

Neutral Citation No. [2015] NICA 21

Ref: GIR9602

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 24/04/2015

2013 No 072645

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent;

-and-

BANGOR PROVIDENT TRUST

Appellant;

-and-

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Notice Party

Before: Morgan LCJ, Girvan LJ and Gillen LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a judgment and order of Deeny J given on 12 August 2014 whereby he allowed the appeal of the Charity Commission for Northern Ireland ("the Charity Commission") which sought to challenge the decision of the

Charity Tribunal for Northern Ireland which had allowed the appeal brought to it by the Appellant to end the Charity Commission's inquiry in respect of the Appellant. The Charity Commission's right to carry out such an inquiry depended on whether the Appellant was a charity. The Appellant denies that it is a charity while the Charity Commission asserts that it is. Thus the key question in the appeal is whether the Appellant was established for exclusively charitable purposes.

[2] Mr Humphreys QC appeared for the Appellant with Ms Quint. Mr Lockhart QC appeared with Mr Matthew Smith on behalf of the Charity Commission. The Attorney General for Northern Ireland appeared with Mr Gowdy for the Notice Party. The Court is grateful to all counsel for their full and helpful written and oral submissions.

The background to the appeal

[3] On 8 August 2012, the Charity Commission decided to institute an inquiry with regard to the Appellant pursuant to section 22 of the 2008 Act, citing a concern in relation to governance and financial matters.

[4] On 17 September 2012, the Appellant applied to the Charity Tribunal for a review of the Charity Commission's decision to institute an inquiry. Under the Charities Act (Northern Ireland) 2008 ("the 2008 Act"), the Charity Tribunal is empowered to direct the Charity Commission to end such an inquiry.

[5] In its decision dated 10 May 2013 (conjoined with the decision in Victoria Housing Estates Ltd v The Charity Commission), the Charity Tribunal allowed the Appellant's application and directed the Charity Commission to end its inquiry in respect of the Appellant. The Charity Tribunal reached its decision on the basis that the Appellant was not, in law, a charity and, therefore, was not subject to the jurisdiction of the Charity Commission for that or other purposes.

[6] The Charity Commission sought and obtained the permission of the Charity Tribunal to appeal to the High Court on the point of law as to whether Bangor Provident Trust Limited was a charity.

[7] On 12 August 2014, Deeny J allowed the appeal of the Charity Commission. He held that the Charity Tribunal erred in finding that the Appellant was not a charity.

The Rules of Bangor Provident Trust Limited

[8] The following text is found on the cover of the Rule book and describes the adopted Rules as "Charitable":

"Register No. N. I.

Rules of Bangor Provident Trust Limited

Model H.3 1952 (Charitable)

Published by the National Federation of Housing
Societies

13 Suffolk Street, Pall Mall, London, SW1”

[9] Rule 2 sets out the objects of the Society in the following terms:

“2. The objects of the Society shall be to erect, provide, improve and manage housing accommodation in Northern Ireland for persons of advanced years and limited means who are eligible to occupy or use housing accommodation provided under the Housing Acts (NI) 1890-1953 (or under any acts amending or substituted for the said Acts) on terms appropriate to their means and to provide such amenities as the Society shall think fit for the occupiers of such accommodation and to do all other things as are incidental or conducive to the attainment of the above objects.”

[10] Rules 49 and 50 set out the powers of the Society’s Committee. Rule 50(k) provides:

“Without prejudice to and not so as to limit or restrict the general powers conferred by the last preceding rule and the other powers conferred by these rules it is hereby expressly declared that the Committee shall have the following powers - that is to say, power -

...

(k) To do all such acts and things as are incidental to the attainment of the objects of the Society or any of them.”

[11] Rule 90 relates to ‘Dissolution’ and provides, as follows:

“...If on the winding up or dissolution of the Society there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of

the Society but shall be given or transferred to some other institution or institutions having objects similar to the objects of the Society and which shall prohibit the distribution of its or their income and property amongst its or their members, such institution or institutions to be determined by the members of the Society at or before the time of dissolution, or in default thereof by such Judge of the High Court of Justice as may have or acquire jurisdiction in the matter, and if and so far as effect cannot be given to a foresaid provision then to some charitable object.”

The Charity Tribunal’s decision of 10 May 2013

[12] The Charity Tribunal considered the following issues:

- (a) whether the Society was a charity in law, that is, whether it was established for exclusively charitable reasons; and
- (b) the effect, if any, on that question of the Charities Act 2008 (Transitional Provisions) Order (Northern Ireland) 2011, that is whether the Society was, or should be deemed to be, a charity in law by virtue of being in receipt of tax relief.

[13] The Society submitted to the Charity Tribunal that it was not a charity in law since it was not, and never had been, established for exclusively charitable purposes only as a matter of law. In this respect, neither the subjective motives or intentions of an institution or corporate body or its controllers or members nor the de facto charitable nature of its activities were determinative of that issue. Essentially, it was submitted that, in accordance with the Society’s Rules, it could lawfully engage in purposes that were not wholly charitable. Particular reference was made in this regard to the dissolution provisions in the Rules. A further and specific aspect of this submission related to the inclusion of the words in Rule 2 “*...and to do all things as are incidental or conducive to the attainment [of [the Applicant’s objects]]*”. It was argued that this power was part of the objects of the Society as set out in its Rules rather than a mere power exercisable only in furtherance of the objects. This in itself showed that the Society was not charitable in law (quite apart from the provisions of the Rules themselves having this effect in law). Were it not for the ‘conducive’ wording, the other objects of the Society would have made it a charity.

[14] It was the Charity Commission’s case that the effect of the ‘conducive’ wording in the Society’s objects was qualified by the stated charitable objects. It also submitted that it was not necessary to analyse the other provisions in the Rules identified by the Appellant to support its submission that the Society was not

established for exclusively charitable purposes. These were matters of governance rather than being determinative of charitable status.

[15] The Charity Tribunal's findings and reasoning were set out in paragraphs 30 – 32 of its decision:

“30. The Tribunal concluded that the determinative issue in this application as to whether Bangor was a charity in law depended on whether the ‘conducive’ wording in the objects clause of its Rules took it outside the realm of being established for exclusively charitable purposes. An ancillary issue was the effect of the terms of several of the Rules of Bangor, but that the Rules did have to be examined on a cumulative basis. The Tribunal agreed that the subjective intention of the parties at the time did not determine this issue.

31. The Tribunal preferred, on balance, the submissions of [Bangor Provident Trust Limited] in relation to the effect of the ‘conducive’ wording in the objects clause of [Bangor Provident Trust Limited]: the fact that this wording appeared in the objects clause and was not confined to a reference to ‘incidental’ had the effect of potentially empowering [Bangor Provident Trust Limited] to engage in activities that were not exclusively charitable. The Tribunal noted that there existed authorities that might tend to the opposite view as to the effect of a ‘conducive’ wording. The Tribunal accepted that use of the wording ‘conducive’ was not necessarily fatal in all cases but, on balance, it was enough in the case of [Bangor Provident Trust Limited] to reach a finding that [Bangor Provident Trust Limited] was not charitable in law, that is, it was not, in law, established exclusively for charitable purposes, since it could, potentially, lawfully engage in non-charitable activities, particularly when taken with a broad, cumulative overview of the Rules of [Bangor Provident Trust Limited].

32. Accordingly, the Tribunal concluded, on balance that [Bangor Provident Trust Limited] was not a charity and the [Charity Commission] did not, therefore, have jurisdiction to open, nor to continue, a

s.22 inquiry in relation to [Bangor Provident Trust Limited].”

The decision in the court below

[16] The issue before Deeny J was whether on the true construction the Rules, the Appellant is established under the law of Northern Ireland for charitable purposes only. At paragraph [11] of his judgment, Deeny J referred to the approach to be taken in order to establish the correct interpretation of the objects and Rules:

“...it was not in dispute that consistent with the modern dicta on the construction of documents this court should look at Rule 2 in the round and at the rules of Bangor generally in order to establish the correct interpretation of the objects and rules as set out originally.”

He stated that the natural and ordinary meaning of “*and to do all other things as are incidental or conducive to the attainment of the above objects*” as included in Rule 2 was to facilitate such objects and not to allow the Society to launch into non-charitable activities. The proper interpretation of Rule 2 was to read its three clauses conjunctively as the clauses were not broken up and as the third clause commenced with the conjunctive ‘and’. He was of the opinion that, while the use of ‘or’ between ‘incidental’ and ‘conducive’ might justify the interpretation that “conducive” could be wider than “incidental”, it did not seem to the judge to create an interpretation that would remove ‘conducive’ and the clause of which it was part from the performance by the Appellant of the first two parts of Rule 2. Deeny J took into account the point that the powers clause at Rule 49 deals with the “*Powers of the Committee*” and that the Rules did not contain a powers clause for the Society as a whole. Although the side label at Rule 2 reads “*Objects of Society*” it does in fact provide the Society, as opposed to the Committee, with the legal powers to achieve its objects. Rule 90 (Dissolution) re-enforced the charitable nature of the Society. The judge observed that the Shorter Oxford English Dictionary defined “*conducive*” as “*tending to promote or encourage*”. While mindful of the judicial observations on its meaning, he stated that the starting point is that the language of “*incidental or conducive to the attainment of the above objects*” is not inconsistent with merely allowing the Society to engage in activities ancillary to its main and indisputably charitable objects. While it may be that the objects would include lobbying of the legislature in regard to the provision of housing to the aged of limited means that would be ancillary and, on a proper reading of the Rules, that would not lead one to conclude that the objects were not exclusively charitable.

Grounds of appeal

- [17] The grounds of appeal are that the learned judge erred:
- (i) in holding that the objects set out in Rule 2 of the appellant's Rules did not extend to purposes which were not exclusively charitable in law or incidental or ancillary thereto;
 - (ii) in finding that the use of the words "*incidental or conducive to the attainment of the above objects*" in the appellant's objects clause did not prevent the appellant's objects from being exclusively charitable;
 - (iii) in failing to distinguish between exclusively charitable objects and mere powers to do acts which are incidental, ancillary or conducive to charitable objects;
 - (iv) in failing to distinguish between the objects of a charity and other provisions in its constitution which might empower it to carry out non-charitable activities or use funds for non-charitable purposes where to do so in the relevant context was a means, or alternatively an involuntary or necessary incident, of furthering the charitable object;
 - (v) in law in distinguishing the case of McGovern v Attorney-General and another [1982] Ch 321 from the appellant's case; and
 - (vi) in failing to take sufficient account of other provisions within the appellant's Rules, and in particular to the dissolution provision in Rule 90 which does not confine the application of the funds in the event of dissolution to charitable institutions or purposes only.

The 2008 Act

[18] Section 1(1) of the 2008 Act sets out the definition of 'charity':

"1. – (1) For the purposes of the law of Northern Ireland, "charity" means an institution which –

- (a) is established for charitable purposes only, and
- (b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities."

[19] Section 2 provides that a charitable purpose is a purpose which (a) falls within subsection (2), and (b) is for the public benefit (see section 3). Section 2(2) lists a number of purposes which include "*the prevention or relief of poverty*" (section 2(2)(a)) and "*the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage*" (section 2(2)(j)).

[20] Section 22 of the 2008 Act refers to the Charity Commission's general power to institute inquiries:

“(1) The Commission may institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes.”

[21] Paragraph 1 of Schedule 7 (not yet in force) refers to the powers of Charitable Incorporated Organisations (CIO):

“Subject to anything in its constitution, a CIO has power to do anything which is calculated to further its purposes or is conducive or incidental to doing so.”

[22] A similar provision is in force in England and is found in section 216 of the English Charities Act 2011:

“(1) Subject to anything in its constitution, a CIO may do anything which is calculated to further its purposes or is conducive or incidental to doing so.”

The parties' submissions

[23] Mr Humphreys on behalf of the Appellant submitted that the objects in Rule 2 are partly but not exclusively charitable as the object of “*anything incidental or conducive to the attainment of the foregoing*” is too wide to be a charitable object in its own right. “*Anything incidental or conducive to the attainment of the foregoing*” could have been expressed as a power exercisable in furtherance of charitable objects. However, in the present case, this is not expressed in the Rules as a mere power but as one of the objects themselves. The inclusion of ancillary powers among the objects clause is fatal to the exclusively charitable nature of the objects as it renders what should merely be the means to an end as an end in itself. This would legitimise the use of resources and the undertaking of activities which are excessively remote from, or indirect in relation to, the actual charitable purposes to be regarded as permissible as ways of furthering the charitable purpose. The learned judge had misdirected himself in failing to distinguish between objects of a charity and other provisions in its constitution which might empower it to carry out non-charitable activities or use funds for non-charitable purposes where to do so was a means, or alternatively an involuntary or necessary incident, of furthering the charitable object. The judge correctly accepted that the subjective intention of those who originally established the Appellant was irrelevant. The case law emphasises the importance of the distinction between objects and powers. It was argued that Rule 2 sets out the objects of Bangor Provident Trust Ltd and there is no basis to say that “*to do all other things*

as are incidental or conducive to the attainment of the above objects” is merely ancillary. Rule 50(k) includes the ancillary or incidental power which applies in relation to the objects or to any one object individually. Rule 90 undermines the case for charitable status as it does not confine the application of the funds in the event of dissolution to charitable institutions or purposes. The literal (and natural) meaning of the wording, *“having objects similar to the objects of the Society”* would enable the funds to be applied on dissolution to a benevolent, not-for-profit but non-charitable housing association.

[24] While agreeing that the subjective intention of the founders of the appellant is irrelevant, Mr Lockhart contended that the words on the front of the appellant’s Rule Book are admissible as an aid to the construction of the objects clause. The words, *“and to do all other things as are incidental or conducive to the attainment of the above objects”* were no more than a power, especially as, in this case, the Rules do not have a clause specifically conferring powers on the Society. In any event it makes no difference if this wording appeared in the part of the instrument describing the objects as opposed to the part describing the powers of the institution. The words empower the Appellant only to pursue that which is conducive to the charitable objects. This is not a case where the appellant is empowered to pursue a free-standing activity which is expressed to be conducive to some new object. Counsel referred to a number of cases in relation to well established charities where such a clause had created no problem (e.g. National Society for the Prevention of Cruelty to Children, The Incorporated Council of Law Reporting for England and Wales v Attorney-General, Royal College of Nursing v St Marylebone Borough Council and Joseph Rowntree Memorial Trust Housing Association Limited v Attorney General). In the case of those charities the objects included the *“conducive to”* formula. It was not suggested in those cases that the clauses undermined their charitable status. It was argued that, on a true analysis of all of the case law, it is no objection to charitable status that the objects clause of the entity in question permits it to engage in activities which are conducive to charitable objects. Rather, the objection arises where the words *“conducive to”* relate to a non-charitable object.

[25] The respondent referred to section 216 of the Charities Act 2011 and paragraph 1 of Schedule 7 (not in force) of the 2008 Act to argue that the UK Parliament and the Northern Ireland Assembly have both recognised that a charity might do things which are conducive to its charitable objects without thereby losing its charitable status. The respondent acknowledges that these provisions concern the powers of the CIO (and not its objects), but argued that it is difficult to discern any principled basis for objecting to an entity which contains provision to this effect in its objects clause, where the inclusion of the same words in a different part of its memorandum of association (or, in the case of a CIO, in its constitution) would be unobjectionable. Since the test is one of purposes, there is no need to look beyond the objects clause in the Rules. It was submitted that the objects clause in question is clearly charitable on its face.

[26] The Attorney General's argument supported that of the Charity Commissioner.

Conclusions

[27] The objects clause of an incorporated body such as the appellant establishes the lawful powers (*vires*) of the body beyond which it is not legally entitled to go. It must act *intra vires* and is not permitted to act outside its objects clause. The powers of a body corporate in its objects clause are to be distinguished from the powers of its directors and agents which emerge from express or implied powers contained elsewhere within the constitutional documentation. The powers of the agents must be exercised within the *vires* of the body corporate and cannot permit the agents to exceed what is permitted by the objects clause. Thus nothing in the rules outside Clause 2 can detract from the charitable status of the company if Clause 2 gives rise to exclusively charitable objects and powers for the rest of the Rules must be construed and acted upon in a way which is compatible with and *intra vires* the objects clause. Hence no real assistance in determining the question in this appeal can be obtained from the provisions outside Clause 2. If it imposes an exclusive charitable purpose on the body then actions outside the exclusively charitable purpose would be *ultra vires* and a breach of fiduciary duty on the part of the directors and members of the governing committee.

[28] Mr Humphreys accepted that the power in Clause 2 to do acts which are incidental to the main objects could only permit acts which are compatible with admittedly charitable objects. On his argument there was, however, a fundamental difference between acts which are *incidental* and acts which are *conducive*. Conduciveness, in his submission, opens the door to a range of actions which go outside the objects covered by the earlier provisions of Clause 2 and thus permits non-charitable *intra vires* activity.

[29] There is undoubtedly case law authority that if the objects clause of a body permits acts which are deemed to be conducive to the purposes of the body in the subjective view of the directors or of the body itself that would undermine the exclusively charitable nature of the body where the other objects are charitable. One must be careful reading the authorities in relation to bodies which in many instances did not have otherwise exclusively charitable purposes. In Dunne v Byrne [1912] AC 407 in relation to a residuary bequest to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in the diocese the Privy Council rejected the argument that this was a gift for valid charitable religious purposes. What the Archbishop might consider to be conducive to "the good of religion" could cover activities that were not charitable in law. It was the width of the subjective view of the Archbishop and the lack of restriction to purely charitable religious activities that were fatal to the charitable status of the gift. In Associated Artists Limited v Inland Revenue Commissioners [1956] 2 All ER 583 the main object of the

body was to present classical, artistic, cultural and educational dramatic work. Amongst the objects in the objects clause was a provision “to do all such other things as are incidental or which the Association may think conducive to the attainment of any of the above objects”. Upjohn J held that the body was not charitable. In particular he held that the sub-clause was independent of and not ancillary to the other objects and that that clause was sufficient to render the objects association non-charitable. What the Association thought conducive would not necessarily be so.

[30] Similarly in Oxford Group v Inland Revenue Commissioners [1949] 2 All ER 537 the objects clause stated that the main object was the advancement of the Christian religion in accordance with the principles of the Oxford Group Movement and to establish charitable and benevolent associations. Sub-paragraph (10) empowered the Association “to do all such things as are incidental or the Association may think conducive to the attainment of the above objects or any of them”. The main object was held not to be charitable. The court also considered that under sub-paragraph (10) set out powers which could not be regarded as exclusively charitable. Cohen LJ said:

“... Under paragraph (10) the association is empowered to do not merely things which are incidental or conducive to the attainment of the main object, but also such things as the association may think conducive to it. In other words, the question which the court would have to decide, if any activity of the association was being challenged as being ultra vires, would be not whether, in the opinion of the court, the activity was conducive to the main object, but whether the association, in undertaking it had thought it conducive. It seems to me that in this case the observations of Lawrence LJ in the Keren Kayemeth case, are directly in point. He said ([1931] 2 KB 482):

‘The company can exercise any or all of these powers whenever in its opinion such an exercise would be conducive to the attainment of the so-called primary object, which from a practical point of view means that it can exercise them whenever it is minded to do so, and whether such exercise is in fact conducive to the attainment of that object or not, as neither the court nor anyone else can control the company's opinion or otherwise interfere with the

manner in which it chooses to carry out its objects. It would be difficult in any case to determine whether any particular enterprise undertaken by the company under its wide powers was or was not in fact conducive to the attainment of the primary object, but when the question whether it is or is not so conducive is left to the decision of the company itself I cannot avoid the conclusion that the objects mentioned in sub-clauses 2 to 22 can be carried out by the company just as freely as the object mentioned in sub-clause 1, and that there is no substantial difference in degree between them'."

This passage underlines the fact that where the powers are expressed in entirely subjective terms it is effectively impossible to prevent non-charitable application of the body's funds and to require the body to operate in an exclusively charitable manner. Where, however, the wording is objective and the power is not left to the subjective decision of the body or its directors it is clearly possible for the court to decide whether in fact what is done is conducive to the charitable purpose. If the act in question undermines the exclusively charitable objects then the act could not be considered objectively conducive to the charitable purposes. It would thus be *ultra vires*.

[31] In the present case the question to be determined is whether the "conducive" power conferred by Rule 2 falls to be construed as a power which can only lawfully be exercised in a way which is ancillary to the admittedly main charitable objects. If it is ancillary and only exercisable where the act in question conduces to the charitable objects of the Society then the power does not detract from or undermine the charitable purpose of the body.

[32] As the authorities make clear it is a question of construction in every case whether a purpose in an objects clause is truly an ancillary purpose subordinate to the main objects of the association. Lord Cohen in Inland Revenue Commissioners v City of Glasgow Police Athletic Association [1953] AC 380 stated the principle thus:

"From (the authorities) certain principles appear to be settled:

(1) If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that main purpose that body of persons is charity notwithstanding the presence of those

elements - Royal College of Surgeons of England v National Provincial Bank Limited (1952) AC 631.

(2) If, however, a non-charitable object is its one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes only within the meaning of the Income Tax Act - Oxford Group v Inland Revenue Commissioners (1949) 2 All ER 537.

(3) If a substantial part of the objects of the body of persons is to benefit its own members, the body of persons is not established for charitable purposes only - Inland Revenue Commissioners v Yorkshire Agricultural Society (1928) 1 KB 611."

One must also bear in mind what Lord Reith said at page 402:

"It is not enough that one of the purposes of a body or persons is charitable: the Act requires that it must be established for charitable purposes only. That does not mean that the sole effect of the activities of the body must be to promote charitable purposes, but it does mean that must be its predominant object and that any benefits to its individual members of a non-charitable character which result from its activities must be of a subsidiary or incidental character."

[33] Reading Clause 2 as a whole set in the context of the document (which on its front page indicates a clear intention to create a charitable body) we have no doubt that the words in questions fall to be considered as incidental to the main purposes which are clearly exclusively and admittedly charitable in nature. The power to do acts incidental or conducive to the charitable objective set out earlier in Clause 2 does not envisage the Society undertaking some activity inconsistent with those charitable purposes.

[34] Accordingly we agree with the reasoning set out in Deeny J's judgment and we dismiss the appeal.