Articles

The charitable trust: not so special after all?

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Abstract

In *Lehtimaki v Children's Investment Fund Foundation (UK)*[1] ('CIFF'), the Court of Appeal was right to decide that the Chancellor had been wrong to seek to control a charity fiduciary's discretion absent actual or threatened breach of fiduciary duty. This decision ought to be welcomed as setting historically sound and principled limits on the tendency to regard charitable trusts as calling for exceptional treatment.

Exceptionalism and regulation in the law of charities

Trusts lawyers often encounter charity law in the guise of the privileges of charitable trusts, such as the power of the court to prescribe a mode for dealing with a trust for uncertain charitable objects or the exemption of a charitable trust from the rule against inalienability. As Lord Macnaghten said famously in *Pemsel's Case*[2], a case familiar to every law student:

> 'The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable.'

There has for some time been a debate as to whether charitable trusts ought to be treated as *sui generis*. In 1999, Dr (later Professor) Jean Warburton argued:

> 'the present insistence on regarding charitable trusts as part of the general law of trusts not only complicates the reform of the general law of trusts, by the need to consider exceptions and variations for charitable trusts, but also inhibits the development of general charity law by failing to consider charitable trusts in the context of charities as a whole.'[3]

There has for some time been a debate as to whether charitable trusts ought to be treated as sui generis 一段時間以來，關於慈善信託是否應該被視為特有信託的爭論

Among other things, she pointed to the focus of those working in charities on the furtherance of their charitable objects, rather than on particular principles distinctively applicable to the chosen legal structure for the charity.

This kind of exceptionalism finds important expression in the description of a charitable trust as in some sense 'public', a sense related to but going beyond the now-statutory requirement in the definition of charity that a purpose must in order to be

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1. [2018] EWCA Civ 1605; [2018] 3 WLR 1470.
2. [1891] AC 531 at 580.
3. 'Charitable Trusts – unique?' Conv 1999, January–February, 20–31 at 30. For a different perspective, see David Dennis, 'The Judicial Control of the Exercise of Discretionary Powers by Charitable Trustees' (2006) 9 (3) Charity Law & Practice Review 1–57, where he argued that the true basis of private law trust principles itself justified differences in application but not differences in the applicable principles themselves.

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charitable be 'for the public benefit'.[4] In *Stanway v Attorney-General*,[5] Sir Richard Scott V-C said:

> 'Charities operate within a framework of public, not private law. The Crown is parens patriae of the charity and the judges of the courts represent the Crown in supervising what the charity is doing and in giving directions, such as those sought from me. The Attorney-General's function is to make representations to the court as to where lies the public interest as he sees it.'

Dr Liz Chan has recently argued in *The Public-Private Nature of Charity Law*[6] that charity law is a hybrid (public–private) legal tradition. As she points out, one aspect of the public nature of charity law, which can be seen as a counterpart to the special privileges of charity, is the special regulation of charitable trusts and trustees *'in a manner reminiscent of the special regulation of public authorities and actors by public law.'*[7]

One obvious impetus to intervention by the Crown is the absence of any 'beneficiary' strictly so-called given that charitable trusts are purpose trusts.[8] It is the Attorney-General's (and the Charity Commission's) role in enforcing charitable trusts which allows such trusts to stand outside the beneficiary principle.[9]

Even in the case of charitable trusts where it is permissible for there to be a small number of beneficiaries, as in trusts for the relief of poverty,[10] the 'beneficiaries' are defined by their poverty and therefore less likely to be able to enforce a charitable trust. Professor Gareth Jones in his renowned *History of the Law of Charity (1531–1827)*[11] recorded:

> 'It has always been a 'peculiarity of Charitable Trusts', as the Victorian charity commissioners were to note in 1857, 'that the persons beneficially interested under them are seldom in a position to originate measures affecting their government, and the disposition of disinterested persons to undertake such measures with a single view to the benefit of their objects cannot always be relied on.''

A further explanation of charitable status and the way in which it calls for additional regulation, Professor Jonathan Garton suggests in his *Public Benefit in Charity Law*,[12] is the 'information asymmetry' between the financiers of a charity and those who carry it out, that is to say:

> 'the situation in which the persons willing to fund a particular service have access to significantly less information about that service than the organization providing it, and as such those persons are not easily able to make an informed decision about whether to fund it. Civil society activity tends to information asymmetry in three situations: where it creates a public good; where it involves the provision of complex or intangible public services; and where it is premised on wealth redistribution'.[13]

Historically, the need for regulation of charitable trusts led by turns to the establishment of Commissioners under the Charitable Uses Act 1601, the bringing of 'information' proceedings by the Attorney-General at the relation of a third party, and in light of the inadequacies of court procedures, the establishment of the Charity Commissioners (now the Charity Commission) in the nineteenth century.

Today, it is rare for the Attorney-General or the Charity Commission under section 114, Charities Act 2011 ('the 2011 Act'), to bring court proceedings. The Charity Commission also has concurrent

4. s 2(1)(b), Charities Act 2011.
5. Unreported, 5 April 2000, p 3 of transcript.
6. Bloomsbury, 2016.
7. ibid p 32.
8. See eg *Attorney-General v Cocke* [1988] Ch 414.
9. *Leahy v A-G of New South Wales* [1959] AC 457 at 478–79 per Viscount Simonds.
10. *Attorney-General v Charity Commission etc (Poverty Reference)* [2012] WTLR 977.
11. CUP, 1969 (2008 reprint), 20–21.
12. OUP, 2013.
13. ibid at 3.10; pp 61–62.

jurisdiction with the court in certain respects (eg to make schemes under section 69, the 2011 Act), and some of the court's historic functions, eg in the removal of charitable trustees, are often now fulfilled by the Commission. 'Charity proceedings' which include a claim for breach of charitable trust but are, broadly speaking, any court proceedings concerned with the internal affairs of a charity, can also only be brought with the Commission's authorization, or failing that, the court's leave, under section 115, the 2011 Act.

However, while the Charity Commission is perceived as a robust regulator, it is widely acknowledged to be under-resourced relative to the size of the Third Sector. In practice, therefore, there remains substantial scope for parties to seek to involve the court in the affairs of charities, even if they are prevented from doing so by the Commission's refusal to authorize charity proceedings.

In light of this, it was arguably too optimistic (or pessimistic in the eyes of some) for Newey LJ to say recently in *Abdelmamoud v Egyptian Association of Great Britain*[14] that, while a derivative claim by a member of a charitable company under the Companies Act 2006 was theoretically possible,

> 'I find it quite difficult, though, to envisage circumstances in which the court would give permission for a derivative claim on behalf of a charitable company. Not only are charities overseen by the Charity Commission, whose functions include 'taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities' (see section 15(1) of the Charities Act 2011), but the Attorney General acts as the protector of charity and has a duty 'to intervene for the purpose of protecting charities and affording advice and assistance to the court' in the administration of charities: see *Wallis v Solicitor-General For New Zealand* [1903] AC 173, 181. If the commission or Attorney General is persuaded that there has been misconduct, it can be addressed without a derivative claim being brought. If, on the other hand, neither the commission nor the Attorney General sees the need to intervene, it may be hard to persuade a court that a derivative claim should be sanctioned'.

In *CIFF*, in which Newey LJ also sat as a member of the Court of Appeal (with David Richards LJ and Dame Elizabeth Gloster), the court was again concerned with the affairs of a charitable company. But in *CIFF* it had to address more directly the court's role in regulating charities—specifically, the question of the relationship between the court and charity fiduciaries, and the circumstances in which the court can direct such a fiduciary how to exercise his powers.

CIFF

CIFF was set against the background of the divorce of Sir Christopher Hohn and his ex-wife Jamie Cooper who had together set up the relevant Foundation, an English charitable company limited by guarantee. Following the conclusion of matrimonial proceedings, at Ms Cooper's request the trustees of CIFF proposed to make a grant of $360 million to a new charitable foundation incorporated by Ms Cooper (BWP). It was agreed between CIFF and Ms Cooper that the grant was conditional on Court or Commission approval and upon certain covenants, which included a covenant by Ms Cooper to resign as a member and trustee of CIFF. CIFF sought the court's approval of the grant.

At first instance, the Chancellor, Sir Geoffrey Vos, held that the trustees had surrendered their discretion to the court.[15] Crucially, his Lordship then went on to hold that the transaction fell within section 215, Companies Act 2006 (as a payment for Ms Cooper's retirement as trustee), so that the members of CIFF would have to approve it under section 217 of that Act.[16] CIFF had three members: Sir Christopher Hohn, Ms Cooper, and a Dr Lehtimaki, the last of whom the Chancellor had joined to proceedings on

14. [2018] EWCA Civ 879 at [36] *per* Newey LJ, with whom McCombe and Longmore LJJ agreed.
15. [2018] Ch 371 at 399F.
16. ibid at 407G.

the third day of the hearing. Since, as the Chancellor held, Sir Christopher Hohn and Ms Cooper were contractually obliged to refrain from voting under a Letter of Intent in respect of the grant, Dr Lehtimaki was the only voting member of CIFF.

The Court approved the grant, but the question then arose whether in light of that approval there remained the need for the Commission's approval (under CIFF's memorandum or Charities Act 2011, section 201) or a members' resolution (under section 217). Dr Lehtimaki had made it clear that he wished to make the decision himself. The Commission had in the view of the Court deferred to the latter's decision albeit that the Chancellor held that it should be given the opportunity properly to exercise its statutory discretion.[17]

In those circumstances, the Chancellor's view of the position and duties of Dr Lehtimaki as member became decisive. The Chancellor concluded that at least in the circumstances of the *CIFF* case the members of the charitable company owed fiduciary duties to act in the best interests of *CIFF* and not to act under a conflict of interest in considering the section 217 resolution.[18] He agreed with passages at page 33 from the Commission's 2004 publication RS7 (March 2004) to the effect that in the circumstances of the case 'members [of CIFF] have an obligation to use their rights and exercise their vote in the best interests of the charity for which they are a member'.[19]

He went on to hold that it was not open to any member of CIFF to vote against that resolution once the court and the Commission had approved the transaction:

> 'Here, both the Commission and the trustees of CIFF have decided that their discretion to approve the Grant should be exercised by the court. That discretion has now been exercised. The discretion so exercised binds the charity and the charitable company, CIFF. Its management is only divided between trustees and members for specific purposes. Here, the trustees of CIFF bound CIFF in relinquishing their discretion to the court, and the court order will bind CIFF in deciding that the Grant should be made. That means that, whilst the members must pass a resolution under section 217 to approve the Grant, it is not in this case open to any member of CIFF to vote against that resolution, once the court and the Commission have approved the grant. The member does not have a free vote in this case because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction over the administration of charities.'[20]

The sole voting member, Dr Lehtimaki, appealed against the order of the Chancellor that he should vote for the resolution. He argued that CIFF's members were not fiduciaries and in any event the court was not entitled to make such an order even if they were.

The Court of Appeal was therefore concerned with the following questions:[21]

i. Was Dr Lehtimaki subject to any (and, if so, what) fiduciary duties?
ii. Was the Court's inherent jurisdiction in relation to charities extensive enough to allow it to order a member to exercise a discretion in a particular way regardless of whether there is evidence of breach of duty on the part of the member ('the Inherent Jurisdiction Issue')?
iii. In the light of the answers to the previous questions, was the Chancellor entitled, on the facts of the present case, to direct Dr Lehtimaki to vote for a resolution under section 217 of the Companies Act 2006 approving the payment of the Grant?

In summary the Court of Appeal decided:

i. Dr Lehtimaki was under a duty corresponding to the statutory duty of a CIO member (section 220,

17. ibid at 419F-G.
18. ibid at 416D.
19. ibid at 418B-D.
20. ibid at 421A-B.
21. [2018] 3 WLR 1470 at 1482F-G.

Charities Act 2011) to exercise the powers that he had in that capacity in the way that he decided, in good faith, would be most likely to further the purposes of CIFF.

ii. However, the court's inherent jurisdiction over charities did not extend to directing a member how to vote. The court could intervene in Dr Lehtimaki's exercise of his voting powers only where he was acting or proposing to act in breach of fiduciary duty.

iii. There was no evidence of such a breach, and therefore the Chancellor was not entitled to direct Dr Lehtimaki to vote for the relevant resolution.

Whether or not the Court of Appeal's decision on issue (i) has wide implications for charitable companies generally or only for those in some way analogous to CIFF, the Court's decision on the Inherent Jurisdiction Issue is likely to affect charities and their fiduciaries generally.

Ms Cooper and the Attorney-General argued before the Court of Appeal that the court's general reluctance to interfere with the decisions of fiduciaries did not or ought not to apply to members of charitable companies (or, as appropriate, the trustees of charitable trusts and the directors of charitable companies).[22] Ms Cooper's Counsel, Lord Pannick QC, argued that the court had a jurisdiction to supervise, control, and direct the regulation of a charity, where the court considered this expedient.[23]

The Court of Appeal noted the historic recognition by the courts of the 'special treatment'[24] that charities have received in English law, and the important role of the courts and the Attorney-General in relation to charities, quoting the passage from Sir Richard Scott V-C's judgment in *Stanway* above.[25]

The Court of Appeal started its analysis with the conventional approach to the decisions of private trustees,[26] as summarized in the well-known case of *In re Beloved Wilkes' Charity*[27] about the power of certain trustees to select a student to be trained as a Minister of the Church of England under a charitable will trust:

> 'in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases'.

The application of this principle in a charities context was further supported[28] by reference to the judgment of the Upper Tribunal in *R (Independent Schools Council) v Charity Commission for England and Wales*,[29] where the Tribunal made clear it could not and would not tell the charity trustees of independent school charities how to exercise their powers in fulfilment of their charitable objects.

No authority binding on the Court of Appeal was cited for the application of the principle of non-intervention in the context of charitable fiduciaries, and obviously not in the context of member fiduciaries given that *CIFF* recognizes a fiduciary duty on members for the first time.[30]

22. ibid at 1489D.
23. ibid at 1482A.
24. *Gaudiya Mission v Brahmachary* [1998] Ch 341 at 350D *per* Mummery LJ.
25. *CIFF* at 1489C-E.
26. ibid at 1488G-1489B.
27. (1851) 3 Mac & G 440 at 448 *per* Lord Truro LC.
28. ibid at 1493G-1494A.
29. [2012] Ch 214 at 284C-F.
30. As to *Re Beloved Wilkes*, It is doubtful that a decision of the Lord Chancellor sitting alone binds the Court of Appeal: *Wheeldon v Burrows* (1879) 12 Ch D 31 at 54–55 *per* Thesiger LJ; *Ashworth v Munn* (1880) 15 Ch D 363 at 377 *per* James LJ; contrast *Gard v Commissioners of Sewers of City of London* (1885) 28 Ch D 445 (Lord Chancellor's decision on appeal binding).

On the other hand, the Court of Appeal rightly found the authorities cited to them in support of a more interventionist approach to be concerned with the court's distinctive jurisdiction to make schemes in relation to charities[31] or simply not decisive of the point.[32] There had been no application for a scheme in this case.

But it is an open question what would have been the position if the grant had been sought to be effected by way of a scheme eg by the imposition of a duty on the charity trustees to make the payment. It may seem artificial to some that what the court might be able to achieve by scheme it cannot achieve more directly by a more general jurisdiction to give directions where expediency demands it. The fact that CIFF is a company (and not a trust) would probably not have been obstacle to the making of a scheme.[33] But one answer, at least in *CIFF*, would have been for the Court of Appeal to have held that the possibility of such an administrative scheme was excluded by the regime for member approval in sections 215 and 217, Companies Act 2006. This argument would be by analogy with the principle that, at least where a charity is established by an Act of Parliament, the court will not make a scheme in conflict with the Act.[34]

The Court of Appeal also rightly rejected the argument that the principle in *Saunders v Vautier*,[35] viz. that a trust can be brought to an end by its absolutely entitled beneficiaries of full age and capacity acting together, was applicable by analogy to charities, with the Attorney-General as beneficiary. Neither the court nor the Commission (except by statutory power to direct a winding up: see section 84B, 2011 Act[36]) has the power to bring about the termination of a charitable trust;[37] it is difficult to see why the Attorney-General could.

The Court of Appeal concluded their reasoning that the principle of non-intervention applied with reference to a number of compelling factors by way of reinforcement of their decision:

- a charity's duly appointed organs will usually be more familiar with the charity's affairs than a judge;
- there was a risk of discouraging donors, charity trustees, and members if the court could interfere with decisions where expedient;
- in this case, section 217, Companies Act 2006, and section 201, 2011 Act, had together entrusted the decision to the membership of CIFF subject to the written consent of the Charity Commission.[38]

Conclusions

It is tempting to feel that the Chancellor's judgment as to what was in the best interests of CIFF ought to have been binding on Dr Lehtimaki given that he was party to proceedings and was joined partly for that purpose.[39] However, the joinder of Dr Lehtimaki did not change the nature of the proceedings as the Chancellor characterized them—it was only the trustees who had surrendered their discretion, and not Dr Lehtimaki. Once the Chancellor's decision is regarded as one about the decision-making of the *charity trustees*, there is nothing illogical about Dr Lehtimaki being permitted to depart from the Chancellor's approval of the grant after honest and proper consideration even if he is bound by the decision.

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31. *Re JW Laing Trust* [1984] Ch 143; *Re Royal Society's Charitable Trusts* [1956] Ch 87; *Attorney-General v Dedham School* (1827) 23 Beav 350 *Attorney-General v Gleg* (1738) 1 Atk. 356.
32. *Construction Industry Training Board v Attorney-General* [1973] Ch 173.
33. *Liverpool District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193, where Slade J held that a cy-près scheme could be made in relation to the assets of a charitable company incorporated under the Companies Acts.
34. *Construction Industry Training Board v Attorney-General* [1973] Ch 173 at 187 *per* Buckley LJ. The Chancellor in *CIFF* rejected the argument that this principle prevented the court from ordering Dr Lehtimaki how to vote in the context of a company incorporated under the Companies Acts: [2018] Ch 371 at 418G-H.
35. (1841) Beav 115.
36. See s 84B, 2011 Act.
37. *Re Faraker* [1912] 2 Ch 488 at 495 *per* Farwell LJ.
38. *CIFF* at 1494.
39. [2018] Ch 371 at 397B-C.

trustees, there is nothing illogical about Dr Lehtimaki being permitted to depart from the Chancellor's approval of the grant after honest and proper consideration even if he is bound by the decision

From a broader perspective, the Court of Appeal's preparedness to apply the principle of non-intervention to a charity is not disruptive of charity law generally because the principle is not distinctively a trusts law principle. That is to say: since the principle is probably not peculiar to the trust as a particular kind of legal structure for charity, it is unlikely to cause troublesome discrepancies within charity law in so far as charity law straddles structures of different kinds. *CIFF* was of course concerned with a company and not a trust, and while this was not expressly recognized in the Court's judgment, the principle of non-intervention is consonant with the court's approach to the management decisions of directors of private companies.[40]

The Court of Appeal's decision also correctly reflects the historic respect accorded to trustee autonomy in the regulation of charitable trusts, which has gone hand-in-hand with the special favour shown to them by the Crown.

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The Commissioners' jurisdiction under the Statute of Charitable Uses 1601, which established Commissioners who were subject to the supervision of the Chancellor to investigate breaches of charitable trust, could not be used to interfere with or vary the discretion of trustees, if the trustees had acted responsibly, deliberately, and in accordance with the donor's will.[41]

Later, when use of the 'information' as a form or proceedings was conventional, the courts were reluctant to intervene in the administration of a charity, which was generally left to the trustees. In *Attorney-General v Haberdashers' Co.*,[42] upon an information to establish a charitable will trust, Lord Thurlow LC, having decided the principle upon which a surplus was to be divided under a scheme, went on:

> 'As to the execution of the trust, it is not to be kept under the direction of the Court, to be executed by the Court from time to time, but is to be executed under a general direction to the trustees; which is the only way of administering a charity ... If the trustees misbehave, there must be another information upon the new ground. I cannot keep this information here for ever. I know, these applications to the Court are very expensive; and for that reason I want to get rid of it.'

Likewise in the same matter which had mistakenly continued for decades after the death of the original relators and the filing of an information without the Attorney-General's involvement, Lord Romilly MR was of the view that, once the court had made a scheme, it should not be drawn into the administration of the charitable trust.[43] A similar reluctance to intervene, absent mismanagement, even by making a scheme was shown by Sir William Grant MR in *Waldo v Caley*,[44] although this was not a prerequisite to a scheme.[45]

It is striking that in *AG v Governors of Harrow School*[46] Lord Hardwicke LC came close to a different approach by not dismissing an information, even though he had rejected its plea to intervene in the

40. See eg *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832D-E *per* Lord Wilberforce.
41. Gareth Jones, *History of the Law of Charity (1531-1827)* (CUP, 1969, 2008 reprint) 49–50.
42. (1791) 1 Ves J 295.
43. *Attorney-General v Haberdashers Co* (1852) 15 B 397 at 406.
44. (1809) 16 Ves 206 at 211–12
45. See eg *Attorney-General v Dedham School* (1857) 23 Beav 350.
46. (1754) 2 Ves Sen 551.

governors' discretion, in order to 'keep a hand over' the conduct of charity trustees. Nevertheless, there is no indication that he was prepared to intervene absent impropriety even in the future:

> 'At present I do not see how I can interpose; and if I should, it would be in contradiction to the intent of the donor; which was to leave it in the sound discretion of these judges [i.e. the governors of Harrow School]; and where they act fairly, and not corruptly or partially, a court of justice would do too much to control their acts.'[47]

Today, even the Charity Commission under the 2011 Act is typically limited in the self-initiated exercise of its protective and remedial powers by the need for it first to be satisfied that there has been misconduct or mismanagement and/or that there is a need to protect, or secure the proper application of, charity property. It is not authorized to exercise functions corresponding to those of a charity trustee or otherwise directly to be involved in the administration of a charity.[48] It does have powers to direct specific action to be taken, including the winding up of a charity, or not to be taken.[49] But in all such cases, these powers arise only after a statutory inquiry has been commenced and the Commission is satisfied in one of the respects already mentioned or, where action is to be prevented, that it would constitute misconduct or mismanagement. Likewise, the Commission's power to direct the application of charity property is not based on its view of what is expedient but depends on a person who is in possession or control of charity property being unwilling or unable to apply it properly.[50]

Furthermore, I would suggest that the particular 'public' nature of charitable trusts, far from calling for a more interventionist approach from the courts, provides additional justification for a light touch.

Given that faith in the charity sector depends on charity funds being spent to further charitable objects for the public benefit, it is important that such funds are not frittered away in internal disputes or other litigation.[51] A wide supervisory jurisdiction would be an invitation to litigation, and given the breadth of a hypothetical jurisdiction based on expediency, the Charity Commission may find it difficult to keep the number of such cases within reasonable limits by refusing authorization under section 115, the 2011 Act. At the very least, the under-resourced Commission would be likely to be deluged with applications for such authorization.

A wide supervisory jurisdiction would be an invitation to litigation

There is also the need for charity fiduciaries not to be discouraged by a heavy-handed approach on the part of the Court, as the Court of Appeal acknowledged in *CIFF*. The need for the courts to avoid deterring persons from acting as the trustees of charities was acknowledged in a different context by the House of Lords in the Scottish case of *Andrews v McGuffog*.[52]

A 'hands-off' approach on the part of the courts does not of course mean that charity trustees have nowhere to turn. Where charity trustees can properly surrender their discretion or in some other way need properly to seek the court's guidance, there is nothing to prevent them from doing so save that they will require the Commission's authorization to bring charity proceedings. In many cases, the Commission may be able to exercise its own powers to enable the necessary decision-making, and sanction for or advice on a particular transaction may also in appropriate cases be sought from the Charity Commission under sections 105 or 110, the 2011 Act.

47. ibid at 552.
48. s 20(2), 2011 Act.
49. ss 84, 84A, and 84B, 2011 Act.
50. s 85(1)(a), 2011 Act.
51. See eg *The British Diabetic Association v The Diabetic Society* [1996] FSR 1 at 6; *Muman v Nagasena* [2000] 1 WLR 299 at 305C *per* Mummery LJ.
52. (1886) 11 App Cas 313 at 324 *per* Lord Watson, quoting Lord Eldon in *Attorney General v Corporation of Exeter* (1826) 2 Russ 45 at 54 on the court's approach to such trustees who have acted in honest error.

A risk was avoided in CIFF that judicial expressions of special concern for charitable trusts, together with the court's scheme-making powers, would be translated by logic into an extraordinary, general jurisdiction

A risk was avoided in *CIFF* that judicial expressions of special concern for charitable trusts, together with the court's scheme-making powers, would be translated by logic into an extraordinary, general jurisdiction. There is room for argument as to whether it is anomalous that the court should be able to make a scheme where expediency demands it but not be able to control a charity fiduciary's decision-making in another more direct way absent breach of duty. But as Viscount Simonds said in a famous charities case:[53]

> 'It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically.'

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53. *Gilmour v Coats* [1949] AC 426 at 48–49.