republic Of Ireland, which states with reference to religious trusts that "it shall be conclusively presumed that the purpose includes and will occasion public benefit."

Before the recent decision in *Re Heatherington*,[57] the only case directly supporting a similar conclusion in English law was *Re Caus*[58] where the Irish cases were clearly influential. Luxmoore J. tackled the central issue in the debate by examining the ritual nature of the mass itself.[59]

> "In my judgment, once the true nature of the mass is explained, and the destination and object of the payment for it is made clear, there can be no room for any other opinion but that a gift for masses is charitable .... Although there is no decision in *Bourne* v. *Keane*[60] on the question whether a gift for saying masses is charitable or not, there are many passages in the speeches of Lord Birkenhead, Lord Atkinson and Lord Parmoor, that recognise and support the view that such a gift is charitable. I have no hesitation in holding that a gift for the saying of masses constitutes a valid charitable gift on the grounds that it enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion and secondly, because it assists in the endowment of priests whose duty is to perform that ritual act."

Other judges have not been so easily persuaded. Lord Greene M.R. in *Gilmour* v. *Coats*[61] after considering Luxmoore J's judgment, simply disagreed, and whilst carefully refraining from overruling *Re Caus*[62] the implications of his comments are highly critical of the decision. Lord Greene M.R.'s view can be summarised in the following quote:[63]

> "I cannot myself see that the belief of the section of the public said to be benefited can be effectual to confer on the trust the essential characteristic of public benefit at any rate where the belief is a religious belief which in its nature is incapable of proof in a court of law."

Evershed L.J. (as he then was) likewise distinguished *O'Hanlon* v. *Logue*[64] as based on the different social and cultural conditions that exist in Ireland and expressly rejected that Walker L.C.'s proposition, quoted above, was applicable in England. In so far as Luxmoore J.'s findings

57 *Supra.*
58 *Supra.*
59 *Supra,* at pp.169, 170.
60 *Supra.*
61 *Supra,* at p. 527.
62 *Supra.*
63 *Ibid.*
64 *Supra.*

of public benefit in *Re Caus*[65] rested on evidence tendered in the Irish cases, the Lord Justice expressly declined to follow him.

THE RECENT CASE

It is against the background of these cases that the recent decision of Sir Nicholas Browne-Wilkinson V.C. in *Re Hetherington (Deceased), Gibbs* v. *McDonnell*[66] needs to be discussed. There were two straightforward gifts in the will of a Roman Catholic testatrix. "I wish to leave two thousand pounds to the Roman Catholic Bishop of Westminster for masses for the repose of the souls of my husband and my parents and my sisters and also myself when I die." Secondly, "whatever is left over of my estate is to be given to the Roman Catholic Church St Edwards, Golders Green for masses for my soul." The issue was simply whether these gifts were charitable the difficulty centering on the requirement of public benefit. The Vice-Chancellor was essentially faced with a choice between *Re Caus*,[67] which was directly in point in favour of charitable status and *Gilmour* v. *Coats*[68] where the tenor of the decision was somewhat against such a finding. The judge chose to follow the former and held the gifts charitable.[69]

> "In my judgment *Gilmour* v. *Coats*[70] does not impair the validity of the decision in *Re Caus*.[71] Certainly the passage from the judgment of Luxmoore J which I have quoted which suggests that public benefit can be shown from the mere celebration of a religious rite is no longer good law. The same in my judgment is true of Luxmoore J's first ground of decision, if it suggests that the performance *in private* of a religious ritual act is charitable as being for the public benefit. But in my judgment there is nothing in the House of Lords decision which impugns Luxmoore J's second ground of decision, namely that the public benefit was to be found in the endowment of the priesthood. Therefore the decision in *Re Caus*[72] is still good law and I must follow it."

The difficulty with the judgment is that there is no real analysis of the meaning of public benefit or legal or philosophical consideration of why the saying of masses is considered to be for the public benefit. In this respect, the judgment compares poorly with Jenkins J at first instance in *Gilmour* v. *Coats*.[73] Sir Nicholas Browne-Wilkinson simply concentrates on the precedent of the previous authorities and justifies his decision by the lame comment that *"Re Caus* is still good law and I must follow it."[74]

65 *Supra.*
66 [1989] 2 All ER 129.
67 *Supra.*
68 *Supra.*
69 At p. 134.
70 *Supra.*
71 *Supra.*
72 *Supra.*
73 *Supra.*
74 *Supra.*

The judgment concluded with a number of propositions which can be considered in turn: The first of these is:

> "A trust for the advancement of education, the relief of poverty or the advancement of religion is prima facie charitable and assumed to be for the public benefit: see *National Anti-Vivisection Society* v. *I.R.C.*[75] this assumption of public benefit can be rebutted by showing that in fact the particular trust in question cannot operate so as to confer a legally recognised benefit on the public, as in *Gilmour* v. *Coats*.[76]"

In this respect the Vice-Chancellor follows (without reference to the case) the approach of Cross J in *Neville Estates Ltd* v. *Madden*,[77] referred to above, rather than the attitude of the courts in *Gilmour* v. *Coats*[78] to the effect that the element of public benefit must be demonstrable and capable of affirmative proof.

The second proposition was stated as follows:

> "The celebration of a religious rite in public does confer a sufficient public benefit because of the edifying and improving effect of such celebration on the members of the public who attend."

In *Gilmour* v. *Coats*[79] all the judges categorically denied that the edifying effects of a strict and pious religious life in private could constitute the required public benefit. It is difficult to see why the fact that the rites are performed in public should lead to a different conclusion. If the basis of the public benefit is "the edifying and improving effect" then it is simply concerned with whether such an effect can be proved, and surely it is irrelevant whether the rites are public or private. A better argument in support of charitable status for trusts providing for the celebration of religious rites in public is that such a trust simply advances religion by enabling the public to participate in their religion and thus is charitable. If religion is accepted at all as charitable then it seems that enabling the performance or practice of rites central to that religion should qualify.

The third proposition was:

> "The celebration of a religious rite in private does not contain the necessary element of public benefit since any benefit by prayer or example is incapable of proof in the legal sense, and any element of edification is limited to a private, not public, class of those present at the celebration: see *Gilmour* v. *Coats*[80] itself; *Yeap Cheah Neo* v. *Ong Cheng Neo*[81] and *Hoare* v. *Hoare.*"[82]

75 [1947] 2 All ER 217, at pp. 220, 223.
76 *Supra.*
77 *Supra.*
78 *Supra, per* Lord Greene M.R. at p. 526, and Lord Reid, at p. 864.
79 *Supra.*
80 *Supra.*
81 (1875) LR 6 PC 381.
82 (1886) 56 LT 147, [1886-90] All ER 553.

The first part of this proposition must be correct on the authorities but the justification is more difficult to accept. Edification is not the correct criteria and it is submitted should not depend on whether the ceremony is public or private. It is clearly possible to argue, as was done in *Gilmour* v. *Coats*,[83] that the public at large can be edified by the private religious activities of a closed group. The reason why private ceremonies are not charitable is because they exclude the public from participation; the provision must enable the public to advance their religion not a private class.

The final proposition was as follows:

> "Where there is a gift for a religious purpose which could be carried out in a way which is beneficial to public (i.e. by public Masses) but could also be carried out in a way which would not have sufficient element of public benefit (i.e. by private Masses) the gift is to be construed as a gift to be carried out only by the methods that are charitable, all non-charitable methods being excluded: see *Re White, White* v. *White*[84] and *Re Banfield (decd.), Lloyds Bank Ltd.* v. *Smith.*[85]

It is axiomatic that a charitable trust must be limited exclusively to charitable objects. If the trust permits part of the property to be applied for non-charitable purposes, the whole gift is affected by that defect and fails: *Ministry of Health* v. *Simpson*[86]; *Re Jenkins' Will Trusts.*[87] It is submitted that the two cases cited in the proposition do not provide sufficient justification for departing from the fundamental proposition. Since the gifts in *Re Hetherington* were not limited to public masses but could have been used for closed or private masses, it is arguable that the trust should not have been held charitable.

Finally the factor which seems to have been most influential in the case was that the gifts would in effect go to augment the stipends of priests and thus relieve the Roman Catholic Church *pro rata* of the liability to pay such stipends. This is frankly totally unconvincing. If a testator bequeathed an annual sum to a priest to provide religious instruction and education for his children, the supposed justification that this would be charitable applies. But clearly it is not. No doubt a provision for the payment of salary of a priest without more would be charitable but when it is limited to or conditional on the performance of activities, then that becomes the primary object of the trust and it is submitted, the issue centres on those activities rather than on the payment of the money.

[83] *Supra.*
[84] [1893] 2 Ch 41 at 52-53, [1891-4] All E.R. 242 at 244-245.
[85] [1968] 2 All ER 276, [1968] 1 WLR 846. This is in contrast to the specific legislative position in Singapore, s. 67 of the Trustee Act, which specifically validates trusts which include non-charitable as well as charitable purposes. Contrast the much more restrictive and practically unimportant provision in English law, Charitable Trusts (Validation) Act 1954.
[86] [1951] AC 251.
[87] [1966]Ch249.

EFFECT ON SINGAPORE LAW

It is clear that in Singapore and Malaysian cases trusts for Sin Chew, Chin Sheng and Muslim rites, have consistently been held non-charitable.[88] This conclusion has been reached in cases decided after *Re Caus* was reported in 1934;[89] *Tan Chin Ngoh* v. *Tan Chin Teat*[90] (1946, *Sin Chew case*), *Phan Kin Thin* v. *Phan Kuon Yung*[91] (1940, *Chin Sheng case),* and *Re Alsagoff Trusts*[92] (1956, *Muslim rite case),*. The question now arises, if, in the light of *Re Heatherington*,[93] trusts for the saying of Masses are now accepted as being charitable in England, will this affect the altitude of Singapore courts to trusts for the Chinese ceremonies? The answer must no doubt depend, to a great extent, on whether the latter can be regarded as analogous to the ceremony of the public performance of the Mass. Does the public benefit now thought to be intrinsic to the saying of masses in public apply equally to Sin Chew ceremonies? Alternatively are they to be regarded as *sui generis* category of valid but unenforceable trust?

The debate on the analogy of Sin Chew ceremonies and the saying of masses is well documented. In *Yeap Cheah Neo* v. *Ong Cheng Neo*[94] Sir Montague E Smith drew the analogy.[95] But in more modern cases the two ceremonies have been contrasted. Thus in *Re Khoo Cheng Teow*[96] Terrell J. thought that an important distinction existed between the two forms of rite. In that case the judge received evidence from Chinese experts on the nature and object of Sin Chew ceremonies and referred to Sir Benson Maxwell's exposition of the nature of the Sin Chew ceremonies in *Choa Choon Neo* v. *Spottiswoode*[97] In that early case it was forcibly pointed out that the object of Sin Chew ... "is solely the benefit of the testator himself, and although the descendants are supposed incidentally to derive from the performance of the Sin Chew ceremony the advantage of pleasing God and escaping the danger of being haunted these advantages are obviously not the object of the testator, nor if they were, would they be of such a character as to bring the devise within the designation of charitable, as used in our Courts in reference to such objects." Terrell J. thought[98] that although certain superficial resemblances could be found between the two ceremonies there were sufficient essential characteristics which differentiated the two ceremonies. The judge concluded that whereas the Sin Chew ceremonies are only intended to benefit the testator himself, or the particular deceased person for whom the cere-

88 See the cases referred to in footnotes 6, 7 and 8 *supra.*
89 It is interesting to note that the influential *Re Khoti Cheng Teow* (1933) 2 MLJ 119 was decided shortly before *Re Caus* was reported.
90 (1946) 12 MLJ 159.
91 (1940)9 MLJ 44.
92 (1956) 22 MLJ 244.
93 *Supra.*
94 (1875) LR 6 PC 381. See also *Re Wan Eng Kiat* [1931] SSLR 57.
95 *Supra* at p, 396. "The dedication of this Sow Chong House bears a close analogy to gifts to priests for masses for the dead."
96 (1933) 2 MLJ 119.
97 *Supra,* at p. 218.
98 *Supra,* at p. 121.

monies are performed, the sacrament of the mass is for the benefit of all the members of the Catholic Church past or present.[99] At the date of that decision, 1932, it had not yet been decided in England whether a gift for Masses for the dead was a good charitable gift but the judge was clearly of the opinion that even if it were so decided as it was of course in *Re Caus*[100] in 1934, that would be no reason for holding that a gift for Sin Chew purposes was charitable as the characteristics of the two ceremonies were essentially different.[101] Then Bee Lian in the article referred to above[102], after reviewing the debate thought that the most compelling reason for the majority view in favour of dichotomy was as follows:

> "In the final analysis, the purpose of Sin Chew ceremonies was to benefit the testator and the other sacrament of the mass was for the benefit of all the members past and present of the Catholic church."

But as that writer pointed out, this is not entirely convincing as there is an equally selfish motive in masses which are to be said, as in *Hetherington*,[103] for the benefit of the souls of the testator and his immediate family, a fair point which must be admitted. But notwithstanding more recently the dichotomy has been reaffirmed[104]. Murray Aynsley C.J., in *Phan Kin Thin* v. *Phan Kuon Yung*[105] thought that Sin Chew ceremonies were limited in object to the benefit of a particular person, whereas the saying of masses is not so limited. The saying of masses in public is a public celebration of a religious rite which the public can attend and participate in. The Chinese ceremony although performed in public is essentially a private affair in which the public cannot participate. Furthermore Sir Nicholas Browne-Wilkinson V.C. in *Re Hetherington*[106] attached considerable importance to the fact that the gift in the case before him contributed to the endowment of priests. Although this point is obviously flawed (as has been pointed out above) it is a significant point of distinction between masses and Sin Chew ceremonies. On this basis a trust for one can be charitable whereas the other cannot as lacking public benefit. Before *Re Hetherington* that is where the balance of the debate lay, but the recent case must now weigh heavilly on the side of charitable status and would, it is suggested, justify a reappraisal of the issues in Singapore.

99 *Supra,* at p. 121.
100 *Supra.*
101 *Supra,* at p. 121.
102 *Supra,* footnote 9, at p. 242.
103 *Supra.*
104 See also Professor Newark 'Public Benefit and Religious Trusts' (1946) 62 LQR 234, 241 of the same opinion. It seems that Then Bee Lian was unconvinced as to the correctness of the distinction drawn in *Re Khoo, supra,* preferring to explain that decision as an attempt to reconcile the previous decisions on Sin Chew which had clearly declared them non-charitable and the Irish cases which at the date of *Re Khoo.* 1934, had recognised trusts for the saying of masses as charitable. The difference it was suggested must be in the nature of the ceremonies, at p, 244, 245. The criticism of Terrell J. by Then Bee Lian is it is suggested, somewhat ingenuous since the dichotomy between the ceremonies was the reason and not merely the excuse for the judge's decision.
105 (1940) 9 MLJ 44.
106 *Supra.*

An alternative analogy that has been explored in some cases is between Sin Chew ceremonies and trusts for the maintenance of tombs and graves.[107] As such the trusts would be valid if limited within the perpetuity period but unenforceable, and fall within the anomalous category of gift recognised as unobjectionable on public policy grounds and accepted as a concession to natural human desires and weaknesses. Clearly there is authority strongly supporting the view that this is the true status of trusts for the Chinese ceremonies *(Choa Choon Neoh*,[108] *Re Khoo*,[109] and *Phan Kin Thin*[110]). The analogy between trusts for the maintenance of tombs and graves is not exact but whether one regards such trusts as falling within that category or constituting a separate category with similar characteristics probably is without significance. In *Re Alsagoff Trusts*[111] Murray Aynsley C.J. simply regarded the trust for the reading of the Quran at the Testator's grave as within the exception to the beneficiary principle[112] and justified as a gift to so called trustees. Thus valid but unenforceable. But a further gift in the same will "to maintain and provide, mats and Zamzam water for the use of persons visiting the Mosque at Mecca" was upheld as a valid charitable gift. Thus prompting the judge's cynical remark recorded above who continued:[113]

> "Such benefit to the public who attend churches as is provided by hassocks to kneel upon will no doubt continue to be regarded as charitable, while the performance of the rites at which they have come to assist will not be."

CONCLUSION

The decision in *Re Hetherington* can be challenged on the grounds of logic and precedent but will no doubt be accepted for reasons of policy as correct. The boundaries of charity have been too narrowly drawn in English Law, the fiscal advantages leading to the public benefit jacket being applied too tightly. In cases of religious trusts where no tax perquisites apply, the constraints can justifiably be relaxed. A trust to promote in public any bone fide religious activity is now likely to be accepted as charitable. A selfish motive, or a primary objective of benefiting a particular family or individual will not be fatal provided the trust is not exclusively so framed. A public act to which the public has access and can participate would seem to be all that will be required. Singaporean lawyers can usefully note these trends. The advantage of the perpetuity position enjoyed by charitable trusts and the greater liberty enjoyed in the expression and definition of the object clause, is no less important in Singapore than in England. Perhaps now less regard might be paid

107 See Sir Montague E Smith in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) LR 6 PC 381 and Murray Aynsley C.J. in *Phan Kin Thin* v. *Phan Kuon Yung* (1940) 9 MLJ 44.
108 *Supra.*
109 *Supra.*
110 *Supra.*
111 *Supra.*
112 Typified by *Re Dean* (1889) 41 Ch D 552, an "animal" case.
113 At p. 245.

to the restrictive decision in *Gilmour* v. *Coats*[114] and greater emphasis placed on *Neville Estates Ltd* v. *Madden*[115] and *Re Hetherington*[116] that where there are manifestly religious elements in a trust the public benefit might be assumed rather than be required to be affirmatively proved. The recent case provides an opportunity to expand the concept of charitable purposes so as to embrace trusts for Sin Chew, Chin Sheng and for the public performance of Muslim rites. This would free such trusts from the grip of the perpetuity rule and give them a validity more genuine than mere acceptance as anomalous valid, but unenforceable, trusts.

C. H. SHERRIN*

[114] *Supra.*
[115] *Supra.*
[116] *Supra.*

* LL.M. (Lond.), Ph.D. (Lond.), Barrister, Reader in Law. University of Bristol; Senior Visiting Fellow, Faculty of Law, National University of Singapore.