

Background Briefing

Private Benefit in England and Wales

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"The law of charity is a moving subject"
– Lord Wilberforce

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Private Benefit in England and Wales*

1. Introduction and Summary

As the divide between public and private benefit lies at the heart of charity law, identifying and addressing questions of permissible and impermissible private benefit is an important issue in all common law jurisdictions. Different jurisdictions have addressed this in different ways through statutory provisions and common law. The current law and regulatory practice on private benefit in England and Wales differs from that in Canada in several respects. This is for a number of reasons: firstly, unlike Canada, there is a large body of case law on private benefit but no specific statutory provisions. Secondly, the Charity Commission, the charity regulator has taken a different approach, due, at least in part, to its wider remit and statutory objectives, and lastly, since 2006 England and Wales has had a statutory definition of charity.

In England and Wales the last twenty years has seen considerable debate on the definition of public benefit culminating in the *Charities Act 2006* (consolidated five years later in the *Charities Act 2011*) and subsequent Charity Commission guidance and challenges in the Upper Tribunal.¹ The 2006 Act included a statutory definition of charity which provided that a charitable purpose must both be included in the list of descriptions of purposes in the Act and be for the public benefit (referred to in the Act as the public benefit requirement).² To achieve continuity, common law was maintained to determine the meaning of the public benefit requirement.

In the case of *R (Independent Schools Council) v Charity Commission*³ [Independent Schools], the Upper Tribunal identified two aspects of the public benefit test, firstly that the nature of the benefit itself must be for the public benefit and secondly those who benefit must be identified as the public or a sufficient section of the public. This distinguishes charities from organisations set up to provide benefit solely or predominantly to private individuals. In some cases there may be both public and private benefit, and in establishing what level of private benefit is permissible, the principle under common law continues to be that any private benefit must only be incidental. This flows from the requirement under the *Charities Act 2011* that to be a charity an institution must be established for charitable purposes only.⁴ The courts have set out several tests to determine what is incidental in this context, although ultimately it must be considered on the facts of the case. The most recent full discussion of permissible private benefit is in the 2012 case of *Helena Partnerships Ltd v HM Revenue and Customs* [Helena Partnerships].⁵

Charity Commission material on private benefit (usually now referred to by them as personal

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¹ The body to which Charity Commission matters may be first appealed.

² Part 1 of the *Charities Act 2006*, (U.K.), 2006, c. 50; now at s. 2(1)(b) and s.2(4) of *Charities Act 2011*, (U.K.), 2011, c. 25.

³ 2011 UKUT 42 (TCC) [2912] Ch.

⁴ Section 1(1) *Charities Act 2011*.

⁵ 2012 4 AER 111.

benefit) is found not only in their key guidance on public benefit but in a number of different publications including guidance on specific charitable purposes, on membership charities, on fundraising and investment and several pieces of guidance on the duties of charity trustees reflecting the many different regulatory situations where private benefit may be an issue.

Situations which give rise to questions of private benefit can be broadly classified as 1) excessive benefits to charitable beneficiaries, where the level of assistance is not commensurate to the need, for example in housing cases and charities for the relief of unemployment; 2) excessive benefits to members, for example in professional bodies and learned societies; and 3) where benefits accrue to parties other than the charitable beneficiaries, for example in organisations established for the promotion of the arts or industry or commerce. In practice, the situation where personal benefits are most often considered by the Charity Commission is where there are unauthorised benefits to charity trustees or related parties.

Matters involving private benefit are addressed by the Charity Commission both at registration and in monitoring and compliance cases. The registration application process addresses private benefit in the context of the balance of private and public benefit, the sufficiency of the beneficial class, any unstated non charitable purpose and trustee benefits. The most common compliance cases involving private benefit relate to unauthorised benefits to trustees and related parties. Compliance cases involving other issues of private benefit are, in practice, less common.

2. The Rules in England and Wales governing issues of private benefit

2.1. Common law principles on private benefit

2.1.1. Distinction between benefit to the public and benefit to individuals

The second element of the public benefit test, as identified in the *Independent Schools* case, was that those who benefit must be the public or what the courts have determined to constitute a sufficient section of the public. A charity cannot exist for particular private individuals. Examples of cases where the courts have held that benefit accrues to private individuals rather than the public include a trust for the protection of private investors,⁶ a school for children of the employees of a particular employer⁷ or a convalescent home for members of a trade union and their wives.⁸

Selection of those to benefit must not depend on any private nexus such as family relationship, contract of employment or membership of a society or association. Separate rules apply in the case of charities for the relief of poverty, where charitable purposes have long been accepted for the relief of poverty of relatives of a named individual, for employees of a single employer or members of an association. Although there are only a few “poor relations” on the Register of Charities, there are a large number of benevolent funds for employees of a trade or profession or single employer. Following the *Charities Act 2006* the Charity Commission queried whether such charities could meet the public benefit test. The question was settled by the Upper Tribunal in 2011 following a reference by the Attorney General⁹ where it was held that these charities

⁶ *Foreign Bondholders Corporation v IRC* [1944] 1KB 403 CA.

⁷ *Oppenheim v Tobacco Securities Trust Company Ltd* [1951] AC 297 HL.

⁸ *Re Meads Trust Deed* [1961] 2 AER 836. Discussed at 29-30 of Picarda, *Law and Practice Relating to Charities*, 4th Edition.

⁹ *Charity Commission for England and Wales and others v Her Majesty's Attorney General* (FTC/84/2011).

remained charitable after the *Charities Act 2006* and were not required to meet the public benefit requirement in the second sense of the term.

There is a large body of authority on the question of what constitutes a sufficient section of the community or public, which will vary according to the specific charitable purpose, but this is outside the scope of this article.

2.1.2. When is private benefit incidental?

The key principle established by the courts with regard to private benefit is that it must be legitimately incidental. In the leading case of *IRC v City of Glasgow Police Athletic Association*¹⁰ [Glasgow Police Association], Normand LJ said “that the respondents must show in the circumstances of the case that, so viewed objectively, the association is established for a public purpose and that private benefits to members are the unsought consequences of the pursuit of the public purpose and can therefore be disregarded as incidental”.¹¹

What is legitimately incidental to the pursuit of the objects is a matter to be considered in the individual circumstances of the case. A preliminary point is that although a charity must be established for purposes for the benefit of the public rather than individuals, a charitable purpose may confer personal benefits on individuals or other legal entities. Clearly a charitable food bank established for the relief of poverty confers personal benefits on the recipients; a charitable school benefits the individual pupils, as does a charitable hospital its patients. In *London Hospital Medical College v IRC* Brightman J said

I would suppose that most schools of learning confer a personal benefit on the individual scholars who are admitted thereto. X an individual scholar is not per se an object of charity. The school of learning that X attends is nevertheless charitable if the school exists for the benefit of the community. The fact that X receives a personal benefit is incidental to the implementation of the purposes of the charity.¹²

Some principles have been established by the courts to assist with determining when a private benefit can be treated as incidental; firstly the private non charitable benefit must not be an independent benefit, that is, it must come about either in the direct delivery to a beneficiary or directed to some charitable purpose. In *Commissioners of Inland Revenue v Yorkshire Agricultural Society* which involved benefits to members, Atkin LJ said

If the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the Society being established for charitable purposes only.¹³

The action giving rise to the private benefit must be one which furthers the charitable object. It must not be aimed at providing some collateral object which is an end in itself. In the Glasgow Police Association case, the objects of the association claiming charitable status were expressed

¹⁰ *IRC v City of Glasgow Police Athletic Association* [1953] 1 AER 747, [1953] AC 380. [Glasgow Police Athletic Association].

¹¹ *Ibid.* at 751.

¹² [1976] 2 AER 113 at 135.

¹³ *CIR v Yorkshire Agricultural Society* [1928] 1 KB 611 [Yorkshire Agricultural Society].

to be to encourage and promote all forms of athletic sports and pastimes and there were no stated links to promoting the efficiency of the police force. Reid LJ stated that

conferring the benefits on members bulks so largely in the purposes and activities of the association that it cannot be properly be said to be established for charitable purposes only.¹⁴

A case with social, cultural and athletic activities, which was decided the other way, was that of *London Hospital v IRC*¹⁵, which concerned the students union attached to a medical school. Here the objects did include an express link between the social, cultural and athletic activities and the student life of the medical school and Brightman J held that the students union was established for the sole object of assisting the medical school in its charitable purpose of teaching medicine by promoting physical, cultural and social outlets which would enable the school to perform its charitable purpose. Any personal benefits to the students did not contradict this.

The private benefit must be a necessary or integral part of a course of action deemed to be an effective way of furthering the charitable purposes. In the case of *Incorporated Council of Law Reporting for England and Wales* Russell LJ considered the private benefit accruing to lawyers from the provision of law reports by a non profit business and held that

if the publication of reliable reports of decisions of the courts is for the benefit of the community and of general public utility in the charitable sense it is an inevitable and incidental necessary step in the achievement of that benefit that members of the legal profession are supplied with the tools of their trade¹⁶

The most recent case on private benefit, is the 2012 Helena Partnerships case.¹⁷ In this case Helena Partnerships, a registered social landlord, took a transfer from St Helen's Metropolitan Council of a large part of the Local Authority's housing stock under the UK Government Large Scale Voluntary Transfer Programme. Under agreements, some of the housing was to be reserved for people with a charitable need but some was to be available to people with no such need. The objects were to provide housing and accommodation and related assistance, facilities and amenities. In his judgement Lloyd LJ identified the real issue as the balance between public benefit and benefit to individuals arising from the undertaking of the objects. He made a distinction between charities which provide direct benefits to individuals, which are justified as being for the public benefit on the basis that it is desirable that there should be provision for those in particular need, and those where there is general benefit with less or no immediate benefits to individuals. The provision of public works would come within the latter case.

He went on to say, that in any given case, whether any benefit obtained by an individual as a result of carrying out of the objects in question is subordinate to public benefit, will depend on the nature of the objects, the terms of the constituent document and the nature of the benefits accruing from the carrying out of the objects. In this case he held that the objects were not charitable on the grounds that the provision of housing was not within the fourth head of charity as it was not within the intendment of the preamble of Elizabeth (the case was decided in relation to a period before the commencement of the *Charities Act 2006*). Also that the degree of individual benefit afforded by the provision of housing was so substantial that it could not properly be regarded as subordinate to the public benefit of the availability of a stock of suitable

¹⁴ *Supra* note 10 at 756.

¹⁵ 1976 1 WLR 613.

¹⁶ *Incorporated Council for Law Reporting for England and Wales v AG* 1972 73 at 87.

¹⁷ *Supra* note 5.

housing. (Although the judgment uses the term subordinate it confirms that a variety of words; ancillary, incidental, subservient may be used to the same effect).

2.2. Guidance from the Charity Commission

The Commission has a statutory objective to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities, along with an objective to promote awareness and understanding of the operation of the public benefit requirement. Guidance on issues relating to personal benefit is included in a number of different Charity Commission publications and web-based advice. The primary guidance on Public Benefit, revised in 2013 is made up of three parts; Public benefit: the public benefit requirement PB1, Public benefit: running a charity PB2 and Public benefit: reporting PB3.¹⁸ This suite of guidance is particularly important, as under the *Charities Act 2011*, charity trustees are required to have regard to guidance made by the Charity Commission in pursuance of its public benefit objective when exercising any powers or duties to which the guidance is relevant.¹⁹ The first two parts of the Guidance both include a short section on personal benefits, supplemented by a document on Examples of Personal Benefits with links to other Charity Commission guidance where personal benefit may arise (this does not form part of the statutory guidance). The Guidance itself simply states that “a personal benefit is a benefit that someone (individual or organisation) receives from a charity. Personal benefit is incidental where (having regard both to its nature and to its amount) it is a necessary result or by-product of carrying out the purpose and personal benefits should be no more than incidental”.

This should be read in the context of the document Analysis of the Law relating to Public Benefit²⁰ which makes reference to the leading cases on incidental private benefit.

Much of the Charity Commission’s more detailed guidance on personal benefit relates to benefits to trustees, in line with their strong focus on charity trustees and charity governance. (Charity trustees are defined under the *Charities Act 2011* as “the persons having the general control and management of the administration of the charity”²¹). The main duties relevant here are the duty to act in the best interest of the charity only, the duty not to receive any unauthorised benefit and the duty of care.

An outline of the rules on personal benefits for trustees is included in the Commission’s core publication. The Essential Trustee: what you need to know.²² More detailed guidance on identifying and dealing with conflicts of interest concerning benefits is included in Conflicts of Interest: a guide for charity trustees (CC29).²³ Conflicts of interest often arise in the context of a potential trustee benefit and detailed rules on payments and other benefits are covered in the

¹⁸ See Part 6 Personal benefit in Public benefit: The Public benefit requirement PB1 May 2013 and Part 6 Managing personal benefits in Public benefit running a charity PB2 May 2013 (<https://www.gov.uk/government/publications/public-benefit-the-public-benefit-requirement-pb1/public-benefit-the-public-benefit-requirement>).

¹⁹ S. 17(1) *Charities Act 2011*.

²⁰ Analysis of the Law Relating to public benefit Charity Commission 2013 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589796/Public_benefit_analysis_of_the_law.pdf).

²¹ S. 177.

²² The essential Trustee: what you need to know (CC3) (<https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc>).

²³ *Conflicts of interest: a guide for charity trustees (CC29)* (<https://www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29>).

document Trustee expenses and payments (CC11),²⁴ Broadly, charity trustees are not permitted to receive any payments (other than reimbursement of reasonable out of pocket expenses) or other benefits unless they are authorised by the charity's governing documents, statute, the Charity Commission or the courts. The *Charities Act 2011* permits payments to trustees for goods and services, provided that a number of conditions are met, but for other payments, unless these are permitted under the charity's governing documents, authority from the Charity Commission will normally be required. All payments to charity trustees, including expenses, must be disclosed in the Trustees Annual Report (part of the annual accounts of larger charities).²⁵ Specific guidance on situations where users or beneficiaries serve as charity trustees and therefore receive benefits from the charity are included in the Commission's guidance Users on Board.²⁶

More detailed discussion and application of the general principles on incidental private benefit is found in guidance on specific charitable purposes. These guidance papers date back to the Review of the Register undertaken by the Commission between 1999 and 2004 when the Commission considered the adoption of new framing of charitable objects. This was all in the context of public benefit and issues of potential impermissible private benefit were addressed in the papers on Museums and Galleries (RR10), The Promotion of Urban and Rural Regeneration, Preservation and Conservation (RR9), and Charities for the Relief of Unemployment (RR3).

Personal benefit is also covered in guidance on fundraising²⁷ to deal with the situation where local businesses may receive commercial benefits from being able to use a charity's logo on its material or products, in guidance on public service delivery where a local authority may benefit from carrying out some of its services under contract, and guidance on social investment.

3. Situations which give rise to questions of private benefit

3.1. Excessive benefits to beneficiaries

As already discussed, furthering a charitable purpose will often involve benefits to individuals; however, the benefit must not be unlimited and should be proportionate to the need. There is limited guidance on the subject and it is not raised often by the Charity Commission in practice. A situation where it has been discussed is disaster appeals to assist a small number of victims. Here failure to draft the appeal by reference to the need of the victims will render it non charitable. The leading decision in this area concerned the Penlee Lifeboat disaster fund in 1981 when sixteen men lost their lives, including eight volunteer lifeboat men. The resulting public appeal raised considerable funds, far more than needed to meet the needs of the relatives of the dead. The appeal trust did not qualify as charitable and, following this, guidance was produced by the Attorney General²⁸ which stated that as charitable funds were essentially public in their nature,

²⁴ *Trustee expenses and payments (CC11)* (<https://www.gov.uk/government/publications/trustee-expenses-and-payments-cc11>).

²⁵ *Charity reporting and accounting; the essentials (CC15b)* (<https://www.gov.uk/government/publications/charity-reporting-and-accounting-the-essentials-cc15b>).

²⁶ *Users on board: beneficiaries who become trustees (CC24)* (<https://www.gov.uk/government/publications/users-on-board-beneficiaries-who-become-trustees-cc24>).

²⁷ *Charities and Fundraising (CC20)* (<https://www.gov.uk/government/publications/charities-and-fundraising-cc20>).

²⁸ *Penlee lifeboat disaster fund; guidance for organisers of disaster appeals, UK Home Affairs, 1981 Dec 22 - 1982 Mar 09.*

they could not be used to give individuals benefits over and above those appropriate to their needs.

The Disaster Appeal guidelines address the situation where it is clear from the outset that the funds will exceed the charitable needs. In other situations such as charities established under the Relief of Unemployment, beneficiaries may reach the stage where their needs have been met and they are therefore no longer charitable beneficiaries. The Charity Commission's guidance on the Relief of Unemployment²⁹ confirms that if a charity provides one to one support to newly self employed, it needs to have a mechanism for withdrawal of that support, for example on a time limited or income acquired basis. Similarly a tenancy or lease to the newly self employed would need to provide for termination where the individuals no longer qualified as beneficiaries.

The question of excessive private benefit could arise in housing cases but in the case of *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General*³⁰ it was held that the sale of self contained dwellings for the elderly under different schemes were for the benefit of a charitable class even though there was no provision for the termination of the tenancy if a beneficiary ceased to qualify and even though a beneficiary might profit by an increase in the value of their equity. In the latter situation the court held that the matter was incidental to the objective of the schemes and the profit was not at the expense of the charity. Indeed it might be thought improper if there were a profit that it should accrue to the charity which has provided no capital.

Another potential area of private benefit is "gold plating" of services. This was raised in the context of charitable schools in the Independent Schools Council case by the Education Review Group, an intervener. In a submission to the Tribunal they argued that, in so far as it exceeds expenditure reasonably necessary to provide an education, additional gold-plating should not be considered charitable. The submission referred to "eye-catching expenditure which can be identified: for example, the maintenance of beagle kennels, a golf course or stables" provided to compete for pupils from affluent families and argued that a charity must consider the extent to which the benefits provided are in excess of the charitable need. This argument was not accepted by the Tribunal.

3.2. Excessive Benefits to members

The Charity Commission's guidance on Examples of Private Benefit provides that a charity must not be set up to provide benefit only to the organisation's members unless a sufficient section of the public can access those benefits by becoming members, or the membership structure is a suitable way of carrying out the charity's purposes for the public benefit. There will however be many cases where there is both benefit to the public and benefit to members where the incidental test needs to be applied.

Membership benefits were discussed in the case of *IRC v Yorkshire Agricultural Society*. In this case the Society's objects related to holding an annual meeting for the exhibition of farming stock and implements and the general promotion of agriculture. A number of privileges were attached to membership, including free admission to shows and parts of the grandstands. It was held that these individual benefits were incidental and the society was established for charitable purposes only.

²⁹ Charity Commission Relief of Unemployment RR3 (<https://www.gov.uk/government/publications/charities-for-the-relief-of-unemployment-rr3>).

³⁰ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General* 1983 Ch 159.

A number of the cases relating to non incidental benefits to members concern professional bodies (many, but not all, professional bodies are established as charities in England) and learned societies. Here there are often both benefits to the public, often in the form of setting standards, and also private and professional benefits to individual members. In these cases the courts and the Charity Commission have had to determine the balance, or what has been described by the Commission as “poise” between public and private benefit. They must consider how far benefits accrue principally to the wider public or to enhancing the professional status and intellectual development of individual members of the profession.

There are cases concerning the charitable status of several of the professions. In *General Medical Council v IRC, Sargent*³¹ LJ held that all the objects of the Council were professional, for the benefit of the members, and the benefit to the public was a secondary result. However, over seventy years later in 2001 the Charity Commission accepted the General Medical Council (GMC) for charity registration on the grounds “that there had been sufficient changes in the relevant legal framework to the constitution and activities of the GMC and in the social and economic context within which the GMC operates for them to reconsider charitable status of the GMC despite prevailing legal authorities”.³²

Another case involving a medical regulator where the court held that the benefit to members predominated was that of the *General Nursing Council for England and Wales v St Marylebone Borough Council*³³. Here the main objects were to maintain a register of nurses and make rules regarding their admission which were not regarded as charitable as they were about the enhancement of the qualities and status of nurses, albeit a result of the work of the Council would be to the public advantage (The Council was also registered subsequently by the Charity Commission in 1983).

A medical case decided the other way was *Royal College of Surgeons of England v National Provincial Bank Ltd* where the court held that the professional benefits to members were “an incidental though an important and perhaps necessary consequence of the work of the college in carrying out its main object the promotion and encouragement of the study and practice of the art and science of medicine”.

Another case where the members’ benefits were held to be incidental was a case involving the Geologists Association in 1928.³⁴ Here Greer LJ said

If you come to the conclusion as you may well in many cases that one of the ways in which the public objects of an association can be served is by granting special advantages to the members of the association then the association does not cease to be an association with charitable objects because incidentally and in order to carry out its charitable objects it is both necessary and desirable to confer special benefits on members.

In every case it is a matter of degree as to whether the personal benefit to members of the society, both intellectual and professional, can be disregarded. In practice at registration the Commission will look in detail at the benefits received by members in terms of subsidised access to services as well as their professional advancement. They will also look at how far events and

³¹ [1928] AER 252.

³² Decision of CCEW 2nd April 2001 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324270/GMC.pdf).

³³ [1959] AC 540.

³⁴ *Geologists Association v IRC* 1928 14TC 271.

training are open to the wider public. This is an area where, since the *Charities Act 2006*, professional bodies have been reviewing and articulating their public benefit.

3.3. Benefits to parties other than the charitable beneficiaries

3.3.1. Under Promotion of industry and commerce

Many of the cases involving the question of incidental private benefit come under the common law fourth head purpose of the promotion of industry and commerce. The *Yorkshire Agricultural Society* case discussed above had purposes for the promotion of agriculture. The case of *Commissioners of Inland Revenue v White and the AG*³⁵ involved a society with purposes to advance and encourage craftsmanship through the provision of workshops for craftsmen. Here it was held that the purposes were charitable and any benefits to the individual craftsmen were merely incidental.

The Charity Commission addressed the issue of private benefit in 2017 in their decision on the registration application of the organization Countryside Alliance.³⁶ One of the purposes here was to promote agriculture, game and food production for the public benefit. The Alliance promoted game through a campaign called “game to eat” which promoted the eating of game to the public. The Alliance’s website included a link to the Game to Eat website which included information about specific sellers of game. The Commission held that the organisation was not charitable as the primary result of furthering this purpose was private benefit accruing to those commercially involved in the production of game.

The Commission had considered the balance of public and private benefit earlier in the sister body of the Countryside Alliance Foundation, again under the promotion of agriculture, where a distinction was made between encouraging the purchase of locally grown food and farmers’ markets generally and promoting the interests of individual agriculturalists.³⁷ Charity registration was only granted on the basis that lists of particular producers should be removed from the proposed charity’s website and that promotional literature relating to individual businesses should not be given.

3.3.2. Under the promotion of Urban and Rural regeneration

The Charity Commission’s guidance on the Promotion of Urban and Rural regenerations sets out the general principles on incidental private benefit and the need for an organisation to demonstrate that its activities will not result in an unacceptable level of private benefit. It then sets out an example; an area is deprived, largely because of poor housing and high crime rate, and has reasonably low levels of unemployment. If in this case the organisation carried out retraining for employment there would only be a minor effect on reducing deprivation and the public benefit of the activity is likely to be outweighed by the private benefit which will accrue to the employers. However in an area of high unemployment, the retraining activities are likely to have considerable effect on the regeneration of the area so that the public benefit is likely to outweigh any private benefit to the employers.

³⁵ 1949 AER 537.

³⁶

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/602740/Countryside_Alliance_Decision_Final.pdf.

³⁷ <https://www.gov.uk/government/publications/countryside-alliance-foundation>.

3.3.3. Under the Relief of Unemployment

Organisations set up for the relief of unemployment will not be charitable if they include more than incidental private benefit either for the beneficiaries and/or for those who would not qualify as beneficiaries. The case of *IRC v Oldham TEC*³⁸ concerned the provision of support services and advice to new businesses. In this case the court held that the organisation was not charitable as the purposes would allow the organisation to promote the private benefit of individuals, regardless of whether there would be any consequential benefits to the wider community.

3.3.4. Arts and conservation charities

The Review of the Register paper (RR9) on Preservation and Conservation covers the (not uncommon) situation where a family gives a historic house to a charity and a member of the family continues to live in it and sometimes is an employee or acts as a trustee. The publication sets out guidance on how the continued relationship with the original owner should be regulated to restrict private benefits. At registration, the Commission will require full details of access for the public including opening hours, the terms of any lease back to members of the family and details of any other benefits retained by the original owners.

Similar issues arise in the case of art galleries and museums. The Commission's guidance on Museums and Art Galleries (RR10) sets out examples of the situations where the Commission will usually make enquiries. These include where a benefactor makes a gift of a collection or exhibits but reserves the right to use any exhibits for certain private occasions or where the exhibits are loaned. The guidance goes on to say that the situation is more complicated where the works are of a living artist, as here an artist whose work is being exhibited or otherwise promoted, could benefit from having their profile raised.

3.3.5. Benefits to investors in social investment

A new area where private benefit has been discussed is in social investment. In their 2011 guidance on Investment by Charities, the Charity Commission permitted charity trustees to engage in what they referred to as "mixed motive investment", that is investment aimed to both produce a financial return and fulfil the charitable objects. Some lawyers questioned the legal underpinning for this aspect of the guidance and as a result a statutory power for charity trustees to engage in social investment was granted by the *Charities (Protection and Social Investment) Act 2016*. In guidance on the new power, the Commission requires charity trustees to consider any private benefit which might arise to the investors in relation to the social investment and to ensure that it is necessary in the circumstances, reasonable in amount and in the interests of the charity.³⁹

The question of private benefit to investors in social investment had been considered earlier by Lord Hodgson in his Review of the *Charities Act* in 2013.⁴⁰ In this he accepted that social investment would generate private benefit for investors and considered that the general private benefit rules that the benefit must be necessary and incidental were overly limiting as they would create legal uncertainty as what can be offered to investors and create a conservative mindset

³⁸ *IRC v Oldham Training and Enterprise Council* STC 1218.

³⁹ Social Investment by charities the new power instituted by the *Charities (Protection and Social Investment) Act 2016* Charity Commission.

⁴⁰ Paras 9.11 and 9.27 *Trusted and Independent: Giving charity back to charities .Review of the Charities Act 2006.*

among potential investors. He recommended that the first part of the test should still be that the benefit should be necessary, but in the second limb, the test of incidental should be replaced by proportionate. He acknowledged that care and guidance would be needed to avoid undermining the principle of restricting private benefit in other contexts. The recommendation did not find favour with the Charity Commission or the Government⁴¹ who, in their response to his Review, stated that it threatened to undermine the fundamental concept of charitable status.

3.4. Unauthorised benefits to charity trustees or related parties

Trustee pay or other private benefits feature in a large number of Charity Commission investigations (In the 2016 annual report 130 new open compliance cases, 23 new monitoring cases, 10 whistle blowing reports and 5 new statutory inquiries).⁴²

A 2017 case investigated by the Charity commission was Freshstart Housing Limited. This company was set up to provide advice and assistance in finding housing for people in poverty but the Commission found it was a conduit for personal benefit. All people seeking help were referred to an agency, owned by the charity's founder, which then took a fee from the rent. The Commission held that there were inherent conflicts of interest and the personal benefit to the founder was more than incidental so it was not established for exclusively charitable purposes. It was then removed from the Register of Charities, on the grounds that it had never been a charity.

Unauthorised personal benefits to trustees can take many forms. In a prominent decision in 2006⁴³ the Charity Commission ruled that the Tate Gallery was in breach of the rules on trustee benefits by buying art produced by serving trustees. The case which brought the matter to the Commission's attention was the purchase of the Ofili work, the Upper Room, but the Gallery had also failed to follow the correct procedures to purchase works of serving trustees in seventeen cases going back fifty years. The Statute governing the Tate did require two artist trustees, as do the governing documents of other major art galleries, so this was essentially about the proper management of conflicts of interest.

A long running case involving personal benefits to charity trustees which has been playing out in the press relates to the charity trustees of the Albert Hall. Under their constitution charity trustees are permitted to be seatholders and resell their seats at an inflated price. At present nineteen out of the twenty five trustees are seatholders and for some years the Commission has been in dialogue with the Royal Albert Hall to amend the constitution to address concerns and the matter has now been referred to the Attorney General.⁴⁴

3.5. Unreasonable contracting provisions

Private benefit will often arise in the context of a charity's contracts. In most cases the private benefit arising will be incidental, however where the contract provisions are unreasonable this may not be the case. In their guidance on fundraising⁴⁵ the Charity Commission stresses that charity trustees must ensure that fundraising arrangements are in the best interest of the charity

⁴¹ Cm 7800 p 42.

⁴² Tackling abuse and mismanagement 2015/2016 published 20 December 2016.

⁴³ "How the Tate broke the law in buying a £600,000 Ofili work", The Guardian 19th July 2006. (<https://www.theguardian.com/uk/2006/jul/19/topstories3.arts>).

⁴⁴ <https://www.civilsociety.co.uk/news/charity-commission-refers-royal-albert-hall-to-attorney-general-over-governance-issue.html>.

⁴⁵ *Supra* note 27.

and where the charity is working with commercial partners they should not allow remuneration which is excessive in relation to the funds raised. They go on to say that where conflicts of interest and private benefit have not been properly controlled this may be a trigger for Commission intervention.

3.6. Payment of Excessive compensation

Payment of excessive compensation to employees or consultants could also give rise to questions of non incidental private benefit. In the last few years the question of high executive pay in charities has been the subject of much criticism by parts of the media and public as evidenced in opinion polls. In response to this, in 2013 the National Council for Voluntary Organisations set up an Inquiry into Senior Executive pay and in the Report published guidance for trustees on setting the remuneration and disclosure of both the process and pay. The Charity Commission has mainly treated the issue as one of reputational risk and taken the view that this is essentially a matter for trustees so that no regulatory action has been taken.

4. When these issues are addressed by the Charity Commissions

4.1. At Registration

Much of the focus of the charity registration process is on public and private benefit. A number of the questions relate to the public benefit of the purposes and activities. In addition, the Charity Commission will consider the sufficiency of the beneficial class and the balance of public and private benefit, including any benefits that may arise to parties beyond the charitable beneficiaries, and benefits to members. There are also specific questions to establish that any personal benefits are incidental under the different charitable purposes. For Arts charities where the organisation promotes the work of individual artists or performers, the Commission will need to be satisfied that any personal benefit to those individuals is incidental. In the case of amateur sport organisations, the Commission requires details of any payments or personal benefits provided to players, trainers and coaches and any social or members-only facilities offered to non playing members.

A number of questions are raised about benefits to founders, trustees and related parties; the application form asks whether the organisation does or will employ a trustee, founder or person related to a trustee or founder or if the organisation does or will buy goods or services from these persons. There also needs to be disclosure of any other benefits to someone involved with the organisation.

4.2. In the context of compliance cases

A large number of statutory inquiries and regulatory cases involve issues of unauthorised benefits to trustees and related parties, often through associated companies and unmanaged conflicts of interest.

There are also cases on unreasonable fundraising contracts where only a small proportion of the funds raised goes to the charity and cases concerning land disposals that are not in the best interest of the charity where a sale is at less than the full market value. These cases often involve a breach of the charity trustees' duty of care.

Cases investigated by the Commission involving other issues of private benefit are less common in practice.

4.2.1. Sanctions

Where charity trustees are in breach of trust or duty amounting to mismanagement or misconduct, a number of sanctions are available. In less serious cases an action plan will be issued. The Commission may also issue a statutory warning and in extreme cases remove trustees and appoint new trustees or an interim manager.

Trustees who have been guilty of breach of trust or breach of duty may be personally liable for any sums lost to the charity although in practice this is rare.

Trustees or other parties who have received unauthorised benefits may be required to repay the sums received to the charity. A 2018 Charity Commission decision following an inquiry into a grant making charity revealed that after Commission intervention three charity trustees had repaid a total of £650,000 to the charity in respect of unauthorised consultancy payments.⁴⁶

⁴⁶ <https://www.gov.uk/government/publications/inquiry-into-a-grant-making-charity>.



The Pemsel Case

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