PUBLIC BENEFIT IN A FAMILY TRUST

Cafoor v. *Income Tax Commissioner* [1]

Fine distinctions and refinements govern the law of charities. This is especially significant with regard to the requirement of public benefit as an essential ingredient of a legal charity, which has been labelled, not unjustifiably, the "most difficult of the many difficult problems in this branch of the law".[2] In the words of Viscount Simonds: [3]

> To determine, whether the privileges, now considerable, which are accorded to charity in its legal sense, are to be granted or refused in a particular case, is often a matter of great nicety, and I think that this House can perform no more useful function, in this branch of the law that to discourage a further excess of refinements where already so many fine distinctions have been made.

Perhaps this judicial approach can be seen adhered to in the most recent case on public benefit: *Cafoor* v. *Income Tax Commissioner,*[1] a Privy Council decision in an income tax appeal from the Supreme Court of Ceylon.

A trust deed directed the trust income to be applied by the board of trustees for the education, instruction or training in England or elsewhere abroad "of deserving youths of the Islamic Faith" in any department of human activity. [4] The same clause also provided that the "recipients of the benefits provided for in this clause shall be selected by the Board from the following class of persons and in the following order: male descendants along either the male or female line of the grantor or of any of his brothers or sisters failing whom "youths of the Islamic

1. [1961] 2 W.L.R. 794.
2. Viscount Simonds in *I.R.C.* v. *Baddeley* [1955] A.C. 572 at p. 589.
3. *Ibid.*
4. Clause 2 of the trust deed.

Faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Colombo in Ceylon".[5] The appellants claimed that this trust was " a trust of a public character established solely for charitable purposes" within the exemption from income tax granted by section 7(i)(c) of the Ceylon Income Tax Ordinance, 1932.

Thus two classes of persons were specified as propositus of the trust: In the first place the trust extended to the members of the family of the grantor of the trust and could therefore be regarded as a family trust, *i.e.,* a private trust as opposed to a public charitable trust. The benefit of the trust was also available to a section of the public which might have been sufficient to base a finding of "public benefit" necessary for a legal charity. The Privy Council had therefore to decide whether this was a charity entitled to the privilege of tax exemption, *i.e.,* "a trust of a public character established solely for charitable purposes".[6] It was decided in an opinion delivered by Lord Radcliffe, that, on construction of the trust deed, an absolute priority in the selection of the beneficiaries was conferred on the family of the grantor, which thus negatived the "public benefit" essential for a charitable trust. Assuming that the trust created was one for education, a concomitant factor essential for the validity of it depended on whether the objects tabulated in the trust deed justified a finding of "public benefit". In arriving at the conclusion that the trust was not one of a public character, the following principles, it is submitted, were directly or impliedly established by the Privy Council:

(*a*) Although educational purposes are themselves charitable purposes, public benefit is required to mould them into charitable trusts.[7]

(*b*) The presence of public benefit is negatived if the trust is one for the benefit of persons related to a named person or employed in a named corporation.[8]

(*c*) Therefore, trusts under which the beneficiaries are defined by reference to a purely personal relationship with a named person cannot be valid charitable trusts.[9]

(*d*) A trust which provides for the education of a section of the public does not necessarily lose its charitable status or its public character merely because persons related to a named individual are mentioned explicitly as qualified to share in the educational benefits.[10]

(*e*) A trust providing for the education of a section of the public loses its public character if the preference given to persons related to a named individual amounts to giving an *absolute priority* to the benefit of the trust resulting in a primary disposition in favour of the persons.

The first proposition is too well-founded to warrant further discussion. The statement of law in proposition *(b),* on the other hand, is of recent development in

5. That this trust was "a trust of a public character established solely for charitable purposes" within the exemption granted by the Ceylon Income Tax Ordinance, 1932, had been decided by the Board of Review under the Ordinance for a previous year.

6. One other question was before the Judicial Committee, namely whether the prior decision of the Board of Review estopped — as *res judicatae* — the determination of the Question for a subsequent year. Answering it in the negative, the Privy Council had to decide on the charitable character of the trust, for the current year.

7. See also *I.R.C.* v. *Glasgow Police* [1953] A.C. 380 (H.L.) and *Re Cox* [1955] A.C. 627 (P.C.).

8. See also *Oppenheim* v. *Tobacco Securities Trust Co.* [1951] A.C. 297 (H.L.); *cf: Re Cox* [1955] A.C. 627 (P.C.).

9. Following *In Re Compton* [1945] Ch. 123 and *Oppenheim* v. *Tobacco Securities Trust Co.* [1951] A.C. 297 (H.L.); *cf: Re Cox* [1955] A.C. 627 (P.C.).

10. [1961] 2 W.L.R. 794 at p 805.

the English courts. Inherent in this proposition is a wider principle which creates a peculiar situation with regard to the validity of trusts for the endowment of educational institutions as being charitable, notwithstanding the reservations of benefits to descendants or relatives of the settlor. Lord Radcliffe, for the Privy Council, regards these "founder's kin" cases as "validly instituted, though there seems to be virtually no direct authority as to the principle upon which they rested" and that "they should be regarded as belonging more to history than to doctrine".[11] In the English courts, Lord Greene had examined the earlier authorities on this subject in *Re Compton* [12] where he doubted the correctness of the statement of law in *Tudor*[13] that "bequests for the education of the donor's descendants and kinsmen at schools and colleges are valid requests". Admittedly, *Tudor's* proposition is too wide, but these "founder's kin" cases have been supported in *Oppenheim* v. *Tobacco Securities Trust Co.*[14] where Lord Simonds said: [15]

> If I may begin at the bottom of the scale a trust established by a father for the education of his son, is not a charity. The public element, as I will call it, is not supplied by the fact that from the son's education all may benefit. At the other end of the scale the establishment of a college or university is beyond doubt a charity. ... So also the endowment of a college, university or school by the creation of scholarships or bursaries is a charity and nonetheless because competition may be limited to a particular class of persons. It is upon this ground, as Lord Greene M.R. pointed out in *Re Compton* (1945) Ch. 123, 126, that the so called founder's kin cases can be rested.

Thus seen, the authorities only support the view that the trust in such a case would be construed as being one to some particular college or foundation upon trust to educate descendants there. They do not extend to cases, like the present one, where no specified educational institution is designated for the purpose of the trust. It is therefore to be doubted whether Lord Radcliffe's statement that the "founder's kin" cases belong "more to history than to doctrine" is justifiable. Nevertheless, the principle in these cases can hardly apply to the trust in the present case where no specified educational institution was designated. Proposition (*b*), however, is subject to this exception.

In a similar vein Lord Radcliffe labels the "poor relations" cases as "no more than an anomaly in the general law".[16] That it is an anomaly in the country of its origin certainly warrants refusal to extend by analogy the principle in those cases to the construction of the Trusts Ordinance, 1918, of Ceylon. But nearly all recent English decisions have treated these cases as "good law".[17] As to the Privy Council hierarchy — in 1955, in *Re Cox,*[18] Lord Somervell expressed some doubt on the validity of these cases, but did not, one way or the other, pronounce on the correctness of these cases.[19] This case was an appeal from Canada, where no codified

11. *Ibid.* at p. 804.
12. [1945] Ch. 123. The authorities examined were *Spencer* v. *All Souls College* (1762) Wilm. 163; *A.G.* v. *Sydney Sussex College* (1869) 4 Ch. App. 722; *Concannon* v. *A.G.* (1914) I.E. 194; *Re Rayner* (1920) 89 L.J. Ch. 369; *cf: Re Drummond* [1914] 2 Ch. 90 and *Re McEnery* (1941) I.R. 323.
13. *Charities* (5th Ed.) at p. 30.
14. [1951] A.C. 297 at p. 306.
15. *Ibid.* at p. 306.
16. [1961] 2 W.L.R. at p. 804. The main "poor relations" cases are: *Isaac* v. *De Friez* 2 Amb. 595; *A.G.* v. *Price* 17 Ves. 371; *White* v. *White* 7 Ves. 423; *Bernal* v. *Bernal* (1838) 3 Myl. & Cr. 559; *Browne* v. *Whalley* (1866) W.N. 686; *Gillam* v. *Taylor* L.R. 16 Eq. 581; *A.G.* v. *Duke of Northumberland* 7 Ch. D. 745.
17. *In re Compton* [1945] Ch. 123: Lord Greene at p. 139; *Gibson* v. *South American Stores* [1950] 1 Ch. 177: *Cf: Re Sir Robert Laidlaw,* 1935, unreported. The point was left open in *Oppenheim* v. *Tobacco Securities Trust Co.* [1951] A.C. 297.
18. [1955] A.C. 627.
19. *Ibid.* at p. 639.

trust law exists, but the English equitable principles apply. It may therefore be submitted that the principle in these cases may be acceptable in those common law countries, for example, Malaya, Singapore, Australia and Canada where no codified Trust Acts exist, but where English equitable principles without any reservations excepting peculiarities of English equity apply. Consequently, proposition (*b*) is also subject to this "anomaly in the general law".

In proposition (*c*) the *Compton* Test of public benefit is accepted *in* toto by Lord Radcliffe, without any reservations at all. Therefore a trust for educational purposes, for persons related to a named person can never be a charitable trust, since in such a case their claim to the benefit of the trust depends on a purely personal element — the personal link between them and the named person. The test is essentially and exclusively based on the presence of the personal link of any of the possible beneficiaries to the named propositus. This important factor is brought out emphatically by a vigorous opponent to the test: Lord MacDermott in *Oppenheim* v. *Tobacco Securities Trust Co.* [20] where he says:

> The test thus propounded focusses upon the common quality which unites those within the class concerned and asks whether that quality is essentially impersonal or essentially personal. If the former, the class will rank as a section of the public and the trust will have the element common to and necessary for all legal charities, but if the latter, the trust will be private and not charitable.

Thus once the personal link is deciphered, it is submitted, the public character of the trust is vitiated. Therefore, it would seem to follow, as a logical corollary to this test, that the presence of the personal link in any of the beneficiaries forming the class alleged to amount to the public or a section thereof, necessarily negatives the element of public benefit. With this in mind proposition (*d*) ought to be examined.

That the public character of a trust for the education of a section of the public is not negatived merely because persons related to a named individual are qualified to share or even preferred in the selection to share in the educational benefits is stated by Lord Radcliffe as a "qualified exception" to the *Compton* Test of public benefit. It is submitted, that, as stated as a standard exception, the recognition of it has no substantial basis and goes a long way towards destroying the *Compton* Test. If any basis for this exception is claimed, it can only be the principle in the "founder's kin" cases, but as has been pointed out above Lord Radcliffe thought these to be inapplicable outside England. Even within England, it is submitted, recognition of this exception cannot be founded on the principle in the "founder's kin" cases for as Lord Simonds says in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.:* [21]

> The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit.

Perhaps support for Lord Radcliffe's "qualified exception" can be found in *Re Koettgen's Will Trusts*[22] where preference was given in the selection of the beneficiaries from a section of the public to certain employees and their families. Nevertheless it was held that there was public benefit sufficient to constitute a charity. But this decision is regarded with disfavour by their Lordships. Lord Radcliffe remarks: [23]

20. [1951] A.C. 297 at page 316.
21. *Ibid.* at p. 306.
22. [1954] 2 W.L.R. 166.
23. [1961] 2 W.L.R. atp. 806.

> It is not necessary for their Lordships to say whether they would have put the same construction on the will then in question as the judge did, or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with *Oppenheim's* Case ....

Upjohn J., in *Re Koettgen's Will Trusts,* had distinguished *Oppenheim's* case[24] on the ground that the necessary element of public benefit was present when the class was ascertained, and therefore did not lose the charitable character by the subsequent preference given the certain employees and their families in the section of the beneficiaries. Upjohn J. arrived at this conclusion since he was of the opinion that the potential beneficiaries have to be *confined* to some aggregate of individuals related to a named individual to lack the necessary element of public benefit.[25] In disapproving this, for the Privy Council, Lord Radcliffe must be of the view that in applying the *Compton* Test the beneficiaries need *not be confined* to some aggregate of individuals ascertained in accordance with the test, for the trust to lack public benefit. The element of public benefit therefore may be vitiated even if some of the potential beneficiaries claim to be objects of the trust because of a purely personal link with a named person. But this appears to be incompatible with Lord Radcliffe's "qualified exception". What is said above would appear to emphasise, more than is necessary according to his "qualified exception", the importance of the personal link between the persons mentioned explicitly as qualified to share in the benefits of the trust and a named person. According to the "qualified exception" something more is required to make this personal link a vitiating factor of public benefit.

This requirement is perhaps to be found in the principle embodied in proposition (*e*). After recognising the exception, Lord Radcliffe parts from it to decide that if the preference, given to the family of the grantor, amounts to an absolute priority to the benefit of the trust, then the trust lacks public benefit and thus becomes a primary disposition to the family — *i.e.* a family trust — although the potential beneficiaries cover a wider class sufficient to form a section of the public. In this respect *Re Koettgen's Will Trust*[26] was distinguished on a point of construction although it is submitted, that Lord Radcliffe, with much justification, came very near to disapproving it. Perhaps the distinction drawn between the two trust provisions have their real basis on other factors, which though inarticulate, are evident. Upjohn J. was concerned with the validity of trusts *per se.* In the instant case, the Privy Council was concerned with the trust as one "of a public character" for income tax exemption "established solely for charitable purposes", and was therefore justified in so deciding to levy tax on trust income, the benefit of which was preferred expressly to the family of the grantor. One should note that on construction, the desire of the grantor to prefer the members of the grantor's family was an imperative direction. The trust had to be exclusively for charitable purpose in *Cafoor's* case, not so in *Re Koettgen's Will Trusts.* Again the preference given in the latter case was to employees and their families of a named company, whereas in the Privy Council decision, their lordships were faced with a preference to members of the grantor's family. Recently, some judges, *e.g.,* Lord MacDermott in *Oppenheim's* case,[24] tend to look with more favour on trust for the benefit of employees than where the benefit can accrue to the relations of the founder of the trust. The personal link in the *Compton* Test is more apparent when the personal tie is by blood than by contract. But however justified, it cannot be denied that *Re Koettgen's Will Trusts*[26] "opens the way to serious evasion of the *Oppenheim* ruling".[27]

24. [1951] A.C. 297.

25. Contrary to the opinion of Jenkins L.J. in *Re Scarisbrick* [1951] Ch. 622 at p. 648.

26. [1954] 2 W.L.R. 166.

27. P. S. Atiyah in "Public Benefit in Charities" (1958) 21 *M.L.R.* 138 at p. 148.

Thus one cannot go far in basing Lord Radcliffe's "qualified exception" on the decision of Upjohn J. But one is also compelled to admit that this "qualified exception" does open the way to a wide evasion of the *Compton* Test. Perhaps, this depends on the scope of proposition (*e*). This apparently is a question of construction in each case, and what is "absolute priority" in one trust may not be so in another.

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