

CHAPTER 3: IS IT POSSIBLE TO DEFINE CHARITY?

Texts on the general law relating to trusts and specialist texts on the law relating to charities contain numerous statements to the effect that the task of evolving a satisfactory definition of charity is an impossible one.¹ *Jacobs' Law of Trusts in Australia* says that the term 'charitable trust defies satisfactory short definition'.² Reference is made to *Re Nottage* where Rigby LJ said that it was probably impossible to define what is a charitable bequest. He added that it was certainly not advisable to attempt to do so.³ In *Re Tetley* Lord Sterndale MR said:

I am unable to find any principle [let alone definition] which will guide one easily and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down.⁴

Earlier in *Re Foveaux* Chitty J said that the best that could be done was to consider each case upon its own special circumstances.⁵ Dixon J (later Dixon CJ) was later to describe this as a 'safe but unenlightening conclusion'.⁶

Picarda refers to the statement of Viscount Simonds in *Inland Revenue Commissioners v Baddeley* that no comprehensive definition of legal charity has been given either by the legislature or the judges.⁷ Picarda, writing in 1999, says that this is still true.⁸ The judgment in *Baddeley* was given in 1955. Six years earlier Viscount Simonds had said in *Gilmour v Coats* 'It is a trite saying that law is life, not logic. But it is, I think, comprehensively true of the law of charity that it has been built up not logically but empirically.'⁹ The fact that that is so obviously true has probably been the main reason why attempts to define charitable purpose have either not been made or have failed. Yet

1 See, for example, the discussion in Sheridan, LA 1992, *Keeton and Sheridan's The Modern Law of Charities*, 4th edition, Barry Rose Law Publishers Ltd, Chichester, pp 1-10; and Sheridan, LA and Keeton GW 1983, *The Modern Law of Charities*, 3rd edition, University College Cardiff Press, Cardiff, pp 23-29.

2 Meagher, RP and Gummow, WMC 1997, *Jacobs' Law of Trusts in Australia*, 6th edition, Butterworths, Sydney, p 182.

3 [1985] 2 Ch 649 at 656.

4 [1923] 1 Ch 258 at 266.

5 [1895] 2 Ch 501 at 504.

6 *Hobart Savings Bank v Federal Commissioner of Taxation* (1930) 43 CLR 364 at 374-375.

7 [1955] AC 572 at 583.

8 Picarda, H 1999, *The Law and Practice Relating to Charities*, 3rd edition, Butterworths, London, p 8.

9 [1949] AC 426 at 448-449.

occasionally there has been a judicial call for a definition. See the dissenting judgement of Lord MacDermott in *Oppenheim*.¹⁰

Many people, both administrators and senior employees of organisations involved in the sector, have expressed difficulty in being confident about their ability to identify a charitable purpose. Lord Macnaghten's four heads of charity propounded by him in 1891 in *Pemsel's* case,¹¹ valuable though they have proved, are by no means exhaustive even as a guide. In no way have they replaced the need to refer to the Preamble in some cases. This was emphasised in 1949, 58 years after *Pemsel's* case, by Viscount Simonds in *Gilmour v Coats* where he said that it had been over and over again to the Statute of Elizabeth to which the courts had looked for guidance.¹² He added:

A great body of law has thus grown up. Later it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages.¹³

The requirement in paragraph 4 of the terms of reference that we provide options for enhancing the clarity and consistency of the existing definitions in Commonwealth law and administrative practice presents the Committee with a difficult task. However, the fact that the law is said to be uncertain and to a degree unpredictable in the Committee's view provides a sound reason why we should attempt the exercise. Before we proceed directly to that matter, which is addressed in Chapter 16, there are a number of preliminary matters with which we should deal.

10 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

11 *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep. 28; [1891] AC 531.

12 [1949] AC 426 at 442.

13 [1949] AC 426 at 483-484.