Inland Revenue
Te Tari Taake

IRRUIP 4/IP3168 THE PUBLIC BENEFIT TEST

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Exemptions — Entities eligible for tax exemption available to charities — Common law requirement ("public benefit test") — Satisfaction of public benefit test necessary — Commissioner's view — Courts' approach unclear in applying public benefit test to different types of charitable entities — Uncertainty in application of law — Evidence suggests New Zealand law diverging from UK law — Alternative interpretations of law set out — Which interpretation presents better view of law — Income Tax Act 1994, ss CB 4(1)(c), (1)(e), OB 1.

1. SUMMARY OF THIS PAPER

1.1 This paper discusses the common law requirement that to be charitable an entity, such as a trust, must be for the benefit of the community or an appreciable section of it. That requirement is known as the public benefit test. Satisfaction of the public benefit test is necessary before an entity can, in most cases,[1] take advantage of the tax exemption available to charities under sections CB 4(1)(c) and CB 4(1)(e) of the Income Tax Act 1994.

1.2 The Commissioner does not consider that the courts have adopted any clear approach in applying the public benefit test to different types of charitable entities. There is some uncertainty over how the law is to be applied in this area. This paper sets out alternative interpretations of the law and seeks public comment on which of those interpretations should be considered to be the better view of the law. Any such comments or submissions will be taken into account by the Commissioner in forming what he considers to be the best view of the law, and how it applies to the provisions of the Income Tax Act 1994.

1.3 It is accepted that the public benefit test requires that, to be charitable, an entity must be "for the benefit of the public or a sufficiently important section of the public". In some cases the term "community" is used in place of "public". Boundary issues have arisen over the meaning of that term, and whether specific groups or classes of persons satisfy the requirement of comprising the public (or the community) or a sufficiently important section of the public, or community.

1.4 In an attempt to clarify and rationalise the public benefit requirement, the courts developed further tests to establish whether groups benefiting from trusts comprised the community. Through cases such as *Re Compton*[2] and *Oppenheim v Tobacco Securities Trust Company Limited*[3] it has been established that where the beneficiaries are determined on the basis of a personal relationship such as a blood or contractual tie, the trust will be for the benefit of a fluctuating body of private individuals and is therefore not charitable.

1.5 The *Re Compton* and *Oppenheim* tests, as they became known, were questioned by the House of Lords (Lord Cross) in *Dingle v Turner*[4], although not overruled. While those tests have continued to be applied in the English courts, Lord Cross's comments have been noted with apparent approval and arguably adopted by the New Zealand Court of Appeal and subsequently the High Court.

1.6 This paper notes that there is evidence that appears to suggest that the law in New Zealand may be diverging from that which has continued to be followed in the United Kingdom. It is arguable that the law is not entirely clear and is not static, and is developing in New Zealand in a different manner than that being followed elsewhere. This paper discusses those developments in the public benefit test and concludes that the law is currently uncertain.

1.7 Given that there appear to be different ways that the law as it relates to the public benefit requirement in respect of charities could be interpreted, the purpose of this paper is to outline those alternatives and to seek public comment. This paper does not propose a preferred interpretation and similarly does not address policy issues, such as whether or not certain entities or charities **should** be subject to income tax. Such issues fall outside the ambit of this paper because they do not form part of the role of Adjudication and Rulings unless they are relevant to the interpretation of the law.

2 BACKGROUND

2.1 *Introduction*

2.1.1 Section CB 4(1)(c) of the Income Tax Act 1994 ("the Act") exempts from income tax any income, with

the exception of business income,[5] derived by any entity that is a charity. Section CB 4(1)(e) in turn exempts from income tax the income of any business carried on by, for, or on behalf of a charity. As a first step,[6] it is necessary for any entity wishing to take advantage of either section to be a charity. In order to be treated as a charity, it is necessary to satisfy the common law requirements. The common law meaning of "charity" imposes a two step test. Firstly, the entity must be established for a charitable purpose, and secondly it must be "for the benefit of the public or a sufficiently important section of the public". The second step is known as the public benefit test.

2.1.2 As it is the Commissioner of Inland Revenue's role to apply the provisions of the Act, including sections CB 4(1)(c) and CB 4(1)(e), it is necessary for the Commissioner to determine whether an entity is charitable and therefore entitled to the tax exemption.

2.1.3 This paper notes that there appears to have been some development or evolution of the law in New Zealand, but the question remains as to the extent of those developments, if they have in fact taken place, and how far they extend. This paper therefore invites public comment on the various interpretations and views and which should be considered to be the better view of the law.

2.1.4 It is important to note that this paper does not address policy issues, such as whether specific entities or particular purposes should, or should not, be considered charitable. Such policy considerations are outside the ambit of Adjudication & Rulings' role, unless they assist in the interpretation of the law and as such are factors that would, or could, be taken into account by a court when considering such issues as those addressed in this paper.

2.2 *Legislation*

2.2.1 All legislative references in this paper are to the Income Tax Act 1994, unless otherwise stated.

2.2.2 Section CB 4(1)(c) exempts from income tax the gross income, other than business income, of a charity. It states:

> To the extent that in the absence of this section the following amounts would be gross income, they are exempt income:
>
> > (c) Any amount derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, except where the amount so derived is an amount to which paragraph (e) applies:

2.2.3 Section CB 4(1)(e) exempts from income tax the business income of a charity. The section provides, to the extent that it is relevant to the issue being considered in this paper:[7]

> To the extent that in the absence of this section the following amounts would be gross income, they are exempt income:
>
> > (e) Any amount derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within New Zealand, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual:

2.2.4 Section OB 1 defines the term "charitable purpose" as:

> **'Charitable purpose'** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community:

2.3 *Income tax exemption for charities*

2.3.1 Under section CB 4(1)(c), the income derived by "trustees in trust for charitable purposes" or by any organisation "established exclusively for charitable purposes" is exempt from income tax. Section CB 4(1)(e) similarly exempts from income tax the business income of such an entity. The term "charitable purpose" is defined in section OB 1, as:

> ...includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community:

2.3.2 The Court of Appeal noted in *Molloy v CIR*[8] that the definition of charitable purpose in the Income Tax

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Act does not have the effect of enlarging or altering the common law meaning of charity.[9] The definition itself is derived from the classes of charity distinguished by Lord Macnaghten in *Commrs of IT v Pemsel*[10] and which are:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.

2.3.3 Before an entity will be considered charitable in law, there are two requirements that must be satisfied. Firstly, the entity's purpose must fall within one of the four classes listed above, and which are known as “the *Pemsel* Heads”. Secondly, the entity must be established for **the benefit of the public or a sufficiently important section of the public**, rather than for the benefit of private individuals.[11] This second requirement is known as the public benefit test.

2.3.4 However, it should be noted that the relief of poverty does not require that the public benefit test be met. In *Oppenheim v Tobacco Securities Trust Company Limited*,[12] at p.33, Lord Simonds noted the accepted position under the law:

> ... as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class ‘other purposes beneficial to the community’. This is certainly wrong except for the anomalous case of trusts for the relief of poverty...

2.3.5 In the recent Canadian case *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue*,[13] the Supreme Court noted the position of the public benefit test in relation to the Pemsel Heads. In the majority judgment, Iacobucci J said from page 72:[14]

> The Supreme Court of Canada implicitly adopted the *Special Commissioners of Income Tax* classification in *Dames du Bon Pasteur v R*, [1952] 2 SCR 76 (SCC), and explicitly approved of it in *Towle Estate v Minister of National Revenue* (1966), [1967] SCR 133 (SCC). However, *Guarantee Trust* this Court also noted, citing with approval *Verge v Somerville* ... at page 499, that the *Special Commissioners of Income Tax* scheme is subject to the consideration that the purpose must be '[f]or the benefit of the community or of an appreciably important class of the community' (p. 141). This language of 'benefit of the community' is unfortunate because it creates confusion with the fourth head of charity under the *Special Commissioners of Income Tax* scheme — trusts for other purposes beneficial to the community. Nonetheless, this notion of public benefit is different and reflects the general concern that '[t]he essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage': Waters, *supra*, at p. 550[15]. This public character is a requirement that attaches to all the heads of charity, although sometimes the requirement is attenuated under the head of poverty. It is this public quality that I also take Rand J to be referring to in *Dames du Bon Pasteur*,*supra*, at p. 88, when, after outlining the four classifications of charitable purposes, he stated that 'the attributes attaching to all are their voluntariness and, directly or indirectly, their reflect on public welfare'.
>
> The difference between the *Special Commissioners of Income Tax* classification and this additional notion of being 'for the benefit of the community' is perhaps best understood in the following terms. The requirement of being 'for the benefit of the community' is a necessary, but not a sufficient, condition for a finding of charity at common law. If it is not present, then the purpose cannot be charitable. However, even if it is present the court must still ask whether the purpose in question has what Professor Waters calls, at p. 550, the 'generic character' of charity. This character is discerned by perceiving an analogy with those purposes already found to be charitable at common law, and which are classified for convenience in *Special Commissioners of Income Tax*. The difference is also often one of focus: the four heads of charity concern what is being provided while the 'for the benefit of the community' requirement more often centers on who is the recipient.

2.3.6 Therefore, the requirement is that the public benefit test must be met in all cases, except where the charity is for the purpose of "the relief of poverty". The public benefit test itself is discussed below.

2.3.7 As noted above, sections CB 4(1)(c) and CB 4(1)(e) provide an exemption from income tax for entities that meet the requirements of the common law meaning of charity. The Commissioner of Inland Revenue is

not charged with any responsibility to determine whether or not any entity is charitable, *per se*, but rather is charged with the task of assessing income tax. In doing so the Commissioner is required to take into account the provisions of the Act, including the income tax exemption available to charities. In order to apply that exemption, the Commissioner is required to form a view on whether the exemption applies, which in turn requires the Commissioner to determine whether, in his view, the entity is a charity.

2.3.8 If the Commissioner forms the view that an entity is not a charity, and is not entitled to the tax exemption, the resulting tax assessment is able to be challenged in the courts. The courts are, therefore, the final arbiter of whether or not any entity is charitable.

3 THE TRADITIONAL APPROACH TO THE PUBLIC BENEFIT TEST

3.1 *Introduction*

3.1.1 This section of this paper discusses the development of the common law as it relates to the public benefit test. This discussion is divided into two broad sections. Firstly, what is described in this paper as the "traditional approach" and secondly the more recent cases that could be seen to be throwing doubt on the universal application of the test developed in the earlier cases. The latter includes the New Zealand cases that appear to have directed the New Zealand law on a different course from that followed elsewhere.

3.2 Traditional *approach*

3.2.1 It is settled law that before an entity can be considered charitable it must also "...be of a public character...; that is, it must be for the benefit of the community or an appreciably important section of the community".[16] Lord Simonds, commenting on this requirement, noted in *Oppenheim*:

> This is sometimes stated in the proposition that [a charitable trust] must benefit the community or a section of the community. Negatively, it is said that a trust is not charitable if it confers only private benefits.

3.2.2 When considering whether or not a trust is charitable, the starting point is whether the trust is for the benefit of the public. Lord Wrenbury, in *Verge v Somerville* said:[17]

> To ascertain whether a gift constitutes a valid charitable trust ... a first enquiry must be whether it is public — whether it is for the benefit of the community or of an appreciably important class of the community. [18]

3.2.3 Lord Wrenbury continued, and noted regarding the constitution of "the community or a section of the community":

> The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, cannot.[19]

3.2.4 Whether or not a particular group of beneficiaries constitute, as a class, the community or a section of the community, and thus whether the benefit arising from the trust is a "public" or "private" benefit, is an issue that is, as a general rule, considered on the facts of each case. The courts have hesitated to lay down rules that try to define whether a class of persons constitutes the community for the purposes of the public benefit test. It has been noted that:

> The line of distinction between purposes of a public and a private nature is fine and practically incapable of definition.[20]

3.2.5 Nevertheless, the Courts have provided guidance on the question.

3.3 *Re Compton*

3.3.1 In *Re Compton*[21] the English Court of Appeal approved the rule contained in *Tudor on Charities* that the law will only recognise charities that have a public character. In the case, the Court held that a trust for the benefit of the descendants of named persons could not be regarded as a charitable trust. By limiting the beneficiaries in such a way, a personal qualification is introduced that results in the trust being regarded as a private trust, and not for the benefit of a section of the community.

3.3.2 In *Re Compton* the gift being considered was "for the education of Re Compton and Powell and Montague children... to be used to fit the children to be servants of God serving the nation, not as students for research of any kind...". The Re Compton, Powell and Montague children were defined as the lawful descendants of three named propositi. The Court held that the beneficiaries were not a sufficient section of

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the community for the gift to be charitable, as it was a family trust. Lord Greene said:

> ...a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship is near or distant, whether it is limited to one generation or is extended to two or three in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it.

3.3.3 Lord Greene drew the distinction between persons who are able to join a class of beneficiaries because of an impersonal common quality, and those who qualify because of a personal element such as a relationship to individuals or an individual. In the former case the beneficiary's status as an individual is not a factor, while in the latter it is the person's status as an individual and their relationship to another individual that provides the qualification. In the latter case, the benefit that arises is of a purely personal nature.

3.3.4 This rule, that the existence of a personal element in the qualification will result in a trust not meeting the public benefit requirement, is known as the *Compton test*. The Compton test has been applied and expanded on in later cases.

3.4 *Re Tree*

3.4.1 *Re Compton* was distinguished by the English High Court (Chancery Division) in *Re Tree, Idle v The Corporation of Hastings*,[22] on the facts of the case. In that case, the charitable status of a trust for the benefit of persons who resided in the borough of Hastings prior to 1880, or their descendants, was considered. The purpose of the trust was considered charitable, being for the relief of poverty, which as has been noted is not subject to the public benefit test. However, Evershed J was nevertheless of the view that he was required to decide whether the trust did satisfy the test and consequently that was the issue considered by the Court.[23]

3.4.2 Evershed J accepted the judgment in *Re Compton*, and applied the test postulated by Lord Greene. However, his Honour found, on the facts of *Re Tree*, that he was able to distinguish it from *Re Compton*. In *Re Compton*, in Evershed J's opinion, the issue was that the beneficiaries of the trust were determined by reference to named propositi. In the case under his consideration, the potential beneficiaries were those persons who were able to demonstrate that they either resided in Hastings in 1880 or are descended from such a person. In finding that the trust did meet the public benefit rule, Evershed J noted:

> ...in my view, proof of descent from a resident in Hastings, that is, not from a named resident but from any resident, is, within the principle of *Re Compton* proof of a quality which is impersonal in the sense that, as far as this testator is concerned, the residents, or the descendants of residents, as individuals, are not a link in the chain selected by him as such, nor is he in the least concerned who they, as individuals, may be. It is open to any person, who can claim to have the characteristics of a Hastings ancestry, if I may so describe it, to come in and say: 'I am a member of the class entitled to benefit.' And that class, however awkwardly ascertained or defined, is a section or portion of the general public.[24]

3.4.3 While agreeing with the rule in *Re Compton*, the Judge in *Re Tree* attempted to refine it by providing that where the beneficiaries are defined by a relationship to named persons, the trust is more inclined to be of a family nature. The absence of such a specific defining factor, as was the case in *Re Tree*, means that the quality essential to inclusion is the connection with the locality, which is impersonal and therefore satisfies the public benefit requirement.

3.4.4 The relevance of *Re Tree* does not, however, lie in the comments of the Court in finding that the trust in question was charitable, but in the subsequent comments of the Privy Council in *Davies v Perpetual Trustee Co. (Ltd.)*,[25] in which *Re Tree* was distinguished.

3.4.5 In *Davies*, (which is discussed in greater detail later in this paper), the issue was much the same as in *Re Tree*. However, the Privy Council was able to distinguish the case on the grounds that in *Re Tree* the element of poverty was present. The Privy Council said:

> Counsel for the respondent relied strongly on *Re Tree, Idle v Hastings Corpn*. That case is, however, distinguishable from the present case on the ground that the element of poverty was present, but their Lordships doubt if the decision could have been justified had that element been absent.[26]

3.4.6 The Privy Council elected to distinguish *Re Tree*, but it is clear from the words used that their Lordships disagreed with the conclusions reached by Evershed J. Clearly, their Lordships were of the view that the

basis on which Evershed J distinguished *Re Compton* was wrong and if the element of poverty had not been present he should have found that the trust was not charitable, due to the presence of a relationship to unnamed persons. Such a relationship would have been sufficient to deny charitable status.

3.4.7 The decision in *Re Tree* can therefore be safely put to one side, in favour of the decision in *Davies*.

3.5 *Re Hobourn*

3.5.1 In *Re Trusts of Hobourn Aero Components Ltd's Air-Raid Distress Fund, Ryan and Others v Forrest and Others*,[27] the English Court of Appeal was asked to consider whether an Air-Raid Distress Fund established by the employees of Hobourn Aero Components Ltd was charitable. The purpose of the fund was to "assist employees or ex-employees with the Forces who have suffered the loss of their homes or contents by enemy action". Participating employees subscribed to the fund and the benefits available under the fund were limited to the subscribing employees.

3.5.2 The Court of Appeal confirmed the decision of the lower Court, which had found that the fund was not charitable on the authority of *Re Compton*. Agreeing with that decision, Lord Greene MR said:

> The present case has a feature which was not present, of course, in *Re Compton*, which was not a case of employees, but a case of descendants of particular persons. That feature is that the fund now in question was one put up by the potential and contemplated beneficiaries themselves. We are not dealing with a fund put up by outside persons, although, even if it were, on the authority of *Re Compton*, I should feel constrained to hold that such a fund would not be a good charity. The point, to my mind, which really puts this case beyond reasonable doubt is the fact that a number of employees of this company actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit. I am not concerned for one moment to dispute the proposition that a fund put up for air-raid distress in Coventry generally would be a good charitable gift. I have very little doubt it would be. But there is all the difference in the world between such a fund and a fund put up by, it may be, a dozen inhabitants of a street, or, it may be, a thousand employees of a firm, to provide for themselves out of moneys subscribed by themselves some kind of immediate relief in case they suffer from an air raid. The Attorney-General and Mr Upjohn wish to attribute to the fact that these people were putting up money for their own benefit a very slight importance. To my mind, it is of the greatest importance and is quite conclusive in stamping the character of a private and personal trust upon this fund.
>
> ... it is quite clear that the paramount and principal object of this fund was to benefit subscribers and nobody else. That seems to me to stamp it with the character of a private arrangement, a private trust.[28]

3.5.3 In the case, it is clear that a fund for the relief of air-raid distress is a good charitable gift, within the fourth of the *Pemsel* heads. However, the fund was not a charity because the beneficiaries were limited to the employees of the specific firm, who were also the subscribers to the fund. The fund therefore lacked the necessary public element.

3.6 *Oppenheim*

3.6.1 The *Compton test* was applied in *Oppenheim v Tobacco Securities Trust Company Limited*,[29] but was extended to apply where the common nexus between the beneficiaries was a common contractual relationship. In *Oppenheim*, property was settled to a trust for the purpose of assisting or providing for the education of children of employees or former employees of the British-American Tobacco Co Ltd (BAT), or any of its subsidiary or allied companies. The question put before the House of Lords was whether the trust was charitable. The majority decision was that the trust was not charitable as it failed the public benefit test.

3.6.2 The principal opinion was that of Lord Simonds, endorsed by Lord Oaksey and Lord Morton of Henryton, the latter also adding his own supporting views. Lord Normand delivered a separate opinion. The only dissenting opinion was delivered by Lord MacDermott.

3.6.3 Lord Simonds commenced his opinion with the following words:

> My Lords, once more your Lordships have to consider the difficult subject of charitable trusts, and this time a question is asked to which no wholly satisfactory answer can be given.[30]

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3.6.4 Despite that apparent concern, his Lordship was able to conclude that the trust in question, which was aimed at the education of the children of the employees of BAT, was not charitable. The reasons for that decision were expressed at page 34 where, after reviewing the facts and the relevant authorities, he stated:

> I come, then, to the present case where the class of beneficiaries is numerous, but the difficulty arises in regard to their common and distinguishing quality. That quality is being children of employees of one or other of a group of companies. I can make no distinction between children of employees and the employees themselves. In both cases the common quality is found in employment by particular employers. The latter of the two cases to which I first referred, the *Hobourn* case, is a direct authority for saying that such a common quality does not constitute its possessors a section of the public for charitable purposes. In the former case, *Re Compton*, Lord Greene M.R., had by way of illustration placed members of a family and employees of a particular employer on the same footing, finding neither in common kinship nor in common employment the sort of nexus which is sufficient. My Lords, I am so fully in agreement with what was said by Lord Greene in both cases and by my noble and learned friend, Morton L.J., in the *Hobourn* case, that I am in danger of repeating its purport without improving on their words. No one who has been versed for many years in this difficult and very artificial branch of the law can be aware of its illogicalities, but I join with my learned friend in echoing the observations which he cited from the judgment of Russell L.J., in *Re Grove Grady*, and I agree with him that the decision in *Re Drummond* '... imposed a very healthy check upon the extension of the legal definition of 'charity' ...' It appears to me that it would be an extension, for which there is no justification in principle or authority, to regard common employment as a quality which constitutes those employed a section of the community.

3.6.5 Lord Simonds noted that, in accordance with the clearly established law of charity, a trust is not charitable unless it is directed to the public benefit. He added that the difficulty lies in determining what is sufficient to satisfy the test.[31] By way of example, his Lordship noted that at one end of the scale a trust established by a father for the education of his son is not a charity. The public element is not present, despite the public benefit that may accrue from that son's education. At the other end of the scale, the establishment of a college or university is beyond doubt a charity.

3.6.6 The difficulty arises, according to his Lordship, when the trust is not for the benefit of any institution either already existing or to be brought into existence by the terms of the trust. Rather, the trust is for the benefit of a class of persons at large. The question then turns to whether that group of persons can be regarded as such a "section of the community" to satisfy the public benefit test.

3.6.7 In considering the latter point, Lord Simonds noted:

> These words ‘section of the community’ have no special sanctity, but they conveniently indicate (i) that the possible (and I emphasise the word ‘possible’) beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family, or, as in *Re Compton*, of a number of families, cannot be regarded as charitable. A group of persons may be numerous, but if the *nexus* between them is their relationship to several propositi, they are neither the community nor a section of the community for charitable purposes.[32]

3.6.8 Lord Normand echoed those views. His Lordship also noted that to be charitable a trust must be of benefit to the community or a section of the community, and although there is no general rule that assists in determining this:

> ... the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. ... The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined. It is on the difficulty of defining the attribute or qualification which differentiates a section of the public that all attempts to define the public element in charitable trusts have foundered.[33]

3.6.9 While Lord Normand ultimately reached his view that the trust was not charitable on the basis of precedent, his Lordship also considered the matter in terms of principle, and said:

> If the issue is to be decided on principle and without reference to authority the question is whether a class with the common attribute that the members are the children of the employees of the same

> employer is a section of the public or merely an aggregate of persons without public significance. The fact that the children of the employees and not the employees themselves are the beneficiaries does not help the appellants, for there is no public element in the relationship of parent and child. The common attribute that each parent has a contract of service with the same employer remains for consideration. A contract of service is in a high degree personal, and it constitutes a personal and private relationship between the parties. Whatever the number of the employees in the service of the same employer, each still stands independently in this personal and private relationship to the employer. For certain purposes they are in relationship to one another, the relation of common employment with the rights and duties which arise from that relationship. These are private rights and duties and have no public element, except the interest that the community has in the harmonious and efficient operation of its industries and commerce and in the securing of good and safe conditions of labour. But that interest is not concerned with the employees of particular employers as such, but with employees at large or employees generally in particular occupations and is not an element relevant to this issue. In principle I am unable to say that any public element can be born out of the several private contracts between a particular employer and his employees. The appellant would not boldly submit that when the common employer employed two servants the public element at once emerged. He said it was a question of degree and the courts must take account of the number of employees, the magnitude of the sum settled by the truster, the size of the employers' undertaking, the non-contractual personal relationship (or their absence) between the employer and his employees, and other circumstances. I am unable to find any logical principle in these submissions. If there is no public element to be found in the bare *nexus* of common employment, all attempts to build up the public element out of circumstances which have no necessary relation with it, but are adventitious, accidental and variable, must be unavailing when the truster has chosen to define the selected class solely by the attribute of common employment. I would add that the appellant's argument would lead to a degree of uncertainty in this branch of the law which only compelling authority or logical necessity would induce me to accept. It may be conceded that the distinction inherent in the view I have taken between an educational trust for the children of all employees in the tobacco industry (see *Hall v Derby Sanitary Authority*[34]) and the present trust may appear to many over-refined and unpractical, but, unless it is accepted that all trusts for education are charitable, that is a criticism which cannot be avoided. If a line must be drawn between public trusts and trusts that are not public, there will always be marginal cases and the appearance of over-refinement.[35]

3.6.10 Therefore, on the basis of principle, Lord Normand was, like Lord Simonds, unable to reach a conclusion that a trust for employees, or the children of employees, would satisfy the public benefit requirement and therefore be charitable.

3.6.11 *Oppenheim* serves to clarify, approve and expand the test put forward in *Re Compton* and applied, with a variation, in *Re Hobourn*. *Oppenheim* provided that for a trust to meet the public benefit requirement:

- the number of possible beneficiaries cannot be numerically negligible; and
- the beneficiaries cannot be determined by reference to some personal tie, such as blood or contract.

3.6.12 It is worth noting that Lord Denning MR restated the *Oppenheim* test in his own words in the English Court of Appeal case *Race Relations Board v Charter and others*.[36] Lord Denning said:

> If I may put the test in my own words, it is this. Look at the group of persons concerned. Make sure that there are quite a number of them (they must not be numerically negligible). See what is the quality which they have in common — the quality which distinguishes them as a group from the public at large. Then ask whether the quality is essentially impersonal or essentially personal. If it is impersonal, the group will rank as a ‘section of the public’. If it is personal, it will rank as a private group, and not as a ‘section of the public’.

3.6.13 As has been noted already, the decision in *Oppenheim* was a majority decision. The dissenting view was expressed by Lord MacDermott, and later gained the support of the House of Lords in *Dingle v Turner*. Lord MacDermott contended that the traditional manner of determining the nature of a class of persons was to:

> ...regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed, and

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> the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test.[37]

3.6.14 His Lordship added that if this method was still acceptable in determining whether or not a trust was charitable, he would have determined that the fund in question was charitable. Lord MacDermott noted the large number of persons who constituted the class in question (i.e. the potential beneficiaries — in excess of 110,000 people) and while he accepted that the size of a class of beneficiaries would not be decisive, he added that it cannot be left out of consideration. In considering those who were to benefit from the trust, his Lordship noted:

> No doubt, the settlors here had a special interest in the welfare of the class they described, but, apart from the fact that this may serve to explain the particular form of their bounty, I do not think that this is material to the question in hand. What is material, as I regard the matter, is that they have chosen to benefit a class which is, in fact, substantial in point of size and importance and have done so in a manner which, to my mind, manifests an intention to advance the interests of the class described as a class rather than a collection or succession of particular individuals.

3.6.15 Lord MacDermott later added, having considered a particular trust for the advancement of education:

> If, then, the class of beneficiaries in an educational trust is substantial, and not obviously private in nature, I think one may reasonably commence, in the kind of investigation I am considering, by assuming, until the contrary appears, that the trust is for the benefit of the community.

3.6.16 Lord MacDermott's view is therefore that where the purpose for which a trust is formed is *prima facie* charitable, in that it falls within one of the four *Pemsel* heads, and the class of persons that is intended to benefit are substantial, then it should be considered, as a starting point, that the trust is of benefit to the community. The nature of the relationship, if any, between the beneficiaries and any other party should then be taken into account but is not, of itself, a deciding factor.

3.6.17 Lord MacDermott's view was adopted by the House of Lords in the later case of *Dingle v Turner*, and will be discussed further in the context of that case.

3.7 *Davies*

3.7.1 In *Davies v Perpetual Trustee Co. (Ltd) and Others* the Privy Council applied *Oppenheim* but distinguished the High Court case of *Re Tree*. The facts in *Davies* were substantially the same as in *Re Tree*, with the exception of the element of poverty. However, the Privy Council disagreed with the conclusion drawn in *Re Tree*, that a relationship to unnamed persons was not sufficient to deny charitable status. Rather than directly disagreeing with the decision, the Privy Council elected to distinguish it on the grounds that *Re Tree* concerned a trust formed for the relief of poverty, while *Davies* concerned education.

3.7.2 The question before the Privy Council in *Davies* was whether a devise contained in a codicil to a will was a valid charitable devise. The case concerned a trust for the benefit of "the Presbyterians the descendants of those settled in the colony (New South Wales) hailing from or born in the North of Ireland...".[38] The trust, whose aim was to provide religious education, was found not to be charitable because it lacked the necessary element of public benefit because the nexus between the class of beneficiaries was their relationship to several propositi.

3.7.3 Their Lordships found that the beneficiaries of the trust were:

> ...defined simply by their relationship to one or more of a number of persons living on Jan. 21, 1897.[39]

3.7.4 Their Lordships did not find it necessary to cite any authorities other than *Verge v Somerville* and *Oppenheim*. In concluding that the devise was not a valid charitable devise,[40] Lord Morton of Henryton found:

> [Their Lordships] are unable to hold that the objects of the trust are either the community or a section of the community. They clearly are not 'the community', for the testator has been at pains to impose particular and somewhat capricious qualifications on the persons who are to benefit from this education. Nor can these persons, in their Lordships opinion, be a 'section of the community' in the sense in which these words have been interpreted in the authorities. The facts which must be proved by any boy who claims to come within the class of beneficiaries have already been stated, and it is clear that the nexus between the beneficiaries is simply 'their personal relationship to several propositi', viz., certain persons living at the death of the testator. And these persons are not

> themselves, in their Lordships' view, a section of the community. They are certain Presbyterians who can establish a particular descent. ... In their Lordships' opinion, the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than a 'fluctuating body of private individuals', and the gift must fail because the element of public benefit is lacking.[41]

3.7.5 The effect of *Davies* was to confirm both *Re Compton* and *Oppenheim* and to make it clear that the personal relationship involved does not have to be to named propositi, as suggested in *Re Tree*. It is the fact that the class of beneficiaries are determined by their relationship, whether by blood or contract, to another party, whether a named or unnamed, that is fatal to charitable status.

3.8 *Arawa Maori Trust Board*

3.8.1 The decisions in *Re Compton*, *Oppenheim* and *Davies* were followed by a New Zealand Court in *Arawa Maori Trust Board v Commissioner of Inland Revenue*.[42] The case was a decision of the Magistrates Court and concerned whether the members of a Maori tribe and their descendants are a sufficient section of the community in order to qualify the trust's purposes as charitable.[43] In his decision, Donne S M referred to *Verge v Somerville*,[44] in which it was held that "a trust for a fluctuating body of private individuals cannot (be charitable)" and *Oppenheim*. The Judge noted that the principle in *Oppenheim*[45] "applies whether the relationship be near or distant, whether limited to one generation or extended to two or three or in perpetuity."[46]

3.8.2 Having regard to those authorities, the Judge held that the beneficiaries were a "fluctuating body of private individuals", and for that reason the trust was not charitable. Donne S M said:

> Now, the beneficiaries of the appellant Board are ‘the members of the Arawa Tribe and their descendants’.... To qualify as an Arawa one must trace one's ancestry to someone living in a defined area. The area is fixed and accepted by anthropologists as being exclusively populated by the members of the Arawa Tribe from the time of its landing in New Zealand up to 1840. In my view, therefore, the nexus between the beneficiaries is ‘their personal relationship to the several propositi’, i.e. to certain persons living in the defined area prior to 1840. ...I am satisfied that the beneficiaries here are ‘a fluctuating body of private individuals’ and for that reason also I hold that the trust administered by the appellant is not a charitable one.[47]

3.8.3 This case was not appealed. Rather, section 24B of the Maori Trust Boards Act 1955 was enacted, deeming specific trusts established, for charitable purposes, by Maori Trust Boards to satisfy the requirements of the Income Tax Act in order to obtain the tax exemption available to charities.

3.8.4 A public binding ruling has been issued by Inland Revenue on the application of section 24B of the Maori Trust Boards Act. BR Pub 97/8 "Maori Trust Boards: declaration of trust for charitable purposes made under section 24B of the Maori Trust Boards Act 1955 — income tax consequences". That ruling is discussed further in section 6 of this paper.[48]

3.9 *Conclusions*

3.9.1 The above authorities represent the traditional approach to the public benefit test. The key aspects of that approach can be summarised as follows:

- To be charitable a trust must be for the benefit of the community or an appreciably important section of it;
- A trust will not be charitable if it confers a private benefit;
- A trust will not be charitable if it is for the benefit of a fluctuating body of private individuals;
- The prospective beneficiaries cannot be numerically negligible in number;
- The common nexus between beneficiaries must be impersonal;
- If the common nexus between beneficiaries is a blood or contractual relationship, whether or not to a named person or persons, that is a personal nexus and therefore the trust is not charitable.

4 LATER CASES ON THE PUBLIC BENEFIT TEST

4.1 *Introduction*

4.1.1 As previously noted, the House of Lords decision in *Oppenheim* was a majority view. The minority view

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was delivered by Lord MacDermott. Lord MacDermott's view was subsequently adopted in the *obiter dicta* comments of Lord Cross in the House of Lords decision in *Dingle v Turner*. In that later case, Lord Cross expressed the view that the test in *Re Compton*, which as noted above had been applied, expanded and clarified in *Hobourn*, *Oppenheim* and *Davies*, was too broad and its application should be limited.

4.1.2 Although Lord Cross's comments in *Dingle v Turner* were *obiter dicta*, they were cited with apparent approval by the New Zealand Court of Appeal (Richardson J) in the *New Zealand Society of Accountants* case[49] and, according to Gallen J in the New Zealand High Court case of *Educational Fees Protection Society Inc*, they represent the "trend in current authority"[50] in New Zealand.

4.1.3 While these more recent cases appear to be inconsistent with the cases that represent the "traditional approach", it is arguable that the law is not clearly stated in them. As a consequence, it is no longer possible to determine, with any degree of certainty, whether trusts for the benefit of persons who are determined by either a blood or contractual relationship will satisfy the public benefit test. This section of this paper discusses those more recent cases and the developments in the law that they arguably represent.

4.2 *Dingle v Turner*

4.2.1 In *Dingle v Turner*,[51] the House of Lords was asked to determine whether a trust established for the relief of poverty was charitable. A difficulty arose because the testator's will provided for the establishment of a trust to pay pensions to the poor employees of the testator's company. The appellant argued that the trust was not charitable. The appellant's argument is best summed up in the words of Lord Cross, delivering their Lordships' judgment:

> The appellant says that in the *Oppenheim* case this House decided that in principle a trust ought not to be regarded as charitable if the benefits under it are confined either to the descendants of a named individual or individuals or the employees of a given individual or company and that although the ‘poor relations’ cases may have to be left standing as an anomalous exception to the general rule because their validity has been recognised for so long, the exception ought not to be extended to ‘poor employees’ trusts which had not been recognised for long before their status began to be called in question.[52]

4.2.2 The House of Lords dismissed the appeal and found that the trust was charitable. The decision was reached on the basis of precedent. After reviewing the relevant cases, involving ‘poor relations’, ‘poor employees’ and ‘poor members,’ Lord Cross concluded:

> After this long — but I hope not unduly long — recital of the decided cases I turn to consider the arguments advanced by the appellant in support of the appeal. For this purpose I will assume that the appellant is right in saying that the *Re Compton* rule ought in principle to apply to all charitable trusts and that the ‘poor relations’ cases, the ‘poor members’ cases and the ‘poor employees’ cases are all anomalous — in the sense that if such cases had come before the courts for the first time after the decision in *Re Compton* the trusts in question would have been held invalid as ‘private’ trusts.
>
> Even on that assumption — as it seems to me — the appeal must fail. The status of some of the ‘poor relations’ trusts as valid charitable trusts was recognised more than 200 years ago and a few of them recognised are still being administered as charities today. In *Re Compton* Lord Greene MR said that it was 'quite impossible' for the Court of Appeal to overrule such old decisions and in the *Oppenheim* case Lord Simonds in speaking of them remarked on the unwisdom of—
>
> > ‘[casting] doubt on decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole.’
>
> Indeed counsel for the appellant hardly ventured to suggest that we should overrule the ‘poor relations’ cases. ... So it seems to me it must be accepted that wherever else it may hold sway the *Re Compton* rule has no application in the field of trusts for the relief of poverty and that there the dividing line between a charitable trust and a private trust lies where the Court of Appeal drew it in *Re Scarsbrick*.[53]

4.2.3 Having reached that decision independently of any consideration, or criticism, of *Oppenheim*, Lord Cross nevertheless took the opportunity to record his views on the deficiencies of the rule laid down in *Oppenheim*. Although his Lordship's comments were *obiter dicta*, they have, as will be discussed later in this paper, arguably been adopted in New Zealand. In his opinion, Lord Cross suggested that the tests established in *Re Compton* and *Oppenheim* should not be treated as conclusive of whether or not public

benefit exists and therefore whether or not a particular entity is charitable.

4.2.4 It is worthwhile to set out in full Lord Cross's comments on the *Compton* and *Oppenheim* tests. His Lordship stated, from page 888:

> The *Oppenheim* case was a case of an educational trust and although the majority evidently agreed with the view expressed by the Court of Appeal in the *Hobourn Aero* case, that the *Re Compton* rule was of universal application outside the field of poverty, it would no doubt be open to this House without overruling *Oppenheim* to hold that the scope of the rule was more limited. If ever I should be called on to pronounce on this question — which does not arise in this appeal — I would as at present advised be inclined to draw a distinction between the practical merits of the *Re Compton* rule and the reasoning by which Lord Greene MR sought to justify it.
>
> That reasoning — based on the distinction between personal and impersonal relationships — has never seemed to me very satisfactory and I have always — if I may say so — felt the force of the criticism to which my noble and learned friend Lord MacDermott subjected it in his dissenting speech in the *Oppenheim* case. For my part I would prefer to approach the problem on far broader lines. The phrase a 'section of the public' is in truth a vague phrase which may mean different things to different people. In the law of charity judges have sought to elucidate its meaning by contrasting it with another phrase 'a fluctuating body of private individuals'. But I get little help from the supposed contrast for as I see it one and the same aggregate of persons may well be describable both as a section of the public and as a fluctuating body of private individuals. The ratepayers in the Royal Borough of Kensington and Chelsea, for example, certainly constitute a section of the public; but would it be a misuse of language to describe them as a 'fluctuating body of private individuals'? After all, every part of the public is composed of individuals and being susceptible of increase or decrease is fluctuating. So at the end of the day one is left where one started with the bare contrast between 'public' and 'private'. No doubt some classes are more naturally describable as sections of the public than as private classes while other classes are more naturally describable as private classes than as sections of the public. The blind, for example, can naturally be described as a section of the public; but what they have in common — their blindness — does not join them together in such a way that they could be called a private class. On the other hand, the descendants of Mr Gladstone might more reasonably be described as a 'private class' than as a section of the public, and in the field of common employment the same might well be said of the employees in some fairly small firm. But if one turns to large companies employing many thousands of men and women most of whom are quite unknown to one another and to the directors the answer is by no means so clear. One might say that in such a case the distinction between a section of the public and a private class is not applicable at all or even that the employees in such concerns as ICI or GEC are just as much 'sections of the public' as the residents in some geographical area. In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

4.2.5 Therefore, while accepting that *Re Compton* represented the law, Lord Cross doubted the very basis of the rule established in *Re Compton* and expanded upon in *Oppenheim* — namely that a valid basis upon which to distinguish a public trust from a private one is the distinction between personal and impersonal relationships. Rather than basing the test on whether the beneficiaries are "a section of the public", a phrase that Lord Cross found to be vague and imprecise, his Lordship considered that a broader approach should be adopted.[54] Similarly, Lord Cross disagreed with the Courts' practice of comparing the phrase "a section of the public" with "a fluctuating body of private individuals", the latter group not satisfying the former test. Lord Cross concluded that all the tests achieve is to require a contrast between whether the trust is 'public' or 'private', which means that "one is left where one started".

4.2.6 Lord Cross noted that in some cases the distinction is clear. For example, the blind, his Lordship stated, are clearly a section of the public, while "the descendants of Mr Gladstone might more reasonably be described as a 'private class' than as a section of the public." The former are a 'section of the public' because "what they have in common — their blindness — does not join them together in such a way that

they could be called a private class". It is therefore implicit from that statement that the group described as "the descendants of Mr Gladstone" are a private class because of what they have in common, i.e. the fact that they are related to Mr Gladstone. This is consistent with *Re Compton*, and later cases such as *Davies*, where the common nexus was a similar relationship and such a relationship was sufficient for the Courts to hold that the trusts in question were not charitable.

4.2.7 It is important to note that at no point does Lord Cross specifically state that such a nexus can exist in a charitable trust. However, his Lordship did suggest that the issue is not so straightforward when considering trusts established "in the field of common employment". Lord Cross stated that while "the employees in some fairly small firm" are comparable to the descendants of Mr Gladstone, and therefore might not be a section of the public, his Lordship added that the same might not be the case in respect of the employees of a large company that employs many thousands of men and women.

4.2.8 Nevertheless, while it is not clearly stated in the judgment, it has been suggested that the same reservations that Lord Cross had in respect of the application of the tests to trusts for the employees of large companies existed for him in respect of large groups linked by a common blood relationship. Therefore, it seems reasonable to read his Lordship's remarks as applying equally to both.

4.2.9 Having stated his reasons for disagreeing with the reasoning behind the *Re Compton* rule, Lord Cross did not provide any replacement rule or any basis for a practical method of distinguishing public and private trusts. Rather, Lord Cross simply stated:

> In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

4.2.10 What this amounts to is a direction to consider each case on its own merits, but that unlike under the *Compton test* and the approach taken in *Oppenheim*, the nature of the beneficiaries and any common relationship that they may have will not be determinative of whether the trust is charitable.

Oppenheim reconsidered

4.2.11 In *Dingle v Turner*, Lord Cross referred with approval to Lord MacDermott's dissenting opinion in *Oppenheim*. It is appropriate to consider that dissenting opinion to see if it assists with interpreting Lord Cross's subsequent views.

4.2.12 Lord MacDermott, in delivering the only dissenting opinion in *Oppenheim*, concluded that the trust was charitable. Lord MacDermott considered that determining whether a trust is charitable had traditionally required a consideration of the facts of each case.[55] That involved a survey of all of the relevant facts and weighing them up before reaching a conclusion. Lord MacDermott described this "traditional" approach in the following manner:

> Until comparatively recently the usual way of approaching an issue of this sort, at any rate where educational trusts were concerned, was, I believe, to regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed, and the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test. The investigation left the course of the dividing line between what was and what was not a section of the community unexplored, and was concluded when it had gone far enough to establish to the satisfaction of the court whether or not the trust was public, and the decision as to that was, I think, very often reached by determining whether or not the trust was private.[56]

4.2.13 Adopting that traditional approach, Lord MacDermott concluded that the trust was charitable. Factors that his Lordship found in favour of reaching that conclusion included:

- The large number of beneficiaries, being in excess of 110,000;
- The potential beneficiaries included not only the children of those currently employed, but also

those of former employees;

• If BAT was to merge with any other companies, the children of the employees of those companies would also be entitled to benefit;

4.2.14 Lord MacDermott added that:

> No doubt, the settlors here had a special interest in the welfare of the class they described, but, apart from the fact that this may serve to explain the particular form of their bounty, I do not think it material to the question in hand. What is material, as I regard the matter, is that they have chosen to benefit a class which is, in fact, substantial in point of size and importance and have done so in a, manner which, to my mind, manifests an intention to advance the interests of the class described as a class rather than as a collection or succession of particular individuals.[57]

4.2.15 Lord MacDermott distinguished the trust in *Oppenheim* from that in *Re Drummond*.[58] His Lordship noted that the purpose of the trust in *Re Drummond* case was not, *prima facie*, within any of the classes of legal charity. Lord MacDermott noted that that was a fundamental difference from the *Oppenheim* trust which was for the advancement of education and it therefore fell within one of the four charitable heads. Lord MacDermott then summarised the approach that should be taken:

> If the class of potential beneficiaries in an educational trust is substantial, and not obviously private in nature, I think one may reasonably commence, in the kind of investigation I am considering, by assuming, until the contrary appears, that the trust is for the benefit of the community.[59]

4.2.16 Lord MacDermott compared that approach with the *Compton test*, and said at page 40:

> The [*Re Compton*] test thus propounded focuses on the common quality which unites those within the class concerned and asks whether that quality is essentially impersonal or essentially personal. If the former, the class will rank as a section of the public and the trust will have the element common to and necessary for all legal charities, but, if the latter, the trust will be private and not charitable. It is suggested in the passage just quoted, and made clear beyond doubt in *Re Hobourn*, that, in the opinion of the Court of Appeal, employment by a designated employer must be regarded for this purpose as a personal and not as an impersonal bond of union.

4.2.17 Having therefore stated the fundamentals of the test derived from *Re Compton*, Lord MacDermott continued and accepted that, firstly the result in *Re Compton* was correct, and secondly that the test may be of value and that it would often lead to a correct determination of whether a trust was charitable or not. However, Lord MacDermott did not agree that the test should be regarded "*as a criterion of general applicability and conclusiveness*". He said:

> In the first place, I see much difficulty in dividing the qualities or attributes which may serve to bind human beings into classes into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal. As a task this seems to me no less baffling and elusive than the problem to which it is directed, namely, the determination of what is and what is not a section of the public for the purposes of this branch of the law. After all, what is more personal than poverty or blindness or ignorance? Yet none would deny that a gift for the education of the children of the poor or blind was charitable, and I doubt if there is any less certainty about the charitable nature of a gift for, say, the education of children who satisfy a specified examining, body that they need and would benefit by a course of special instruction designed to remedy their educational defects. But can any really fundamental distinction, as respects the personal or impersonal nature of the common link, be drawn between those employed, for example, by a particular university and those whom the same university has put in a certain category as the result of individual examination and assessment? Again, if the bond between those employed by a particular railway is purely personal, why should the bond between those who are employed as railwaymen be so essentially different? Is a distinction to be drawn in this respect between those who are employed in a particular industry before it is nationalised and those who are employed therein after that process has been completed and one employer has taken the place of many? Are miners in the service of the National Coal Board now in one category and miners at a particular pit or of a particular district in another? Is the relationship between those in the service of the Crown to be distinguished from that obtaining between those in the service of some other employer? Or, if not, are the children of, say, soldiers or civil servants to be regarded as not constituting a sufficient section of the public to make a trust for their education charitable? It was conceded in the course of the argument that, had the

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> present trust been framed so as to provide for the education of the children of those engaged in the tobacco industry in a named county or town, it would have been a good charitable disposition, and that even though the class to be benefited would have been appreciably smaller and no more important than is the class here. That concession follows from what the Court of Appeal has said. But if it is sound, and a personal or impersonal relationship remains the universal criterion, I think it shows, no less than the queries I have just raised in indicating some of the difficulties of the problem, that the "*Compton test*" is a very arbitrary and artificial rule.[60]

4.2.18 The second concern that Lord MacDermott had with the *Re Compton* rule was that it did not appear to have any regard to the size of the class to benefit. His Lordship continued:

> This leads me to the second difficulty I have regarding it. If I understand it aright, it necessarily makes the quantum of public benefit a consideration of little moment. The size of the class becomes immaterial and the need of its members and the public advantage of having that need met appear alike to be irrelevant. In my mind, these are considerations of some account in the sphere of educational trusts for, as already indicated, I think the educational value and scope of the work actually to be done must have a bearing on the question of public health.[61]

4.2.19 His Lordship's final point was that the application of the *Compton test* would be likely to create confusion, in that it would bring into doubt the basis of the charitable nature of some existing charitable organisations:

> Finally, it seems to me that, far from settling the state of the law on this particular subject, the '*Compton test*' is more likely to create confusion and doubt in the case of many trusts and institutions of a character whose legal standing as charities has never been in question. I have particularly in mind gifts for the education of certain special classes, such, for example, as the daughters of missionaries, the children of those professing a particular faith or accepted as ministers of a particular denomination, or those whose parents have sent them to a particular school for the earlier stages of their training. I cannot but think that in cases of this sort an analysis of the common quality binding the class to be benefited may reveal a relationship no less personal than that existing between an employer and those in his service. Take, for instance, a trust for the provision of university education for boys coming from a particular school. The common quality binding the members of that class seems to reside in the fact that their parents or guardians all contracted for their schooling with the same establishment or body. That the school in such a case may itself be a charitable foundation seems altogether beside the point and quite insufficient to hold the '*Compton test*' at bay if it is well founded in law.[62]

Conclusion on *Oppenheim* and *Dingle v Turner*

4.2.20 As noted, the views of Lord MacDermott were adopted by Lord Cross in his obiter comment in *Dingle v Turner*. However, by themselves, both Lord MacDermott's opinion and the *obiter* comments of Lord Cross would have limited precedent value, particularly in light of the earlier case law on the matter (such as *Re Compton*, *Hobourn*, *Oppenheim* and *Davies*). The *Re Compton* and *Oppenheim* tests still appear to be good law in England. *Halsbury's Laws of England* ("Charities", vol. 5(2), 4th edition) states at paragraph 8:

> To satisfy the test of public benefit, a purpose must benefit the community, or an appreciably important class of the community, which must be sufficiently defined and identifiable by some quality of a public nature, but may be restricted within narrow limits. ...
>
> The question what is a sufficient section of the public must be considered in the light of the particular purpose, for they are interdependent; the argument that what is a sufficient section to support a valid trust in one category must be sufficient to support a valid trust in any other category cannot be accepted. In ascertaining whether a purpose is public or private, the salient point to be considered is whether the class to be benefited, or from which the beneficiaries are to be selected, constitutes a substantial body of the public.
>
> The beneficiaries must not be numerically negligible, and must not be ascertained or determined by their connection with a private individual or private individuals or with a company or other employer; nor may they be merely particular private individuals pointed out by the donor or a fluctuating class of private individuals. ...

4.2.21 Therefore, the law in England (and Northern Ireland) still accepts that a trust whose beneficiaries comprise a class of persons identified by a personal relationship, such as a contractual relationship with an

employer or a relationship based on descent from a named or unnamed person will not be for a section of the public and therefore not charitable. In the relatively recent Northern Ireland case of *In Re Dunlop*,[63] although he expressed a preference for the approach of Lord Cross in *Dingle v Turner*, Carswell J said:

> I am conscious, however, that it may not be open to me to adopt this approach to the law, since it is not in harmony with the ratio decidendi of the House of Lords in *Oppenheim v Tobacco Securities Trust Co. Ltd*., which still stands despite the doubts concerning its underlying reasoning expressed by Lord Cross and the concurrence with him of the other members of the House in *Dingle v Turner*.

4.2.22 Consequently, the English and Northern Ireland courts are still bound by *Oppenheim*, although it is noted that, unlike the situation in New Zealand, the case remains a direct precedent.

4.3 *The New Zealand approach*

4.3.1 In New Zealand, the position may be less certain, as reference has been made to *Dingle v Turner* and the dissenting opinion in *Oppenheim*. Some of the comments in those cases have been embraced by the Court of Appeal in *New Zealand Society of Accountants v CIR*[64] and subsequently by the High Court in *Educational Fees Protection Society Inc. v CIR*.[65] On this basis, it is arguable that the *Dingle v Turner* approach has made inroads into the law in New Zealand and the *Re Compton* and *Oppenheim* tests may no longer have unquestioned application.

4.4 *New Zealand Society of Accountants*

4.4.1 In *New Zealand Society of Accountants*, the Court of Appeal was asked to determine whether the fidelity funds operated by the New Zealand Society of Accountants and the New Zealand Law Society were charitable. In unanimously determining that the funds were not charitable, the Court considered the public benefit test and canvassed the authorities already considered in this paper.

4.4.2 Two judgments were delivered, by Richardson and Somers JJ. Casey J concurred with both judgments.

Richardson J

4.4.3 At page 152, Richardson J (as he then was) commenced his discussion of "the public character requirement". His Honour noted that there were no reported decisions that were comparable to the facts under consideration and therefore preferred to approach the matter in terms of basic principle. In doing so, Richardson J specifically accepted the statement in *Tudor on Charities* (7th ed., 1984, p.4) that to be charitable a trust "must be for the benefit of the community or an appreciably important section of the community." His Honour stated:

> The learned editors then go on to say that this requirement may involve the consideration of two questions which are closely related: first, whether the purposes of the trust confer a benefit on the public or a section of the public, and second, whether the class of persons eligible to benefit constitutes the public or a section of it; that so far as the first question is concerned, not every purpose that is beneficial to the public is charitable — it must be within the letter of spirit and intendment of the preamble to the Statute of Elizabeth I; and that while it is difficult and perhaps impossible to formulate a satisfactory test by which to determine whether in any particular case a particular class of persons constitutes a sufficiently important section of the public to establish the validity of a trust alleged to be charitable, a trust for a particular class of private individuals will not be charitable no matter how large the class may be.[66]

4.4.4 This represents what this paper has referred to as the traditional approach to the public benefit test. Richardson J continues:

> However, as Lord Cross of Chelsea observed in *Dingle v Turner* [1972] AC 601, 624:
>
> > 'In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.'

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Te Tari Taake

> Finally, and as also bearing on the significance of the second consideration, the question is not whether a particular object in the abstract is a good charitable object, but whether the purposes of the fund are a good charitable object from the point of view not of the type of misfortune at which it is aimed, but of the beneficiaries (*Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194, 202).[67]

4.4.5 It is arguable that by referring to *Dingle v Turner* in that manner Richardson J was adopting Lord Cross's comments and therefore raising them to a level of precedent higher than their status as *obiter dicta* would otherwise merit. An alternative interpretation would be that, as Richardson J said, he approached the case on the basis of common law principle, rather than applying any precedent (because none exist). Consequently, it could be said that his Honour was simply setting out the accepted law that he was required to have regard to when forming his view.

4.4.6 Richardson J determined that the two funds were not charitable. His Honour rejected the argument that as a consequence of the existence of the fidelity funds there existed a wider public benefit, because the community had "the benefit of knowing that there is a safeguard and protection of their interests."[68] His Honour accepted that there would be instances where a trust that improves the lot of a class of persons may also be for the public benefit. Richardson J noted *Re Good*[69] where a gift on trust for the maintenance of a library and the purchase of plate for an officers' mess was held to be charitable on the basis that "it is the public, not the officers, that are benefited by better means being put at the disposal of the officers to enable them to make themselves efficient servants of the King for the defence of their country."[70]

4.4.7 In the case of the fidelity funds, however, such a benefit did not exist. Richardson J noted that while some members of the community who have not actually suffered loss from "the depredations of professional advisors"[71] may gain some degree of peace of mind, such a benefit was "far too nebulous and remote to be regarded as a public benefit".[72]

4.4.8 Richardson J concluded that the community that benefited from the funds was only those who are entitled to claim from the fund, i.e. those who suffer an otherwise uncompensated loss. On that basis, his Honour concluded that the funds were not for the benefit of the community or a section of the community. Richardson J defined the class to benefit in the following manner:

> The class of persons benefited consists of persons who entrust money to a solicitor or accountant in public practice and lose that money by reason of his theft.[73]

4.4.9 Having determined the class of persons to benefit, and the criteria necessary to fall within that class, Richardson J considered the characteristics of that class and whether they constitute the community or a section of the community. He found that there were three factors that counted against those persons constituting a section of the community and the Fund therefore being treated as a charity.

4.4.10 The first factor was that in providing compensation, there was no selection amongst those who qualify. Compensation was provided on the basis of satisfying criteria of entitlement, rather than need. On this point, Richardson J noted:

> It cannot fairly be described as a trust for the relief of distress and suffering or for the economic welfare of the public. The persons concerned are certainly advantaged but I cannot see that through compensating those qualifying for compensation in this way any substantial benefit occurs to the public.[74]

4.4.11 The second factor was that the funding of the compensation arrangement (the fidelity fund) was part of the costs of carrying on business and the contributions and levies paid by practitioners were deductible expenses incurred in their ordinary income activities. Consequently:

> They form part of the overheads of the professional firms and are built into the general cost structures of the professions so that in a real sense clients too contribute to what may be loosely described as a co-operative fidelity insurance scheme. All this is a far cry from the eleemosynary underpinning traditionally associated with the concept of charities.[75]

4.4.12 The third and final factor was that the claimants come within the trust by reason of their relationship with the particular defaulting practitioner.[76]

4.4.13 While it was only one of the factors that was taken into account, the last point is of particular relevance to the issue being considered in this paper. In his judgment, Richardson J said:

> The third is that claimants come within the trust by reason of their relationship with the particular defaulting practitioner. Where the claimant is a client that relationship is in contract. In any case where funds are entrusted to the professional adviser there is a fiduciary relationship with that adviser founded on equitable principles. Those persons benefit as individuals and because of that relationship.
> ...
> ... What those entitled to benefit from the particular fidelity fund have in common is that each has a fiduciary relationship with a criminally defaulting practitioner and each is entitled to be compensated from the fund for that part of his or her loss not recoverable from the practitioner. These trusts are for those persons and for their financial benefit and that nexus is not in my view sufficient to constitute the beneficiaries a section of the community for charitable purposes.
>
> For these reasons I am not satisfied that these trusts are directed to the public benefit in the sense required by the law of charities and I would dismiss the appeal.[77]

4.4.14 Therefore, one of the reasons adopted by Richardson J for finding that the funds did not satisfy the public benefit test (and were therefore not charitable) was the nature of the common nexus between the beneficiaries. His Honour found that nexus to be a personal relationship, either fiduciary or contractual, with the defaulting practitioners. Those entitled to benefit did so as a consequence of that relationship, rather than as a consequence of the purpose of the trust. This is, in substance, the same as finding that the common nexus was due to a contractual or blood relationship. While it is not clear whether that factor would, of itself, have been sufficient to deny charitable status, it is apparent that it was nevertheless a factor against satisfying the public benefit requirement and therefore being considered charitable.

4.4.15 However, it is also clear that the nature of the relationship was considered by Richardson J to be an important factor, as earlier in his judgment his Honour had specifically defined the class of beneficiaries by reference to their relationship to the defaulting practitioner. This suggests that the relationship between the practitioner and the client (who becomes the potential beneficiary) is the important and defining feature.[78]

4.4.16 When the judgment is read as a whole, Richardson J can be seen as following the general approach advocated by Lord Cross in *Dingle v Turner*, being that it is necessary to weigh up competing factors in determining whether the overall purpose of the entity is charitable. However, Richardson J also accepted that to be charitable it was necessary that the funds satisfied the public character requirement. Therefore, by adopting the overall approach of "purpose" the judgment does support the proposition that a *Dingle v Turner* approach has been adopted in New Zealand, but nevertheless indicates that the views expressed in *Hobourn* and *Oppenheim* are still relevant.

4.4.17 It is also important to note that the judgment, and the decision reached, is consistent with *Hobourn* and *Oppenheim* in that Richardson J found that a class of persons who were defined by the nature of their contractual relationship with a practitioner did not constitute either the public or a sufficiently important section of the public. As this conclusion was reached on the basis of principle, there being no cases directly on point, it is arguable that Richardson J was upholding the principle established in those cases.

Somers J

4.4.18 Somers J also concluded that the funds were not charitable, but for substantially different grounds. His Honour noted that the terms of the establishing legislation were such that the potential beneficiaries extended beyond human beings and included "inanimate persona such as incorporated companies".[79] That fact was sufficient to deny charitable status.

4.4.19 However, Somers J also discussed the requirements of the public benefit test. He said, at pages 155–6:

> While it has been repeatedly held that a trust to be charitable must be of a public nature, that is to say for the benefit of the community or a section of it, as opposed to a gift for the benefit of particular individuals or a fluctuating body of private individuals, it is not possible, at least in the present state of the authorities, to state with any confidence how the line is drawn between the two or to say that it is drawn in the same way as between different types of charitable trust. In *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 it was said that to be charitable the number of possible beneficiaries must not be numerically negligible and that an aggregate of individuals ascertained by reference to some personal tie, such as blood or contract, was not the community or a section of the community for this purpose. That was the case of a trust for the education of the children of over

110,000 employees and former employees of a company but was held not to be charitable for the nexus between the possible beneficiaries was the contract or former contract of employment of their parents with the company. It was recognised that trusts for the relief of poverty did not fit this formula ('poverty in general, has followed its own line': [1951] AC 297, 308) but while the case was concerned only with trusts for the advancement of education it is not easy to see why, if correct, the tests should not apply at least to the fourth head of charity.

In *Dingle v Turner* [1972] AC 601 a trust for poor employees of a company was upheld — thereby confirming that the *Oppenheim* principle did not reach trusts for the relief of poverty. But Lord Cross of Chelsea, who on this point seems to have had the support of the other members of the House, doubted the advantages of the *Oppenheim* test and indicated a preference for the approach of Lord MacDermott who dissented in the *Oppenheim* case (and who, remarkably, was a member of the House in *Dingle v Turner* 21 years later) namely that whether a trust is public or private is a matter of degree in which the existence of a tie of blood or contract is but a feature to be considered.

Inland Revenue Commissioners v Baddeley [1955] AC 572 concerned the fourth head of Lord Macnaghten's classification in *Pemsel* and lends some support to the view that this head has its origin in those parts of the preamble of the Statute of Elizabeth which refer to the repair of bridges, ports, havens, causeways, seabanks and highways, that is to say public works, with the logical corollary that the benefit under this head ought to be available to all although in fact advantage may be taken of it by a few only. The gift for New South Wales returned soldiers upheld in *Verge v Somerville* [1924] AC 496 upon which reliance was placed by the present appellants does not readily fit this concept although it was explained in *Baddeley* as being one of a gift for the benefit of the whole community which by its nature was advantageous only to a few.

But whether the test be that of the majority in *Oppenheim* or that referred to in *Dingle v Turner* or whether the case is to be considered in the way mentioned in *Baddeley* I am of the opinion that the prospective claimants on the fidelity funds in the present cases do not constitute the public or a sufficient section of the public and hence fail to pass this test of charitable purposes. The prospective claimants on the fund are not, as was suggested, the whole community but at best from the appellants' point of view clients of solicitors or accountants and others who deposit money with them. Such persons are a transient and non-permanent number of individuals whose only common characteristic is that each will have deposited money with a solicitor or accountant and who can only become claimants when that professional man steals the money and cannot make good his liabilities.

4.4.20 Somers J noted that there are opposing views of the law, represented by *Oppenheim* and *Dingle v Turner*. His Honour did not express a preference for either test and did not attempt to resolve that conflict, preferring to note that he does not, in any event, consider the beneficiaries of the funds to comprise the community but merely to be clients of the solicitors and accountants and therefore "a transient and non-permanent number of individuals". However, by doing so his Honour applied the principle in *Oppenheim* that a group of persons connected by a common contractual relationship do not comprise a section of the public.

4.4.21 Somers J's comments do not, therefore, assist in clarifying the extent to which *Dingle v Turner* has superseded *Oppenheim* (or *Re Compton*) in New Zealand law, if in fact that is the case. His Honour's comments do suggest, however, that he was comfortable in applying the principle in *Oppenheim* to the facts of the *New Zealand Society of Accountants* case.

4.5 *Educational Fees Protection Society Incorporated*

4.5.1 *New Zealand Society of Accountants* was considered by the High Court in *Educational Fees Protection Society Incorporated v CIR*. As an initial observation, the Court accepted that although the objects of the Society may fall within one of the *Pemsel* heads, it was also necessary "that the object of the charity must be of a public character".[80] This led to a consideration of the traditional cases and a consideration of the extent to which *Dingle v Turner* has been adopted in New Zealand.

4.5.2 In the case, Gallen J was of the opinion that the distinction between personal and impersonal relationships may no longer be totally acceptable as a test of public benefit and the decision in *Oppenheim's* case may no longer represent unquestioned law.[81] Further, following the decision in *Dingle v Turner*, the ultimate conclusion will be at least influenced by the purpose of the trust.[82]

4.5.3 Gallen J was asked to determine whether the Society was charitable. His Honour established that the

Society was established for a charitable purpose, so the matter turned on whether the Society was for the benefit of the public. In the course of the judgment, Gallen J undertook a comprehensive review of the relevant authorities.

4.5.4 His Honour noted the history of the public benefit requirement and the efforts of the courts to establish tests that assist in determining whether or not a particular trust is for the benefit of the public. His Honour discussed at length the conclusions in *Oppenheim* and in particular the dissenting judgment of Lord MacDermott. Gallen J then said at page 8,209:

> I have cited at considerable length from the decision of Lord MacDermott because although his opinion was the dissenting judgment in *Oppenheim's* case, the views which he expressed have been referred to with approval in the House of Lords more recently.
>
> Mr Wilson[83] referred to the decision of the House of Lords in *Dingle v Turner and Others* [1972] AC 601. That was a case where funds were to be held in order to pay the income in paying pensions to poor employees of a named company. The fact that the relief of poverty was involved meant that the considerations which arose in the *Oppenheim* case did not fall to be considered. Nevertheless the *Oppenheim* case was referred to by Lord Cross of Chelsea whose decision was concurred in by the other members of the House. Lord Cross specifically but obiter, indicated that the *Re Compton* rule which found favour in *Oppenheim*, did not seem to him satisfactory and said at p.623:
>
> > "... I would as at present advised be inclined to draw a distinction between the practical merits of the *Re Compton* rule and the reasoning by which Lord Greene MR. sought to justify it. That reasoning — based on the distinction between personal and impersonal relationships — has never seemed to me very satisfactory and I have always — if I may say so — felt the force of the criticism to which my noble and learned friend Lord MacDermott subjected it in his dissenting speech in *Oppenheim*."
>
> He also said at p 624:
>
> > "In truth the question whether not [sic] the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public."
>
> The comments of Lord Cross were referred to and quoted by Richardson J in *New Zealand Society of Accountants v C of IR* (supra) at p.152 and also by Somers J at p.156.

4.5.5 Gallen J considered that the *obiter* comments of Lord Cross have been sufficient to bring into doubt the universal application of the test established in *Re Compton* and refined in *Oppenheim*. His Honour accepted that a trust, to be charitable, must be for the benefit of the public, but stated, having completed his review of the authorities:

> There is no overall test accepted by the Courts which determines for all purposes whether a particular class of beneficiaries does or does not constitute a section of the public.
>
> The comments in *Oppenheim's* case indicate that the question will not be answered by mere numbers. In that case it was accepted that if the qualification as a beneficiary is personal in nature as occurs when that qualification derives from relationship then the class will not constitute a section of the public. The common nexus of employment was considered in *Oppenheim's* case to be a disqualifying factor as being analogous to the nexus of relationship. Following the comments of Lord Cross in *Dingle v Turner* however, the distinction between personal and impersonal relationships may no longer be totally acceptable as a test and the decision in *Oppenheim's* case may no longer represent unquestioned law. Further, following on the decision in *Dingle v Turner*, the ultimate conclusion will be at least influenced by the purpose of the trust.[84]

4.5.6 Gallen J also noted that such a conclusion, (that the purpose of the trust rather than just the class of beneficiaries must be considered in determining whether or not the public benefit requirement is met), would agree with the views of Lord MacDermott in *The Baptist Union of Ireland (Northern) Corporation Limited v*

Commrs of Inland Revenue [1945] NI 99.[85] In that case, his Lordship, (as MacDermott J), said:

> ... I am of the opinion that the mark or test of what is truly charitable, in the limited field of what I have described, is that it should be substantially, not necessarily absolutely, altruistic in character. That, I think, is the element for which one must seek.[86]

4.5.7 In the *Educational Fees* case, the Society had entered into contracts with three private schools. In exchange for the payment of a fee by those schools, the Society would meet the cost of any tuition fees payable in respect of any pupil who lost a parent. The purpose, as previously noted, was accepted as being charitable (being the advancement of education), but it was also accepted that to be charitable the activities of the Society had to benefit the public.

4.5.8 While Gallen J had gone to some length to demonstrate that, in his view, the *Re Compton* and *Oppenheim* tests no longer had universal currency, he still considered that it was necessary to distinguish the facts of the matter he was considering and to show that the tests did not apply in respect of the Society. His Honour noted that there did not exist the type of relationship that existed in either *Re Compton* or *Oppenheim*, but he did see the reasoning in *Oppenheim* as causing problems for the Society. His Honour said at page 8,212:

> I accept however that the reasoning and approach in *Oppenheim's* case does present difficulties in the present situation. If children become beneficiaries only because their parents enter into contractual arrangements with particular schools which are themselves contractors with the trust there is at least an analogy with the facts of the *Oppenheim* case. That case raises difficulties.

4.5.9 Gallen J overcame those difficulties by finding that the trend in the New Zealand authorities was moving away from *Oppenheim* and tending to follow *Dingle v Turner*. His Honour continued, also at page 8,212:

> In my view the current trend of authority is exemplified by the comments in *Dingle v Turner* and the general tenor of the decision in *New Zealand Society of Accountants v C of IR*. If the test was that postulated by Lord MacDermott in *Oppenheim's* case rather than that of the majority, I think that it would in this case be satisfied. Perhaps the best way of dealing with the matter now is to pose the question following the approach adopted by Lord MacDermott, 'is the trust substantially altruistic in character?'

4.5.10 His Honour answered that question in the affirmative, in that the purpose of the Society was "to provide education to children who would otherwise be disadvantaged socially, financially and emotionally". In doing so his Honour rejected the Commissioner's argument that the scheme was no more than an insurance arrangement. Gallen J also did not consider it fatal that a child would only benefit if the school had entered into a contractual arrangement with the Society, and therefore the beneficiaries were linked by that common contractual relationship. While accepting that *Oppenheim* was analogous, Gallen J distinguished the case on the basis that *Oppenheim* related to one trust in respect of one company,[87] while the Society was involved with a number of schools.

4.5.11 It is arguable, therefore, that the decision in *Educational Fees* was reached only on the basis of the facts of that case and the principles established in *Re Compton* and *Oppenheim* are still applicable. This would be consistent with the judgment of Richardson J in *New Zealand Society of Accountants* where his Honour found that one of the bases for finding that the funds were not charitable was the contractual relationship between the practitioners and their clients. Nevertheless, Gallen J did adopt the reasoning of the dissenting opinion in *Oppenheim* and the obiter dicta of Lord Cross in *Dingle v Turner*.

5 CONCLUSION: THE “PUBLIC BENEFIT TEST” TODAY

5.1 In cases such as *New Zealand Society of Accountants* and *Educational Fees Protection Society* there is evidence that the Courts may be moving away from a strict adherence to the principles of *Re Compton* and *Oppenheim* and have aligned themselves more with the approach advocated by Lord Cross in *Dingle v Turner*. As Gallen J noted in *Educational Fees Protection Society*, the trend seems to be moving away from the nature of the beneficiaries being determinative of whether a trust is charitable. Gallen J considered that Lord Cross's obiter comments in *Dingle v Turner* were adopted in *New Zealand Society of Accountants*.

5.2 Certainly the case that *Dingle v Turner* disapproved of the reasoning in both *Re Compton* and *Oppenheim*. In *New Zealand Society of Accountants*, Somers J was neutral, having noted the view of Lord Cross but not choosing between that view and *Oppenheim*. Richardson J, on the other hand, appeared to

accept Lord Cross's view, in discussing the public character requirement, but it is arguable that he ultimately decided the case in a manner that was consistent with *Oppenheim*. Gallen J considered, in the *Educational Fees* case and on the basis of *Society of Accountants*, that the judicial trend was towards adopting Lord's Cross's view.

5.3 However, in the case of trusts for the benefit of persons linked by a common employer, the courts may draw a distinction, in line with Lord Cross's dicta, between a trust for the benefit of the employees of a "small company" and one for the benefit of a "large company". The determinative issue would then become whether or not the purpose of the trust is, to adopt Gallen J's suggestion, sufficiently altruistic. However, his Honour did not go on to give any indication of what would, or would not, be considered sufficiently altruistic. Such consideration can only be given on a case by case basis.

5.4 That said, it is by no means clear, from the judgment in *Dingle v Turner* or from Gallen J's comments in *Educational Fees*, whether the same distinction would be drawn in respect of a trust for the benefit of a group of people who are determined on the basis of a blood relationship. That issue was not directly considered in the cases discussed. Although Lord Cross noted that while he agreed with the practical merits of the *Re Compton* rule, he had doubts about the reasoning that gave rise to it.

5.5 It may be that the New Zealand courts would take the opportunity afforded by *Dingle v Turner*, and its apparent acceptance in *New Zealand Society of Accountants*, to draw a distinction between a trust for the benefit of a close family unit and a trust for a large group of potentially disparate, although technically related, persons. For example, a court may not today decide a case such as *Arawa*, based as it is on *Re Compton* and *Oppenheim*, in the same manner. The court may elect to draw a distinction between the rules established in the "traditional" cases where the beneficiaries are a group such as an iwi or a hapu, albeit that they are, in respect of the particular group, defined on the basis of a common, although potentially distant, blood relationship. If the court determined that a large group such as an iwi satisfied the public character requirement, the charitable nature of the trust would turn on the wider purpose of the trust and how the actual persons to benefit are selected from the wider group of potential beneficiaries.

Lord Cross

5.6 In *Dingle v Turner*, Lord Cross's fundamental concern with the *Compton* test was that, while he agreed with the practical merits of such a test,[88] the basis of the test ("the reasoning by which Lord Greene MR sought to justify it") would seem to be suspect.

5.7 Lord Cross noted that Lord Greene's reasoning in *Re Compton* was based on drawing a distinction between personal and impersonal relationships, trusts based on the latter being public and the former private. His Lordship noted that in applying the distinction, judges have drawn a comparison between trusts for the benefit of "section of the public", such trusts being potentially charitable, and a "fluctuating body of private individuals". Lord Cross's concern was that they are both vague phrases and in his Lordship's view the same group of persons could fit in the terms of either phrase. Lord Cross illustrated this point with the example of the residents of a town ("the ratepayers in the Royal Borough of Kensington and Chelsea") meeting both descriptions.

5.8 Lord Cross concluded that the real issue was, therefore, whether the trust in question was for the benefit of a "public" or "private" class, but, as his Lordship noted, this means that "one is left where one started".

5.9 Having concluded that the matter to be determined was whether the class of beneficiaries was private or public, Lord Cross accepted that some classes are more naturally describable as sections of the public than as private classes, while the opposite will apply to some other classes. Lord Cross gave what he saw as two clear examples of a public and a private class:

> The blind, for example, can naturally be described as a section of the public; but what they have in common — their blindness — does not join them together in such a way that they could be called a private class. On the other hand, the descendants of Mr Gladstone might more reasonably be described as ‘a private class’ than as a section of the public;

5.10 That quote suggests that Lord Cross agreed that a class of persons determined on the basis of a common line of descent would properly be treated as a private, and not charitable, class. However, the issue is arguably not so straightforward. Lord Cross effectively linked the *Re Compton* and *Oppenheim* tests by comparing "the employees in some small firm" with Mr Gladstone's descendants and therefore describing them as a private class. By comparison, Lord Cross considered that in the case of the employees of a large

company, employing many thousands of people who are largely unknown to each other, the answer is unclear. In such a case the distinction between a section of the public and private classes may not be appropriate. On the basis of Lord Cross's view, those employees are, as a group, just as much a section of the public as the inhabitants of a geographic area (who he had already concluded would be likely to fall within either group).

5.11 This raises the possibility that, given the opportunity, Lord Cross would have applied the same distinction, that he appeared to make between the employees of small and large companies, to small and large groups whose common nexus is a blood tie. Therefore, given a suitably large group, and perhaps a sufficiently distant or wide relationship, it would be possible to reach the conclusion that the public/private distinction is similarly inapplicable. It would seem implicit in the examples given that Lord Cross assumed that Mr Gladstone's descendants were a group that was small in number. Such a conclusion would, it should be noted, be at odds with the line of cases that mere numbers will not be sufficient to make an otherwise private class into a section of the public. However, that said, it is conceded that the decision in *Dingle v Turner* already represents a departure from those cases.

5.12 One difficulty with Lord Cross's approach is that his Lordship did not appear to reach any conclusion as to where to draw the line to determine whether an entity would constitute a section of the public or a private class. Lord Cross's discussion of the issue appears to serve no purpose other than to point out some problems with the accepted principles and to suggest that they may be lacking. Having pointed out the problems, his Lordship did not attempt to provide a solution or any replacement for the *Re Compton* and *Oppenheim* rules that he has disagreed with. Rather, Lord Cross stated:

> In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the other hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.[89]

5.13 This does not amount to a solution. Rather, it indicates that whether or not the beneficiaries are a section of the public is only one relevant factor to be considered and will not be determinative of whether an entity is charitable. Satisfying the public benefit test has never been considered determinative of whether an entity is a charity — it is still necessary to be established for a charitable purpose. However, previously it was the case that where a trust was **not** for the benefit of a section of the public it could not be charitable. It is therefore reasonable to conclude that Lord Cross was suggesting that the failure of a group to meet the conventional definition of "a section of the public" will no longer be automatically fatal. Rather, his Lordship added that "much must depend on the purpose of the trust", but he did not provide any assistance on how to apply that test. His Lordship's approach appeared to be that where a trust is established for a charitable purpose, there is a *prima facie* assumption that the trust will be charitable unless further consideration demonstrates that the trust is intended to benefit a private group.

5.14 Therefore, the conclusion reached by Lord Cross is that it is not necessarily valid to draw a distinction between private and public trusts on the basis of the beneficiaries alone. While that is a factor that is to be taken into account, it is necessary to consider the purpose of the trust as well and determine whether, overall, the trust is charitable.

Gallen J

5.15 In *Educational Fees Protection Society*, Gallen J attempted to clarify the meaning of *Dingle v Turner*. His Honour noted that *Dingle v Turner* had been compared with *Oppenheim* in *New Zealand Society of Accountants*, but that neither case had been preferred. However, Gallen J stated, in respect of the approach of the Court of Appeal in *New Zealand Society of Accountants*:

> When the case is read as a whole I think that it can reasonably be said that the approach of the Court indicates that in determining whether or not a particular purpose is to be regarded as charitable ...the question of public benefit will be of significance in determining whether or not the purposes are to be classified as charitable. It will also be important in the particular sense under which the concept of public benefit must be met before a purpose generally classified as charitable, can be classified as

> such for legal purposes. The nature of the charitable purpose may itself be a factor in determining whether or not the requirement of public benefit has been met. This is to put in other terms what Lord MacDermott said in the *Baptist Union* case. He put an emphasis on the necessity that the purpose should be substantially altruistic in character.[90]

5.16 Therefore, while it is clearly still necessary for a charity to be for public benefit, merely considering the class of beneficiaries will not resolve the matter. That will be a factor, but will not be determinative. Rather, it is necessary to consider the purpose of the trust as well. As previously noted, in that regard Gallen J said:

> Following the comments of Lord Cross in *Dingle v Turner* however, the distinction between personal and impersonal relationships may no longer be totally acceptable as a test and the decision in *Oppenheim*'s case may no longer represent unquestioned law. Further, following on the decision in *Dingle v Turner*, the ultimate conclusion will at least be influenced by the purpose of the trust. As I understand him in using that term, Lord Cross is not referring to the general class of purpose as defined in *The Commrs for Special Purposes of IT v Pemsel* ..., but in a much more particular sense, considering the aims and objects of the trust under consideration.[91]

5.17 If this approach to the public benefit test is accepted, one implication that should be appreciated is that there will be no firm rule or principle to follow when determining when, or if, the public character requirement has been satisfied. Neither *Dingle v Turner* nor *Educational Fees Protection Society* provide sufficient guidance to enable a view to be formed on the current state of the law — beyond the conclusion that the law has moved from the relatively clear position that existed in terms of applying *Re Compton* and *Oppenheim*.

6 SECTION 24B OF THE MAORI TRUST BOARDS ACT 1955

6.1 In *Tax Information Bulletin*, ¶98-101 Volume Nine, No. 8 (August 1997), the Commissioner of Inland Revenue published a public binding ruling on the application of section 24B of the Maori Trust Boards Act 1955.

6.2 Section 24B provides that any income derived by a trust established by a Maori Trust Board under that section will be deemed, for the purposes of the Income Tax Act 1994, to be derived by trustees in trust for charitable purposes. This means that the income of the trust will fall within the ambit of section CB 4(1) of the Income Tax Act 1994 and will be exempt from tax. It is important to note that section 24B does not deem the trust to be charitable, only that the income will be deemed to be derived in trust for charitable purposes.

6.3 The Commissioner's view, as expressed in the commentary to the public ruling, is that the purpose of section 24B was to exempt from tax the income of specific trusts that were not otherwise charitable. In the 1961 decision *Arawa Maori Trust Board v Commissioner of Inland Revenue*, the Magistrates Court applied the decisions that have been discussed earlier in this paper and concluded that a trust established by the Trust Board was not charitable, on the basis that it failed the public benefit test. In that case, the beneficiaries of the trust were described by Donne SM in the following manner:

> Now, the beneficiaries of the appellant Board are the “members of the Arawa Tribe and their descendants” ... To qualify as an Arawa one must trace one's ancestry to someone living in a defined area. The area is fixed and accepted by anthropologists as being exclusively populated by members of the Arawa Tribe from the time of its landing in New Zealand up to 1840.[92]

6.4 The Judge determined, on the basis of the case law by which he was bound, that the trust lacked the requisite public element. He said:

> In my view, therefore, the nexus between the beneficiaries is 'their personal relationship to the several *propositi*', i.e., to certain persons living in this defined area prior to 1840.[93]

6.5 As noted earlier in this report, that decision was not appealed. It appears from the history of the amendment that the decision was accepted as being correct in terms of the law and that if, from a policy perspective, it was desirable that the tax exemption available to charities be extended to trusts such as that established by the objector, then a specific legislative provision was required. This led to the enactment of section 24B of the Maori Trust Boards Act.

6.6 On this basis, the enactment of section 24B can be viewed as supporting the traditional view of the public benefit requirement and specifically the rules established in *Re Compton* and *Oppenheim*. In the Commissioner's view, the enactment of section 24B could be seen as confirmation that it was accepted, at that time, that trusts for the benefit of persons determined by a blood, or contractual, relationship were not

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charitable, as they lacked the necessary public element.

6.7 However, it should be noted that both the decision in the *Arawa* case and the section 24B amendment to the Maori Trust Boards Act pre-date the decision of the House of Lords in *Dingle v Turner* and the subsequent developments in the public benefit test. While those cases will not affect the application of section 24B, it is accepted that had the *Arawa* case been heard after the decision in *Dingle v Turner*, the judge may have elected to apply the distinction suggested by Lord Cross.

7 CONCLUSION

7.1 The purpose of this issues paper has been to consider the various authorities that have sought to develop, refine and clarify the public benefit test. By doing so, it is hoped that it will serve to stimulate discussion and that it will provide a basis for submissions.

7.2 That aim was motivated by the Commissioner's view that, with regard to the public benefit requirement, the law of charity has become unclear. There would seem to be some support for the proposition that the law in New Zealand has diverged from that which is still the case in England and arguably in other common law jurisdictions.

7.3 However, it is unclear whether the New Zealand Courts have intended to cast doubt over the application of the public benefit test, or whether they would be prepared to modify the test in any way. As this issues paper has noted, the English Courts appear to have retained the test as it was enunciated in *Oppenheim*. It may be that the New Zealand Courts would, as Lord Simonds suggested in *Oppenheim* when referring to the "poor relations" cases, hesitate before "[casting] doubt on cases of respectable antiquity". The Courts may hesitate to take it upon themselves to modify the common law requirement of the public benefit test.

7.4 In *Vancouver Society of Immigrant & Visible Minority Women*, Iacobucci J commented on the limits imposed on the Court when seeking to advance the common law of charity in order that it "reflect more completely the standards and values of modern Canadian society".[94] He said, at page 73:[95]

> In the absence of legislative reform, Canadian courts must contend with the difficulty of articulating how the law of charities is to keep 'moving' in a manner that is consistent with the nature of the common law. As this Court held in *R v Salituro*, [1991] 3 SCR 654 (SCC) at p.670:
>
> > Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J indicated in *Watkins*, supra, in a constitutional democracy such as ours it is the legislature and not the Courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.
>
> There are thus limits to the law reform that may be undertaken by the judiciary.

7.5 The same issues would need to be considered by the New Zealand judiciary before expanding the scope of the common law meaning of charity as it applies in New Zealand. Such consideration would necessarily take into account the fact that Parliament has seen fit to allow a substantial tax benefit to entities that meet the common law requirement of being charitable, including satisfying the public benefit test. In allowing that benefit, it can be assumed that Parliament had regard to the scope of the public benefit test as it applied at that time. Any subsequent widening, or relaxing, of the test would result in an expansion of the scope of the charity exemption for income tax purposes. It is certainly arguable that such an expansion should be left to Parliament.

7.6 That said, it is not the role of the Inland Revenue Department, and more specifically the Rulings Unit within IRD, to advance the common law development by adopting a view of the law that is not in accord with the current thinking of the courts. Whether this means that the approach applied in *Oppenheim* should still be followed, or whether the current judicial position has moved beyond this, is the subject upon which technically-based views are sought.

7.7 It is acknowledged that this is a difficult and evolving area of the law and it must be stressed that the

Commissioner has not formed a final view on this matter. In looking into this area of the law, in so far as it relates to income tax, the Commissioner's aim is to determine what is, in his opinion, the better view of the law. This will allow the Commissioner to take a more consistent approach to such matters and also provide a greater degree of certainty to those entities who may seek to be treated as charitable for tax purposes.

7.8 As this area of the law is difficult, the purpose of this paper is to set out the issue that is being considered, to outline what is thought to be the relevant existing law on the matter, and to stimulate discussion and comment. If you have a comment or a submission on this matter that you wish to make, please send it to us. All such submissions will be considered and taken into account by the Commissioner in reaching the better view of the law.

8 POLICY REVIEW

8.1 In addition to the above review being undertaken by Adjudication & Rulings, Inland Revenue's Policy Advice Division business group is undertaking a separate review of the public benefit test as part of a wider review of the taxation of Maori Authorities. That review is also intended to clarify the test and, if appropriate, develop legislative options on ways to amend the test to give greater certainty to iwi and hapu-based structures and other entities seeking charitable "status".

8.2 In order to also assist with that policy review, copies of any comment or submissions received in respect of this issues paper will be provided by the Rulings Unit to Policy Advice Division for their consideration also.

Draft items produced by the Adjudication & Rulings Business Group represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers and practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

1. The exception is those entities established for the relief of poverty.
2. [1945] 1 All ER 198
3. [1951] 1 All ER 31
4. [1972] 1 All ER 878
5. *Auckland Medical Aid Trust* v *CIR* (1979) 4 NZTC 61,404
6. Section CB 4(1)(e) imposes a number of additional requirements, in addition to being a charity.
7. Section CB 4(1)(e) contains a number of further requirements that are not relevant to whether the entity is a charity.
8. (1981) 5 NZTC 61,070
9. This view has also be confirmed in subsequent cases, such as *CIR* v *Medical Council of NZ* (1997) 18 NZTC 13,088.
10. [1891] AC 531
11. Cairns, Elizabeth, *Charities: Law and Practice*, 2nd edition, Sweet and Maxwell, London, 1993, p.18.
12. [1951] 1 All ER 31
13. [1999] 2 CTC 1
14. Paragraph 147 of the reported judgment.
15. D W M Waters *Law of Trusts in Canada* (2nd ed. 1984).
16. *Tudor on Charities*, 7th edition, 1984, p.4. Approved by Richardson J in *NZ Society of Accountants*, p.152.
17. [1924] All ER 121. (Privy Council sitting for Australia.)
18. *Ibid*., p.123
19. *Ibid*., p. 123
20. *Halsbury's Laws of England*, Volume 5(2), Page 11.
21. *Re Compton, Powell v Re Compton*, [1945] 1 All ER 198
22. [1945] 2 All ER pp. 65–71 (Chancery Division)
23. *Ibid*., p.67
24. *Ibid*., p.69.
25. [1959] 12 All ER pp. 128–133 (Privy Council, Australia)

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26. *Davies*, p.133.

27. [1946] 1 All ER 501

28. *Ibid*., p.506.

29. [1951] 1 All ER 31

30. *Ibid*., 32.

31. *Ibid*., 33.

32. *Ibid*., 34.

33. *Ibid*., 36.

34. (1885), 16 QBD 163; 55 LJMC 21; 54 LT 175; 50 JP 278; 8 Digest 243, 26.

35. *Oppenheim*, 36.

36. [1972] 1 All ER 566

37. *Oppenheim*., p.39

38. *Davies*, 129.

39. *Ibid*., 131.

40. *Ibid*., 133

41. *Ibid*., 133.

42. (1961) 10 MCD 391

43. *Ibid*., 396

44. [1924] AC 469, All ER Rep 121

45. The principle being "[a] group of persons may be numerous, but, if the nexus between them is their personal relationship to a single *propositus* or to several *propositi*, they are neither the community nor a section of the community for charitable purposes", *Oppenheim*, p.306, cited in *Arawa* at p.396

46. *Arawa*, p.396, *vide In re Compton, Powell v Re Compton* [1945] 1 All ER 198

47. Arawa, p.396

48. The ruling can be found at page 4 of *Tax Information Bulletin*, ¶98-101 Volume Nine, No. 8 (August 1997). The TIB, including the public ruling, can also be viewed on the IRD website (*http://www.ird.govt.nz/*).

49. Gallen J in *Educational Fees*, p.8,210, citing Richardson J in *New Zealand Society of Accountants*, p.152.

50. *Educational Fees*, p.8,212.

51. [1972] All ER 878.

52. *Ibid*., 882.

53. *Ibid*., 888

54. *Dingle v Turner*, 889, Lord Cross: "The phrase ‘a section of the public’ is in truth a vague phrase which may mean different things to different people."

55. He noted that this was particularly so in the case of educational trusts.

56. *Oppenheim*, p39.

57. *Ibid*.

58. [1914–15] All ER 223. *Re Drummond, Ashworth v Drummond* concerned a trust established to earn income for the purpose of contributing to the holiday expenses of the workpeople employed in the spinning department of James Drummond & Sons Ltd.

59. *Oppenheim*, 40.

60. *Ibid*., 41

61. *Ibid*., 41–42

62. *Ibid*., 42.

63. [1984] NI 408

64. [1986] 1 NZLR 147;

65. (1991) 13 NZTC 8,203

66. *New Zealand Society of Accountants*, 152

67. *Ibid*.

68. *Ibid*., 153.

69. [1905] 2 Ch 60

70. *New Zealand Society of Accountants*, 153, citing *Re Good*, 67.

71. *New Zealand Society of Accountants*, 153.

72. *Ibid*.

73. *Ibid*.

74. *Ibid*.

75. *Ibid*., 154.

76. *Ibid*.

77. *Ibid*.

78. *Ibid*., 153 at line 40.

79. *Ibid*., 156 at lines 41–42.

80. *Educational Fees Protection Society*, 8,206.

81. *Ibid*., 8,211.

82. *Ibid*.

83. Counsel for the taxpayer.

84. *Educational Fees Protection Society*, 8,211.

85. *Ibid*.

86. *Baptist Union of Ireland*, 121, per Gallen J, *Educational Fees Protection Society*, 8,211.

87. Although it should be noted that the trust in *Oppenheim* was in fact in respect of the employees of BAT, its subsidiaries and allied companies, and any new or additional companies to which BAT became associated following mergers or takeovers.

88. Those merits being the clear line that the test draws between a private and public trust.

89. *Dingle v Turner*, 889.

90. *Educational Fees Protection Society*, 8,211–8,212.

91. *Ibid*., 8,211.

92. *Arawa*, 396.

93. *Ibid*.

94. *Vancouver Society of Immigrant & Visible Minority Women*, 73, (paragraph 149 of the reported judgment)

95. *Ibid*., (paragraph 150)