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SHIFTING PARADIGM OF INVESTMENT BY CHARITIES

This article argues that charitable identity is dependent primarily on executive provenance. That explains the nature of the public interest in charity law and is the reason that there must be a uniform approach to what application of charity assets to charitable purposes or charitable success means regardless of the legal form of the charity. Further, the article argues that for the sake of charitable success, the focus should generally be on exercise of teleological judgment rather than on exercise of care by charity trustees in investment situations. This means that such charity trustees should be judged in accordance with the business judgment rule in a manner similar to business directors, save that the standard of appraisal should be objective and not subjective and unless the governing instrument of the charity prohibits in effect application of the rule.

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I. Introduction

1 There are two ways to think about investment by a charity. In the passive-income sense, which is first, investment is a means of earning income from putting charitable funds in investment instruments such as bonds and equities. This notion will be irrelevant to fund-raising charities maintained wholly by voluntary contributions which are to be expended immediately for charitable purposes. In contrast, charities with productive permanent endowments including mixed charities maintained partly by voluntary contributions and by endowment, and restricted-purposes charities which are only to expend the income from the principal, must invest their endowments or the corpus to generate the necessary investment income.[1] The second is an active investment sense in which the notion of investment is strategic. Investment embraces any action that indirectly accomplishes the charitable mission or which strategically does so, such as by deferring accomplishment of a specific mission to a more opportune moment or

1 Inbetween are those charities which obtain funds for their mission by attracting donations and grants but are free only to expend the income derived from them (as in *Re Clergy Orphan Corp* [1894] 3 Ch 145) or which carry on a trade for revenue which is ploughed back into their mission. In the latter case, the charity is not investing in the passive sense but earning income from trading.

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where there will be greater effectiveness or impact on public benefit in doing so. This article will argue that the active investment sense is a preferred construction where charity trustees are simply and typically charged to utilise a fund to carry out the purposes for which the charity is organised.[2]

2 Part II exposes a fundamental argument of the article. It contains a general discussion of the critical role of the Executive in the conceptualisation of charity duties by reference to successfully achieving the purposes for which a charity is organised. This conceptualisation is indifferent to the legal form and organisation of a charity.

3 Zooming in on investment-related duties, part III explores two existing conceptions of the duties of a fiduciary in an investment situation. The first stresses the duty to invest with reasonable care or prudence. The other conception stresses the duty of a disinterested trustee to act in the best interests of the charity (duty of good faith). In business contexts in which the duty is engaged, investment bears a wider meaning of any indirect action or strategic action which accomplishes the fiduciary's purposes.

4 Building on the conclusions reached in part II and the observations in part III, part IV argues that the duty of good faith is a more appropriate rule to govern investment by charity trustees. These conclusions are conspicuously true of charities which do not oblige trustees to generate income from an invested corpus. Part IV also considers more briefly whether the position is and should be different where trustees are obliged to accumulate passive income.

II. Legal form and executive provenance

5 Part II begins by setting out the pertinent background to the issues and arguments of this article. This somewhat lengthy excursus will serve to make two essential points. One is that substance rather than form is imperative when conceptualising charity duties by reference to securing effectually the intended charitable benefits. The second is that executive provenance is indispensable in the way charitable success is to

2 On a more conceptual front, making investment is only one aspect of a larger question of how charities are to be administered so as to maximise the beneficial effects of carrying out their mission in perpetuity. In the larger scheme of things, there are related issues such as the doctrine of *cy près* and the pooling of small charitable resources. These related matters need and will not be investigated in this article. Some references to them will be necessary in some places but it would be pretentious to profess to do justice to those matters in this article where more primary issues of passive and active investment are to be explored.

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be defined.[3] The clear conclusion is that charity trustees, whatever the legal form of the charity, operate under the same constraints imposed by executive approval of broadly and categorically defined charitable purposes. It will not be forgotten that these constraints are a necessary condition for the existence of a charity. Without an officially approved purpose, there can be no charity.

A. *Irrelevance of legal form to charity distribution*

6 First, the legal form of association as, or organisation of, a charity, and the divergent manner in which it holds its resources for the sake of its mission do not affect the conceptualisation of charity duties which secure effectual application of charity property to the designated charitable purposes. An incorporated charity[4] is as a general rule the owner of its assets.[5] However, what is more significant is that an incorporated charity has for its objects the charitable purposes or mission stated in its memorandum and articles.[6] While not holding the assets on express charitable trust, the directors are charity trustees where they apply the corporate assets to such purposes as are charitable and are subject to the obligations imposed on charity trustees by the Charities Act.[7] Directors of private charitable foundations are similarly treated. Such foundations are more likely than not established as incorporated charities, the directors being put in control of private funds for the purposes of making grants to other charitable organisations. They do not carry out charitable purposes directly but provide funds to those

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3 Such specification must deal with the problems of effectively creating and distributing social wealth. This article will not be concerned with accommodating changed social conditions because its focus is business options.

4 This term is used to cover both the charity company as well as other bodies corporate such as the charity by charter or by special Act of Parliament.

5 See *Liverpool & District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193. Unless it is a charter charity or charity by special Act of Parliament, an incorporated charity does not hold its assets on charitable trusts unless these have been entrusted to the incorporated charity as permanent endowments or subject to restrictions as to purpose of use.

6 It is possible to incorporate a company that has both charitable and non-charitable objects; unlike a trust which is invalid if its purposes are not exclusively charitable, a company with non-exclusively charitable objects is a lawful creature but nothing changes in so far as its charitable objects are concerned. Such a company, however, may not claim tax exemptions. See *Tennant Plays v Inland Revenue Commissioners* [1948] 1 All ER 506.

7 Cap 37, 2007 Rev Ed. Section 2 does not employ the term "charity trustees" but "governing board members". This helps to avoid conflation when the body corporate is itself a trustee (as in the case of a charity by special Act of Parliament (*Re Manchester Royal Infirmary* (1889) 43 ChD 420 or a charter charity (*Soldiers', Sailors' and Airmen's Families Association v Attorney-General* [1968] 1 WLR 313).

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who do. This distinctive feature, however, makes no difference. The directors of a private foundation are undoubtedly also charity trustees.[8]

7 A charitable society differs from the charitable corporation in that lacking a separate legal existence, the trustees of the assets of the society as designated custodian trustees will hold them on trust for the society's charitable purposes subject to directions of the executive committee members as charity trustees. The latter are of course subject to the Charities Act.[9] In Singapore, the legal form of a charitable incorporated organisation is unavailable. So, there remains only the charitable purpose trust which is the simplest legal form for organising a charity. It goes without saying that the trustees holding property on a charitable trust are charity trustees although not owing duties to individual persons.[10]

B. Irrelevance of legal form to formation of charity property

8 A second point complements the first point about the irrelevance of form. This is that legal form and organisation of a charity also matters very little to the way charitable gifts and donations which make up the social wealth to be distributed to charity beneficiaries are conceptualised.[11] The only thing that matters in the round is the charitable purposes of the gift or donation. Gifts to charitable companies are presumptively construed to be given for their general charitable

8 Though, of course, there is nothing to preclude a charity from making donations to a foundation for charitable purposes as in *Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd* [1982] 1 Ch 49.

9 *Cocks v Manners* (1871) LR 12 Eq 574 was in relation to the sisters of charity of St Paul but not the Dominican convent. A slight complication is that members of a charitable society may, as shown in this little-known case, hold their assets on a contract-holding basis, subject to their contract to devote those assets to the charitable purposes of the society. These assets *ex hypothesi* are not a perpetual endowment. The society, also *ex hypothesi*, may be short-lived but the duties of its charity trustees are clearly the same.

10 As in England, trustees of a charitable trust may seek to be incorporated. When this is done, the incorporated body will have a distinct and separate identity for receiving property for those purposes s 65 of the Trustees Act (Cap 337, 2005 Rev Ed) requires to apply for a certificate of incorporation: ss 66 and 74. Trustees will also enter into contracts in and sue or be sued in the name of the incorporated body, notwithstanding incorporation trustees remain liable in the usual manner and in an unlimited manner: s 69.

11 The only thing that matters is that the donations are for charity. Thus, gifts to non-charitable institutions are non-charitable. They do not become charitable by reason only that they issue from altruistic motives: see *Re Clark's Trust* [1875] 1 Ch D 407 at 500. It is, however, acknowledged that if the dominant motive is not altruistic, the purposes are unlikely to be intended to be charitable: see *Re Corelli* [1943] Ch 332.

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purposes, absolutely of course.[12] Similarly construed are gifts to charitable societies. *A fortiori*, they are gifts on charitable purpose trusts.[13] Thus, it befalls those who allege that the transfers are for restricted uses or purposes or that only the income derived from the transferred corpus may be used to prove that they are unrestricted and general.[14] All transfers alike are construed in a benign manner.[15] So, even where the transfers are restricted, charity trustees are permitted to commingle the funds separately transferred for investment purposes.[16] They should, of course, keep separate accounts in respect of these funds. There is some complication when gifts are earmarked for named and particular charitable companies or societies which have ceased to exist or otherwise are given under circumstances which call for application of the gifts *cy près*, if at all. Where the gift cannot be distinguished from the exact identity of the donee, and no other institution can be identified as fulfilling the purposes of the donee,[17] or the donee cannot be identified as the donee intended despite changes in its constitution or condition,[18] or if an out-and-out intention existed or a general charitable intention cannot be found,[19] the gift is held on a resulting trust for the donor. What is significant is that cases where the gift is held on resulting trust are uncommon.

C. Irrelevance of legal form to charitable identity

9 The irrelevance of legal form to both the creation and distribution of charity property, as has been shown, reveal above all a fundamental and underlying irrelevance of legal form in the conceptualisation of charitable identity or what is a charitable purpose. Without exception, the existence of a charity (as Lord Macnaghten observed in *Special Commissioners of Income Tax v Pemsel*[20] ("*Pemsel*") depends entirely on what purposes are approved. Never questioned in Singapore, the classification of approved purposes in *Pemsel* was

12 This is since the company has legal personality and can own property.

13 *Re Schoales* [1930] 2 Ch 75; *Re Meyers* [1951] Ch 534; *cf Re Lipinski's Will Trusts* [1976] 3 WLR 522.

14 See *Re King* [1923] 1 Ch 243; *Re Royce* [1940] Ch 514.

15 See Lord Eldon in *Moggridge v Thackwell* (1802) 7 Ves 69. The Court of Appeal in *Koh Lau Keow v Attorney-General* [2014] 2 SLR 1165 at [21] considered it trite law that charities are benignly construed by preferring the construction that validates to that which makes the charity void.

16 This is since the donor's intention is unlikely to be otherwise in the absence of any indication otherwise.

17 See *Re Faraker* [1912] 2 Ch 488.

18 See *Re Withall* [1932] 2 Ch 236.

19 See *Re Knox* [1937] Ch 107.

20 [1891] AC 531. It was held that the approved charity was to be given the same scope and effect in tax law as in general law in the absence of contrary indications in the tax law.

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recently reaffirmed in the Court of Appeal.[21] As a result, there are still only four categories of charitable purposes, namely, relief of poverty, advancement of education, advancement of religion, and purposes beneficial to the community within the spirit and intendment of the preamble to the UK Charitable Uses Act 1601[22] ("CUA 1601"). The first three apparently were recognised in the inherent jurisdiction of the Court of Chancery while the fourth originated from the 1601 statute.[23] Most importantly for our purposes, despite these differences in provenance, all four categories are marked by the same two basic characteristics expressed in the formulation of the fourth category. These are that the purpose must in the abstract and in law be capable of benefitting the public (the spirit and intendment requirement of what the Government considers important)[24] and that in the circumstances of any case there is in fact sufficient or demonstrable public benefit (what the court's judge to be sufficient).[25]

10 From the fact that the spirit and intendment requirement permeates all four categories, an important though obscure point is deducible. This is that charitable identity is critically dependent on executive provenance. This point might never have emerged from obscurity had the prime minister, then minister of finance, not announced in Parliament during his Budget Speech the Government's intention forthwith to regard certain activities and purposes as being charitable purposes beneficial to the community.[26] Rachel Leow noted that this intended expansion of charitable objects was not, as in England, carried out by providing an expanded statutory list but announced in Parliament to be implemented by the Internal Revenue Authority and

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21 For pre-2005 cases, see *Re Abdul Guni Abdullasa* [1936] SSLR 5. In *Koh Lau Keow v Attorney-General* [2014] 2 SLR 1165 at 1173–1174, the Court of Appeal treated the classification of *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 as conclusive and authoritative. By popular acceptance, the repeal of the preamble by the UK Charities Act 1960 (c 58) on which the Charities Act (Cap 37, 2007 Rev Ed) was modelled did not have the effect of abrogating the spirit and intendment requirement.

22 c 4.

23 In the US, until the seminal decision in *Vidal v Girard's Executors* 43 US 2 How 127; 11 L Ed 205 (1844), it was more often than not thought that the Chancery jurisdiction was non-existent so that the statute was the very seat of the origins of charity law. Arguably, the inherent pre-1601 Chancery jurisdiction over charities was non-existent in Singapore, not being adaptable to the multi-religious context of the inhabitants.

24 See *Independent Schools Council v Charity Commission* [2012] Ch 214.

25 See *Attorney-General v Charity Commission of England and Wales* LNB News 20/02/2012 74; see also the rejection of private charity in *Ommanney v Butcher* (1823) 37 ER 1098.

26 See Lee Hsien Loong, former Minister for Finance, "Budget Speech 2005", available at http://www.singaporebudget.gov.sg/data/budget_2005/download/FY2005_Budget_Statement.pdf.

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the Commissioner of Charities.[27] Notably, the Budget Speech followed the classificatory terminology of *Pemsel* (that is, of other purposes beneficial to the community). Leow characterised the ministerial speech, nevertheless, as being of the nature of unwritten subsidiary legislation which must therefore comply with publicity requirements of subordinate legislation but being in unwritten form was not thus compliant. She concluded, "the additional charitable purposes [therefore] run the risk of being *ultra vires*, being invalid because of non-compliance with publicity requirements or being of no legal effect as a mere informal rule".[28]

11 Another route is possible and the conclusion better because it avoids the foregoing difficulties. It propounds that the spirit and intendment requirement of charity law is open to executive declaration; and that what happened in Parliament was exactly an executive declaration which was effective to include the announced expansion as being within the spirit and intendment requirement.[29] Aside from *Pemsel*, the key argument for this is that the spirit and intendment requirement embodies an indispensable executive provenance (the Crown charity prerogative) which existed even before it was manifested in the CUA 1601. No one disputes that the Act was passed to approve a wider notion of charity, embracing purposes considered important by the Government as well as control abuses of charity by the appointment of commissioners with powers to make investigations and decrees, nor that much of the new bureaucratic remedy of commissioner oversight fell into desuetude and, following its repeal in 1835, the task of control fell exclusively to the attorney-general.[30] In 1853, however, significant control returned to the executive bureaucracy with the establishment of a permanent charity commission operating alongside the attorney-general and the courts.[31] Significantly then, throughout all material times, executive provenance in charity law in one form or another was never relinquished. The fundamental notion that to define a charity is to exert control over it was never forgotten.

27 Rachel P S Leow, "Four Misconceptions about Charity Law in Singapore" [2012] Sing JLS 37.

28 Rachel P S Leow, "Four Misconceptions about Charity Law in Singapore" [2012] Sing JLS 37 at 48.

29 This result would be more consistent with *Koh Lau Keow v Attorney-General* [2014] 2 SLR 1165 at 1173–1174, where the Court of Appeal treated the classification of *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 as conclusive and authoritative.

30 By way of an information, nominally in the name of the attorney-general, brought by a relator usually at his own expense. The procedure was costly and tedious.

31 Charitable Trusts Act 1853 (c 33) (UK). Subsequently, in 1899, educational trusts were taken out of the Act to be supervised by the UK Board of Education. See Board of Education Act 1899 (c 33) (UK).

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12 Nearer our times, executive interactions in charity law have intensified and become patently visible. There are more, not less, examples of how the definition of charity and instillation of charity duties still greatly depend on the combined efforts of the court and the Executive. Much more of the same English judicial experience after *Pemsel* of deference to the spirit and intendment of the preamble to the CUA 1601, explained as a state agenda by some, will be found.[32] Subsequent legislative amendments of charity law have built further on these foundations.[33] Not to be missed are the legislative enactments compelling registration of a charity unless exempted and concerning the effect of registration by the Commissioner of Charities.[34] Registration concludes the status of the registrant as a charity in a manner not to be disturbed except on proceedings for the rectification of the register by way of deregistration.[35] On the other hand, the registration provisions predicate that a charity in law does not cease to be such by an omission to register. So, the Commissioner of Charities also has an important direct, though not decisive, say in the determination of the first aspect.[36]

13 Particularly strong confirmatory evidence of enduring executive provenance is found in the otherwise mysterious phrase in the second limb of s 2(1) of the Charities Act. There, "charity" means "any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in exercise of the Court's jurisdiction with respect to charities". The second limb of this definition of being subject to the High Court's jurisdiction would be redundant if there were no executive duality. The phrase came into prominence in

32 Blake Bromley, "1601 Preamble: The State's Agenda for Charity" (2002) 7 *Charity Law and Practice Review* 178.

33 Such amendments are primarily in the Charities Act (Cap 37, 2007 Rev Ed).

34 Charities Act (Cap 37, 2007 Rev Ed) s 5(2). Section 5(6) imposes on the governing board members a duty to register.

35 Section 6(1) of the Charities Act (Cap 37, 2007 Rev Ed) gives registration conclusive effect. Section 6(2) provides for objections to registration to be taken as well as for removal of charities which should not have been registered. Unless de-registration is ordered following a successful challenge to status, the opinion of the Commissioner of Charities as to charitable status will prevail. Importantly, such tax benefits as have previously been accorded will not be reversed.

36 Underlined by the fact that s 4(2) of the Charities Act (Cap 37, 2007 Rev Ed) enumerates the determination of charity status as one of the functions of the Commissioner of Charities. In omission cases, the Commissioner also has an important indirect role because it may with authorisation of the Public Prosecutor prosecute charity trustees who omit to register: see s 47A. Also significant is the conferment by s 26A on the Commissioner of the power to direct charity trustees to apply charity property properly to the intended purposes and to make orders necessary or desirable to secure proper application of charity property. So, not only is it a principal function of the Commissioner to determine whether an institution is or is not a charity, he is also empowered to determine whether there is proper application of charity property to the intended purposes.

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the case of *Construction Industry Training Board v Attorney-General*,[37] where it was held to be acknowledgment that there are still charities which are not within the jurisdiction of the court but remain within the Crown prerogative.

14 One fundamental tenet, thus, has remained constant in the history of charity law. It is that the executive prerogative operating alongside the judicial gave and continues to give charity law its life and vigour. This indispensable executive provenance in the definition and formulation of charity duties evinces a clear case and role for executive proclamation in charity law. Expediency also supports such a role. Where otherwise huge sums of money will or have to be expended to make matters plain, the decision can more expediently and less conclusively be made by the Executive performing the role of registration or, in more dubious cases, the decision can be made clearer by executive proclamation such as occurred in 2005. Constitutional moderation is of course necessary. To say that the spirit and intendment requirement may be declared by executive proclamation is not to say that the Executive may by fiat change the charity law. The common law rule is that executive proclamation may underline the law, not change it. So, the thesis of combined efforts in definition of a charity is perfectly consistent with Westminster principles of government according supremacy to Parliament in matters of lawmaking and limiting the executive prerogative of proclamation to clarificatory matters.[38]

D. Non-doctrinal considerations

15 Charity property is social wealth by way of private dedication. It is sensible that both its creation and distribution should be indifferent to divergences in intermediate property-holding by the charity pending distribution; and not dependent on whether the trustee is a non-director charity trustee or a director charity trustee. The latter point makes a great deal of sense in terms of the distinction between the internal and external dimensions of a charity.[39] The multiplicity of legal forms and organisations of a charity exists for different and specific purposes other than specifying external and objective criteria for defining and securing charitable accomplishment or success. Charitable success can be conceived as the effective and optimal application of property having

37 [1973] Ch 173.

38 See Coke CJ in *The Case of Proclamations* [1611] 77 ER 1352. See also A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th Ed, 1915) on the rule of law.

39 This terminology is used advisedly to mean the external effects or impact, not the external transactional relations between the trustees and third-party contracting parties or others in a tort relationship.

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potential for public benefit into actual public benefit. The legal form and organisation of a charity is, among other things, a significant indicator not of how charitable success should be conceived but of scope and extent of internal governance.[40] However, these considerations of governance have little bearing on the definition and instillation of charity duties for the sake of charitable success. There is no reason that the executive function of defining and instilling charity duties for the sake of charitable success should be prescribed diversely. As a practical consideration, the choice of stronger internal controls intrinsic to a chosen legal form will reduce the intensity of the enforcement tasks of the attorney-general, Commissioner of Charities, and the courts. But ease of enforcement only goes to the practicalities of *a posteriori* enforcement. The question of definition and instillation of charity duties remains a distinct *a priori* and framework matter.

16 Another essential point, which may be less obvious, is that the executive role in approving charities consists in providing the assistance of the courts in administering as trustee of last resort what would otherwise be invalid trusts for want of definite beneficiaries. While promulgation of charitable objects implicates taxation options, the executive role does not stem from tax considerations. Tax benefits, to be sure, are given to promote charitable works. Some justify this as reward for the provision of services which the Government considers important and is prepared to support by the indirect provision of tax relief. Others may suggest that tax benefits are efficient in managing the provision of beneficial public services in *ad hoc* or less definitive situations of public need. Even so, it should be made clear that the executive definition of an approved charity does not depend on whether the charity would enjoy tax benefits. There are approved charities which do not enjoy tax benefits from time to time. One reason is that the Government does not limit the availability of tax benefits by reference to how donations are to be used but makes tax benefits available only to charities which *actually use* the property for approved purposes which is otherwise exigible to tax.[41] Nor is there any *quid pro quo*; no one has ever advocated that tax benefits should identify charitable purposes by rank or priority, with more benefits to be given to the promotion of first rank or the most

40 For instance, the promoters of a charitable company will choose the company over the society as the preferred legal form: if the scale and nature of the purposes to be achieved make limited liability necessary or expedient; where quality of management is important in a big charity which is to grow and tap public funds; or where they seek to promote a combination of charitable and non-charitable objects.

41 *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 recognised that, ordinarily, what counts as a charitable gift under general law will count as a tax-exempt charity under tax law. Tax law does not equate "charity" to the relief of poverty. See *Ashfield Municipal Council v Joyce* [1978] AC 122.

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urgent services.[42] This would require a degree of specificity which does not exist and would contradict the categorical definition of approved charity. In other words, the distribution of the social wealth in the hands of charity trustees is indifferent to differentiations between charitable beneficiaries.[43] So, again, taxation options are contingent upon the definition of charity. They are not immanent to the instillation of charity duties.[44] They are the effect of applying the tax law to charity not the cause for which these duties arise, nor the reason (because charities receive public benefits by way of tax exemptions) that charities are approved.[45]

III. Investment activities of charity trustees

17 The conclusions in part II will provide important arguments for a uniform approach to the duties of charity trustees in an investment situation without regard to legal form. Before the case is made in more detail in part IV, it is necessary in this part to outline the development of the prudent investor norm as the yardstick of discharge of what is called here the funds-based duty of investment or passive investment.[46] This is followed by a discussion of a different approach to making investments which avails for-profit directors of business companies or business directors. The usual standard for judging the nature and function of such director in the same situation is that he has a fiduciary duty to act in what he considers in good faith to be in the best interests of the company.

42 In relation to faith-based charities, the courts have held that the law will not discriminate between different religions. See *Thornton v Howe* (1862) 54 ER 1042 at 1044.

43 In alignment with this broad sweep approach, all expended charitable donations are tax-free in the hands of the recipient charity but only tax-deductible by the donor if the charity qualifies as an institution of public character ("IPC") without regard to whether they are actually expended by the IPC.

44 Thus, taxation privileges were from the outset understood to be sufficiently distinct from the question of validity. See Fiona Martin, "The Legal Concept of Charity and Its Expansion after the Aid/Watch Decision" (2011) 3 *Cosmopolitan Civil Societies Journal* 20.

45 Surprisingly, this is a popular argument in US literature. See Ilana H Eisenstein "Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts" (2003) 151 U Pa L Rev 1747.

46 For a statement of what funds-based investment entails, see Charity Commission for England and Wales, *Decisions* vol 3 (1995) at pp 18–19, which considers an investment to be a purchase of an asset for "the main purpose of obtaining an incoming resource derived from ownership of the asset".

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A. *Duty of care and prudent investor norm*

18 It is common knowledge that a sea change to the duties of passive-investment trustees occurred in 2004 with the amendments to the Trustees Act.[47] These amendments abandoned the list approach and introduced the prudent investor norm to replace it.[48] As a result, such trustees are no longer bound to invest only in or according to a list of authorised investments.[49] They are, rather, to invest as any prudent investor would and, in particular, may invest without restriction in principle in every kind of investment as a prudent investor would. This means that trustees making investments must only act prudently, managing the funds as ordinary businessmen would having a moral obligation to provide for another, that is, the duty of ordinary business care befitting the trust.[50]

19 The passive-investment trustee's duty of loyalty is a separate duty that the investing trustee owes his beneficiaries. As a general rule, it may be supposed that the *Mothew* thesis of separation of the duty of care and of loyalty remains authoritative, so that an equitable duty of care is not ordinarily to be equated to a fiduciary duty.[51] So, while disinterested trustees must be prudent investors, they are also fiduciaries who owe a duty of loyalty to act in the best interests of the trust (or more compendiously, a duty of good faith). In relation to charity and non-charity trustees alike, only a handful of authorities exists showing how the two duties of care and good faith interrelate. The two that are highlighted have chosen to stress the prudent investor norm so that there is seldom any practical difference between the duty of care and the duty of good faith.

20 One was a non-charity case, *Cowan v Scargill*,[52] which involved a pension fund trust to deliver financial benefits to participating employees of a company. It was a remarkable case where trustees appointed by the union to the trusts of the pension fund refused to act for moral and political reasons in concurrence with the investment policies which had been adopted by a majority of the trustees. Sir Robert

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47 Cap 337, 2005 Rev Ed, ss 4 and 5.
48 The "prudent investor norm" is US terminology.
49 The notion of authorised investment only applies to the extent the governing instrument demands it: see Trustees Act (Cap 337, 2005 Rev Ed) s 2.
50 *Re Whiteley* (1886) 33 Ch D 347 at 355; *Learoyd v Whiteley* (1887) 12 App Cas 727.
51 After *Bristol and West Building Society v Mothew* [1998] Ch 1. The terminology *Mothew* thesis is coined by The Honourable J D Heydon QC, "Modern Fiduciary Liability: The Sick Man of Equity?" (2014) 20 *Trusts & Trustees* 1006. It will accordingly be assumed that it is far too simplistic to assert that a loyal fiduciary will be careful and a careful fiduciary is being loyal.
52 [1985] 1 Ch 270.

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Megarry VC laid down six principles before deciding that there was nothing in a pension fund trust that would warrant modifying ordinary trust principles, and arriving at the result that the union trustees were in breach of trust judged by those principles.

21 First, a trustee's duty of loyalty is owed to both present and future beneficiaries. He must act impartially as between them. This translates into achieving the best financial return consistent with the safety of the invested corpus. Second, a trustee must set aside his personal feelings and beliefs and must act for the legitimate purposes for which he is authorised to act. He "cannot make moral gestures, nor can the courts authorise him to do so".[53] Third, "benefit", in so far as trustees are concerned, ordinarily means pecuniary benefit but in exceptional cases, trustees may take into account the strong moral preferences of trust beneficiaries when making investments against investing in otherwise more profitable particular companies with objectionable immoral policies. Fourth, investing trustees must take such care as would a reasonable man of business with a moral obligation to provide for others when making his own investments for their benefit. Fifth, by virtue of s 6(1) of the UK Trustee Investment Act 1961[54] ("TIA 1961") (which was then in force), investing trustees have a duty to diversify. Sixth, the principles apply equally to pension fund trusts.

22 Are investing charity trustees subject to the same principles? *Harries v Church Commissioners for England*[55] ("*Harries*"), a charity case, is the second of the two cases shedding light on this specific question. Although the court did not cite the principles laid down in *Cowan v Scargill* which were drawn to its attention, its conclusions on principle were in accord. The court so remarked.[56] If anything, the impression that the requirements of loyalty were also understated is stronger. The starting consideration was a delineation of property-holding in a charity. The court identified "property held by trustees for what may be called functional purposes" such as "office accommodation in which to carry out essential administrative work".[57] For the court, the second type of property was prominent in the case it had to decide. This was "property held by trustees for the purpose of generating money, whether from income or capital growth, with which to further the work of the trust. In

53 *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 at 1106.
54 c 62.
55 [1992] 1 WLR 1241; [1993] 2 All ER 300.
56 *Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1248; [1993] 2 All ER 300 at 305.
57 *Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1246; [1993] 2 All ER 300 at 304.

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other words, property held by trustees as an investment".[58] The court's conclusion was:[59]

> Where property is so held, prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of their investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish.

"Trustees cannot properly use assets held as an investment for other, viz., non-investment, purposes".[60]

23 The court acknowledged several limited qualifications. One is that trustees' investment activities should not conflict with their designated charitable activities. They should not invest in companies which pursue goals inimical to the values which underlie the charitable purposes they must advance. However, the mere fact that their investment activities may possibly conflict with their charitable activities will not implicate them in a breach of duty if these have been undertaken prudently with a view to maximising returns on charity assets. Second, trustees should not invest in investments contrary to the known wishes of the charity's principal supporters if this would cause the charity to lose significant sources of funds. Third, charity trustees making investments may consider social and moral preferences only when both options are equally financially attractive.

24 If the passages cited extensively[61] are followed in Singapore, further qualification may be possible as a result of passage of the Trustees Amendment Act in 2004.[62] These amendments replicate those in the UK Trustee Act 2000[63] which, in the view of the English Charity

58 *Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1246; [1993] 2 All ER 300 at 304.

59 *Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1246; [1993] 2 All ER 300 at 304. The stress on best financial return, whether of income or capital growth, anticipated the statutory confirmation in the UK Trustee Act 2000 (c 29).

60 *Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1247; [1993] 2 All ER 300 at 305.

61 The judgment made no reference to the limited support the Charity Commission for England and Wales had expressed for social investment in their 1987 Annual Report. Charity trustees' investment activities should not be directly contrary to their charitable activities and trustees should have the discretion to decline investment activities which are inimical to their charitable activities. See Russell Sparkes, *The Ethical Investor* (HarperCollins Publishers, 1995) at p 211 for an excerpt of the report.

62 Trustees (Amendment) Act 2004 (Act 45 of 2004).

63 c 29.

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Commission in 2002, required charity trustees "to make sure investments include 'any relevant ethical considerations as to the kind of investments that are appropriate for the trust to make'".[64]

B. Duty of good faith of business director

25 The same double image of care and good faith is true of a business or for-profit director's duty of good faith when making investments. In practice, however, the context is very different. First, the focus is not so much on the generation of income as on achieving business success. From the intra-perspective of shareholders, success means monetary gain or profit, whether immediate or in the medium or long term, but a company must operate in a society and can only make profits if its business is socially useful. There is an important societal reference since the services and products a company delivers and hence also the reputation and goodwill of a company will to an extent depend on the degree to which it is perceived as socially committed and responsible. There is a time frame to business success because earning power is important. This means that there is also a management factor or advantage since the company's continued value and earning power will depend on the ability of its directors to harness its resources, as well as sustain and enhance the company's success. The context therefore makes it clear that business success must be flexibly understood as something more than maximising the present income of the company. Second, the focus in formulating business performance goals is on exercise of judgment as to how to promote business success. Many more decisions will be made by reference to the duty of good faith to act in the best interests of the company than to the duty of care. There are a few cases where the duty of care analysis alone will suffice such as where the decision to be made turns solely and primarily on failure to acquire or consult by exercise of care the relevant materials for judgment and action for promoting business success. In such cases, there has seldom been any need to re-state and confirm the result in terms of the duty of

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64 The Charity Commission for England and Wales continued to make more guarded implied comments in support of social investment in spite of *Harries v Church Commissioners for England* [1992] 1 WLR 1241; [1993] 2 All ER 300; see also Charity Commission for England and Wales, *CC3: Responsibilities of Charity Trustees* (August 1993). Subsequently, Charity Commission for England and Wales, *Guidance: Charity and Investment Matters: A Guide for Trustees* (CC14) (updated on 1 August 2016), issued in 2003 recognised that charities were free to implement an ethical investment policy. The *Accounting and Reporting by Charities: Statement of Recommended Practice* issued in 2005 urged charity trustees to explain, as part of the financial review section of the trustees' report, "the investment policy and objectives, including the extent (if any) to which social, environmental or ethical considerations are taken into account": see p 9, at cl 55(d).

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good faith. In many more instances, the careful acquisition and consultation of relevant materials merely form one aspect of the judgmental process.[65] Lacking the fullest information that the exercise of care would have elicited, a director might still make a judgment falling within his experience and skill which is an acceptable business judgment. But where he does not exercise due care and has also not taken into account the relevant factors in deliberation, he will breach the duty of good faith. The two necessary strands are intertwined but different. A director may perhaps fortuitously have taken into account the relevant factor although carelessly omitting to consult the relevant materials. Such director is not, as such, in breach of good faith. If, however, the critical relevant factor was not considered because he had carelessly omitted to consult the relevant materials, the question would not be whether he has acted in the best interests of the company when he failed to consider a business risk or option, but whether he is guilty of gross negligence, being without any reasonable excuse for the careless omission.

26 Descending to no more than a few necessary details, one sees that the duty of care is objective. That was not always the case. At common law, the duty of reasonable care was at first subjective.[66] It became objective in the course of time[67] and is probably objective as encapsulated in the Companies Act.[68]

27 As was said, the duty of care when making investments, however, is seldom of direct and immediate concern unless the investment would not have been undertaken if the director had not been grossly negligent. As to formulating key performance goals, the earning of income by passive investment is only one of several possible options for promoting the success of the company. Business directors are unlikely to regard generating income from investments as a primary goal of business development unless they are directors of an investment company. When they invest in the shares of another company, there will be reasons of strategy (including market competition), not merely income generation. Absent strategic reasons, directors who invest in another business merely for passive income can hardly claim to be promoting the success of the company. Such cases are in any event rare.

65 *Cf Bairstow v Queens Moat Houses Plc* [1998] 1 All ER 343.
66 See *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 427.
67 See *Re D'Jan of London Ltd, Copp v D'Jan* [1994] 1 BCLC 561.
68 Section 157(1) of the Companies Act (Cap 50, 2006 Rev Ed) does not clearly separate the duty of honesty and the duty of due diligence; *cf* s 174 of the UK Companies Act 2006 (c 46). But the case law of Singapore adopts the common law distinction between duty of care and the duty of good faith. See Timothy Liau, "Is Criminalising Directorial Negligence a Good Idea?" (2014) 14 *Journal of Corporate Law Studies* 175 at 178–179.

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In the normal run of cases, the duty of good faith will be forefronted. The duty of care will be recessive, and more peripheral in impact. A corollary is that when making investments, directors of a company do not assume and follow the lines drawn by passive investors. Every business venture which is indirect is an investment in the future of the company, whether it involves developing a new product, market, or service or investing in the shares of an allied company or setting aside an investment fund in the meanwhile.

28 There is little need to delve into details of this duty of good faith beyond highlighting in the first place that unlike the objective duty of reasonable care, the business director's duty is subjective. The director discharges this duty when he considers in good faith to follow the course which is in the best interests of the company. Lord Greene MR in *Re Smith & Fawcett Ltd* stated this when he said that directors "must exercise their discretion bona fide in what they consider – not what a court may consider – is in the best interests of the company".[69] Another way of stating the subjective effect is to express it as a subjective business judgment rule. Directors' judgments as to where the company's interests lie and how these should be advanced, if exercised in good faith, are not open to review in the courts.[70]

IV. Uniform charity duties in investment

29 With the key differences between the two conceptions of investment-related duties outlined, we are in a position in part IV to deal with four distinct and specific questions. These are all aspects of the same broad question whether the nature and function of the charity trustee in an investment situation should be judged according to one or the other standard of rationality.

A. Charity director's duty of good faith

30 The first specific question is whether there is or should be any difference between the charity director's[71] and the business director's duty in an investment situation. US courts have uncontroversially held charity directors to the standard of the business judgment rule in relation to conduct which is primarily of a judgmental nature. The leading authority is said to be *Attorney General v President and Fellows*

69 *Re Smith & Fawcett Ltd* [1942] Ch 304 at 308.
70 See *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483.
71 This term is used instead of non-profit director since the focus of the article is on the charity director.

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of Harvard College[72] where the fellows (akin to directors) of Harvard College, a corporation, made a decision as trustees of a testamentary charitable trust to relocate a part of the trust property away from the main property. The US Supreme Court upheld the decision as it passed the scrutiny demanded by the business judgment rule. Strictly, the directors' decision was not an investment decision. The case is therefore not direct authority that charity directors like business directors need only to satisfy the business judgment rule when making investments for strategic reasons. But there can be few doubts about acceptance of this generalisation in view of the wide reasoning of the court.[73]

31 Commonwealth authorities on directors of charities are sparse and none is directly on point. Being a decision on *vires*, *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd*[74] ("*Rosemary Simmons*") need not be considered. The case as an authority on *ultra vires* corporate actions is of no significance in Singapore where statute has delinked corporate incapacity and want of power and validity of corporate action.[75] Under Singapore law, the only real question where business directors make gratuitous loans or donations is whether they have satisfied the requirements of good faith.[76] More relevant is the case of *Evans v Brunner, Mond and Co Ltd*[77] ("*Evans*"), which arguably is a decision on the duty of good faith. That was a case where Eve J refused to restrain business directors from acting upon their resolution to make grants out of the company's invested surplus reserves to support the training and education of scientists and engineers at tertiary institutions. Accepting evidence that the company desired to select future employees out of this pool of trained men, he held that the advantage which was sought was direct and substantial and that the means were conducive and necessary to the continued progress of the company as chemical manufacturers. Eve J considered it unnecessary to decide whether the resolution in question was an object of the company or a mere exercise of power to attain it.[78] The question

72 350 Mass 125 (1966).

73 This is assumed to be uncontroversial in Jeremy Benjamin, "Reinvigorating Nonprofit Director's Duty of Obedience" (2009) 30 Cardozo L Rev 1677; see also Harvey J Goldschmid, "The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems and Proposed Reforms" (1998) 23 J Corp L 631 at 644. Any doubts otherwise are removed in those states which have implemented the US Uniform Management of Institutional Funds Act.

74 [1986] 1 WLR 1440.

75 Companies Act (Cap 50, 2006 Rev Ed) s 25.

76 Walter Woon, "*Ultra Vires* and Corporate Capacity in Singapore" (1989) 1 SAcLJ 52.

77 [1921] 1 Ch 359.

78 If that had been the question, he would have had to bear in mind that a power is subsidiary to the authorised object: see *Re Horsley & Weight Ltd* [1982] Ch 442 at 448.

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which he framed was rather one of construction of the resolution as to whether it was outside cl 3, which gave the company power to do whatever was incidental to its objects. He rejected the construction which counsel urged on him that it was a resolution to benefit science. The resolution was rather one to benefit the company by raising the availability of trained men of science for employment in the company, and therefore "not … impeachable by reason of the generality of the language in which it [was] expressed".[79] More significantly, Eve J disposed of the argument that the resolution was of dubious benefit to the company. It did not relate to *vires* or validity but rather "to matters having an important bearing on the way the discretion vested in the directors should be exercised".[80] As to that, he held that the company had provided sufficient proof, in effect, that the directors had acted in the best interests of the company.

32 Not being a charity case, *Evans* as a decision on good faith and not *vires* is only helpful up to a point. The third case of *Simmonds v Heffer*[81] was arguably a charity case but ultimately is not more useful because the court's reasoning was not directed to the duty of good faith but to the question of *vires*.[82]

33 In Singapore, the last two mentioned cases are relevant but in view of their inconclusive state, further arguments will be made that the courts should not hesitate to follow the US case law and likewise scrutinise promotion-of-charitable-success decisions of the charity director more flexibly in accordance with the business judgment rule. First, investment in the passive-income sense employed in the private law of trusts makes little commercial sense when a charity company is essentially an investor in its own business. Some reservations might have existed prior to the replacement of the list approach by the prudent investor norm. There were a few cases involving charter charities and charities by special Act of Parliament which held that such incorporated charities were trustees and subject to the restrictive list approach.[83] Where such strictures existed, there could be objections to re-characterising conduct in investment situations in terms of the duty

79 *Evans v Brunner, Mond and Co Ltd* [1921] 1 Ch 359 at 367.
80 *Evans v Brunner, Mond and Co Ltd* [1921] 1 Ch 359 at 368.
81 [1983] BCLC 298.
82 See *Simmonds v Heffer* [1983] BCLC 298 at 304, where Mervyn Davies J distinguished *Evans v Brunner, Mond and Co Ltd* [1921] 1 Ch 359 as being a case where the payment was incidental to the true objects of the chemical manufacturer because it was made in pursuit or as an extension of an express authorised object. The unrestricted payment in the instant case was not so made, and was therefore *ultra vires*.
83 *Re Manchester Royal Infirmary* (1889) 43 ChD 420; *Soldiers', Sailors' and Airmen's Families Association v Attorney-General* [1968] 1 WLR 313.

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of good faith for fear of bypassing the protections given by the list of authorised investments. But these considerations have ceased to be relevant after 2004. Since then there has been no essential difference between a charity director's duty of care and a business director's in relation to passive investments. Second, the passive sense of investment in any case is merely one of many strategic options open to a charity director who will choose that option if he considers it to be in the best interests of the company. Third, a charity director is confronted by a complex array of strategic options and the business judgment rule is apposite in requiring him to act upon his fiduciary judgment. True, unlike the business director's duty to promote the company's success, which encompasses the extremely wide field of every profitable human endeavour, the charity director looks only to promote the success of the charitable purposes of the company. These may be extremely wide as in the case of a company whose object is to advance charity (because then the entire range of charitable purposes is possible in the director's discretion) or narrowly defined in terms of purpose and institution. However that may be, the charity director has the same breadth of fiduciary judgment and his discharge of duty calls for the same breadth of fiduciary judgment as to fitness and means of accomplishing the charitable purpose or purposes.[84]

34 True also, risk-taking is implicit in business judgments. Business directors must invariably consider the risks associated with alternative business options whereas charity directors will take into account the relative efficacies of alternative charitable courses.[85] However, charity directors should also consider the risks of non-accomplishment of the designated purposes, not so much because the charity's capital will dwindle but so that its capital can be replenished by similar voluntary donations. It is a mistake to suppose that a charity is only to distribute social wealth, not to produce it. A charity too has earning power, so to speak. The earning power of a charity is conditioned by public perceptions of the worthiness of its cause, the manner of deployment of its resources and engagement with that cause, as well as the management abilities of its officers. All charities operate in a social and ethical

84 This article is not implying that there are no material differences altogether between the judgmental conduct of the business director and the charity director as to how success can be promoted. The state of company law now accepts a new policy to give directors extreme flexibility to pursue purposes to reflect changed business conditions and to use property for purposes for which it was not originally intended. There is clearly not the same flexibility to advance purposes which are at variance with the clearly defined purposes of the original charity instrument as a response to changes in social or political conditions.

85 *Cf* Harvey J Goldschmid, "The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems and Proposed Reforms" (1998) 23 J Corp L 631 at 641.

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environment and their respective values will depend on the same three references as in the case of business companies to sustainability over time, space and personnel, that is, management calibre and quality. So, the success of charity "business" will similarly centre about the exercise of judgment as to policies, means of execution, fitness of purpose and courses of action. Both charity director and business director alike are better served by a best judgment rule because both are called upon to judge and choose between optional policies, means of execution, and courses of action based on predictions and assessment of relevant considerations which include the generation of passive income but typically go far beyond it. The rationalism perpetuated by conceiving that the more money charity trustees generate by passive investment the better it is for the charity is only cogent if this is the strategic thing to do in the circumstances. It is flawed as a general proposition.

35 Finally, there is a much overlooked but compelling argument of logic. The duty of care and the duty of good faith are mutually exclusive frames of rationality corresponding to mutually exclusive states of mind. Lack of care connotes not having the state of awareness of material information or propositional contents as a result of the conduct of neglect. Good faith connotes having the state of mind of an honest and committed person when exercising judgment. Admittedly, the older case law could be perceived as consistent with a non-mutually exclusive scheme where there is a penumbra of uncertainty in which a degree of partial overlap of care and good faith is assumed. Where there is both neglect and as a result of lack of propositional awareness as well as irrationality in judgment, courts can avoid reducing their decision to a single frame of reference. But the importance of contextuality in the case law on the business judgment rule as applied to business directors already hints that the dichotomy between care and acting in the best interests of the company is exclusive and that the context and the true nature of the action which is impugned determine which is preeminent. An exercise of judgment entails finding a cause to believe in a state of things, actually existing or potentially realisable. An application of prudential principles in contrast has regard to the existence of propositional contents not belief. Thus, the fiduciary makes a teleological judgment that he believes an action will effectually accomplish the designated purpose. However, he exercises reasonable care to invest if he has regard to propositional contents about investment yields and risks. Whether he believes the market will rise or fall is irrelevant. Whether the market reports and such expert advice as is necessary to be obtained support an investment in the quantum in question are relevant. Context, as has been said, is crucial because the exercise of judgment may involve secondary application of prudential principles while the exercise of care may call for judgment to be made in some auxiliary manner. For example, an investor applying well-established principles of portfolio management may need to make

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judgments as to which of two investments (which have pros and cons) to select if he cannot have both. That does not mean that he is not primarily exercising care in making investments. If, however, a director is primarily investing for passive income for strategic reasons (with a long-term view of acquiring the business (say)), he is primarily making a judgment as to strategy and should be judged accordingly. Likewise, where a charity director makes passive investments, judging that this is the best way in the circumstances to maximise charity resources for future deployment in sustainable charitable activities, he is primarily engaged in judgmental conduct.

B. Non-director charity trustee duties

36 There is a second specific question to be considered: should there be any difference between the charity duties of a charity director and non-director charity trustee? It has already been shown that both business director and charity director alike face the same judgmental problem when it comes to making decisions to promote the success of the company and the charity respectively. There can also be no difference between the charity director and non-director charity trustee where the real gravamen of the complaint of breach of duty stems from the judgmental conduct (the misjudgment) of the trustee, and not the peculiar hierarchy he occupies in an organisation.

37 The case for not distinguishing between the charity duties of a non-director trustee and charity director can be strengthened by attention to several other considerations. The most important consideration has already been established in part II,[86] namely, in approving charities of whatever legal form the executive provenance is critical and there is no executive reason for differentiating charity duties by reference to legal form. There are also cogent reasons of policy for not doing this. Like the charitable company, the non-incorporated charity is marked in principle by an absence of time limitation; charitable purposes are to be accomplished over an indefinite period unless the contrary intention exists. While the corporate charity is, by constituent definition, perpetuitous, the non-incorporated charity is so by principle. So then, both forms of charity share the same *raison d'être* that the employment of property should be unaffected by short-term and transient obstacles or impediments. Charity directors and non-director charity trustees alike have a similar need and interest to deviate around changed economic conditions so as to achieve sustainable distributions of charity.

86 See paras 6–14 above.

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38 It may be objected that the above submissions come with negative implications. One is that the business judgment rule is an imposition that will add to the burden of lay charity trustees. The criticism would be that lay trustees have a meaningful role to play in the promulgation of charitable works and the law ought not to set standards impossible of attainment by lay trustees. Some may further urge that the duty of good faith is less urgent in the case of lay trustees. They are, after all, committed to benefiting their charges, or else they would not have agreed to accept the labour of love. There is an added consequential criticism. Many small charities are typically managed and subsidised by volunteer trustees. They are rewarded by the social prestige of their positions and the satisfaction of giving back to society. But when the burden on lay trustees is too high the rewards of social prestige will be diminished. This, it is feared, will lead to severe reduction of the pool of lay persons willing to undertake the office of a charity trustee. The consequences are dire because without them much small-scale charitable work would be seriously impeded or frustrated. The above objections fall into two classes. With respect to the first, that the duty to act in the best interests is too onerous on lay trustees, the easiest answer is that the objection lacks empirical basis. Reasonable settlors would not saddle their intended lay trustees with a role above which they are able and thereby willing to undertake; if any settlor purported or attempted to do so, he should expect the intended lay trustee to disclaim and has only himself to blame if the intended lay trustee disclaims the trust. With respect to objections based on policy, there is no reason of policy to encourage the use of lay trustees in managing complex and simple charities alike. Like a company organised for profit, the success of a complex charity depends on the calibre and quality of its management. Such a charity is akin to a business enterprise, different only in its orientation to the public service. It should aspire to be as successful as any self-centred enterprise. In any case, the aspiration to succeed cannot be less whether a charity is big or small. The small should be as efficient as the big, that it may grow bigger. It is for the sake of policy that social wealth should be not only distributed to those in need and with greatest potential for benefit but also engendered. Dedicated business acumen and entrepreneurial ability is to be fostered in both instances. It follows that there is little sense in encouraging an anomalous difference which may slant promoters of charitable causes to choose one legal form of charity over another by reason only that trustees are erroneously perceived to have more latitude for exercising business judgment if they are directors. Perhaps the highest that the objection may be put is that there is some justification to uphold the settlor's intention to use lay trustees or to rely prominently on voluntarism so as to recognise the supreme importance which trust law accords to the intention of the settlor. Doubts are later raised as to whether this is an absolute truth. But if it were so, it would not be wrong to require the settlor to prescribe

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such duties as befits his vision of voluntarism. There is no policy to favour voluntarism as a default position.

C. *An objective business judgment rule for charity trustees*

39 The arguments thus far show that judging charitable activities by the business judgment rule will better reflect the nature of the judgmental conduct involved, and accommodate the elements of indirect strategic benefits as well as tolerate economic deviations for the sake of achieving the designated purposes on a sustainable basis. The third specific question dealt with in part IV asks whether a contrasting qualification should, however, be made between the exercise of business judgment by the business director on the one hand and the exercise of judgment by charity trustees on the other. More exactly, the question is whether unlike business directors, whose business judgments are evaluated subjectively, charity trustees should be held to an objective business judgment standard. The opinion of most US writers is generally that there are more similarities than differences between the teleological decision-making (judgmental) processes non-profit directors and business directors alike are called upon to make when exercising their powers of business judgment. They maintain that just as business directors must be acknowledged as having discretion to pursue non-monetary gains for strategic reasons, so must non-profit directors in relation to social assets.[87] The subjective business judgment rule is therefore supported for the sake of function, not form.

40 It is suggested that the real rationale for the subjective business judgment standard of a business director is contractual. Shareholders agree that they will not monitor and question the teleological judgments of the business director unless the judgments are not made in subjective good faith. That agreement is what characterises the contractual nature of the capital of a business company so that directors have no autonomous authority over the company capital save as authenticated by the constitutional documents of the corporation. By virtue of that explicit consent of the shareholders, directors can deploy company capital to business policy decisions by their resolutions alone.[88] The result is this. As business directors' fiduciary duties to manage property of the company in its best interests are ultimately derived from the

87 See Ronald A Brand, "Investment Duties of Trustees of Charitable Trusts and Directors of Nonprofit Corporations: Applying the Law to Investments That Acknowledge Social and Moral Concerns" [1986] Ariz St LJ 631; *cf* Harvey J Goldschmid, "The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems and Proposed Reforms" (1998) 23 J Corp L 631.

88 Consent may be explicit as contained in the articles or on an *ad hoc* basis by alteration of the articles of the purposes, specific terms of the original charter, by-laws or rights and privileges in the existing property.

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contract between shareholders *inter se*; these duties may be modified by that contract. In order that these duties further the contractual purposes, they must correspond to the variable needs of business innovation and entrepreneurial creation. Shareholders will expect and require directors to react and adapt to changes in the economic background and climate in which they conduct the business of the company. For the sake of corporate success, directors will be chosen for their business acumen and given the largest possible discretion to manage and advance the business. There will of necessity always be options and divided opinions as to how success can be achieved but having chosen them, shareholders will repose trust and confidence in their judgment. It follows that this judgment is a subjective one. It is a legitimate judgment as long as it is free and impartial and honestly believed to be in the best interests of the company.

41 Neither of the above rationales, however, is pertinent where property is devoted to charity. Property donated to a non-incorporated charity does not ordinarily result from a contract to contribute capital to the charity. Nor are there individual beneficiaries who together consent to the trustees' employment of the designated trust funds. The attorney-general is the enforcer of charities but not a beneficiary because, in a real sense, the designated purposes are the "imputed beneficiaries". As to those purposes, the settlor's historical intention is paramount. His opinion from time to time is inconsequential unless he has reserved a pertinent power of control or management. So, as Lord Eldon said in *Attorney-General v Pearson*, if an "institution was established for the express purpose of a form of religious worship or the teaching of a particular doctrine … it is [not] in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded" and to apply the funds to those purposes.[89] If a difference in opinion arises as to which form or teaching is correct, the funds are to be applied to the benefit of those who adhere to the original purposes of the founders, as objectively ascertained.[90] In the case of a charitable company, there is a contract between the guarantors and the company but it is not about contributing capital and entrusting its deployment to the directors. The contract is to indemnify third parties in certain prescribed and limited circumstances. So, the premises for subjective appraisal are also absent. Such capital as is acquired by donation or grant to the incorporated charity is indistinguishable from donations or grants made to non-incorporated charities. Accordingly, the duty to act in the best interests must remain objective for the sake of uniform production and distribution of social assets without regard to

89 (1817) 36 ER 135 at 150.
90 *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515.

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legal form.[91] As was said, it is the very condition of the charity's existence that its mission is approved by the Government according to the objective framework of *Pemsel*.

42 The conclusion that the objective business judgment rule is governing will not be inimical to charity-giving. An objective scrutiny of judgmental decisions to promote charity success would reduce donor incentive to impose restrictive purposes in order to redress what the donor may perceive, rightly or wrongly, to be a *carte blanche* to trustees to make sincerity the entire touchstone of decision-making. Some have pointed out that unduly restrictive charitable giving in fact hampers the work of charity. Donors, however, need not trouble themselves to impose restrictions when the law is that trustees must seek to ascertain the objective meaning that would commend itself to reasonable trustees. The terms would not be open to private interpretation. Second, judgments as to means and ends will also have to be objective. Third, where trustees are given full discretion to decide what charitable purposes to promote, judgments as to which purposes should be promoted will also be open to objective appraisal. Fourth, an objective appraisal will not be unduly burdensome since the courts and the Commissioner of Charities will lend their assistance and guidance on matters of construction. Fifth, imposition of an objective standard is salutary in averting the dangers of cronyism which might otherwise arise where the pool of professional charity trustees is too small.

43 All this is not to suggest that non-availability of shareholder vigilance in the case of a charity is without significance. Running a charity requires management prowess and not merely earnest conviction in the cause of charity. The problem, however, is the absence of market indicators of management abilities by means of which intending donors and settlors may determine the charity's management prowess and hence potential for greater charitable success. There is no equivalent earning capacity measure by which predictions of charitable success may be made. This absence of market control implies that the burden of proof should not lie on the person with standing to enforce the duty of good faith of the charity trustee to prove breach of duty. Any allegation of breach of good faith by a charity trustee should rather be disproved by the trustee to make up for the absence of market control. In a similar vein, this article rejects populist arguments that for the sake of easing the burden of enforcement, the duty-of-care framework should be preferred to the good-faith framework. The argument supposes that the duty of good faith is subjective whereas this article argues for an

91 *Cf* Jeremy Benjamin, "Reinvigorating Nonprofit Director's Duty of Obedience" (2009) 30 Cardozo L Rev 1677 which, on the assumption of subjectivity of appraisal, argues for a strong duty of obedience.

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objective duty and the need for rebuttal is lessened. To be sure, the problem of effective enforcement is a cause for concern. Public enforcement of charity duties is, doubtless, expensive. Until and unless a dedicated and experienced body of supervisors exists, a more limited standard may be of some help in lowering the costs. But the solution to enforcement problems lies in modifying standing requirements and imposition of suitably heavy duties of reportage and again, not in conflating existence of duty with enforcement of breach of duty.

D. Where spending and investing are separated

44 The purpose of this final section is to focus attention on *Harries* and more briefly on *Rosemary Simmons* for the sake of arguing that they should be regarded as very narrowly circumscribed and irrelevant respectively.

45 Both cases raise an unsettled point of contention about how the limits of construction in charity law should be understood. Citing both cases and presuming that they were of general scope, the English Law Commission in their 2005 consultation paper[92] considered that they raised serious obstacles to social investment. Social investment, as conceived by the Law Commission, comprehends an investment that does not yield a positive financial return such as where a charity to provide housing for the destitute lends money free of interest to a developer of low-cost housing. It is highly likely that the Law Commission regarded *Harries* as not only governing charity trustees who are bound to invest designated funds but also those who have both the power to spend and the power to invest non-designated funds. Such trustees making social investments will inevitably violate the duty of care as expounded in *Harries*, which requires maximisation of financial benefit as a general rule. Regarding the limits on spending, the Law Commission expressed the view that:[93]

> *Rosemary Simmons* may suggest that a general catch-all power does not permit social investment. The charity in that case would also, in all likelihood, have had a power to invest and a power to spend, yet those powers did not give the charity power to execute the guarantee any more than did the general catch-all power.

92 Law Commission, *Social Investment by Charities: A Consultation Paper* (Law Com CP No 216, 2014).

93 Law Commission, *Social Investment by Charities: A Consultation Paper* (Law Com CP No 216, 2014) at para 3.44. The Law Commission "took a more liberal view of charity trustees' powers of investment than the court in Rosemary Simmons": Tudor on Charities (William Henderson & Jonathan Fowles eds) (Sweet & Maxwell, 10th Ed, 2015) at p 810.

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Supposing then the case law to stand in the way of salutary and desirable social investment, the Law Commission proposed and devised statutory reforms which have since been implemented to enable charity trustees to pursue social investments.[94] Nothing equivalent exists in Singapore. Questioning whether similar reforms are really needed, this article first makes the case for comprehending *Harries* narrowly and recalls the earlier demonstration of the irrelevance of *Rosemary Simmons* as a decision on the doctrine of corporate *ultra vires*.[95]

46 The conclusions of the Law Commission as to the effect of *Harries* will be seriously anomalous and unattractive if the arguments and conclusions already reached in this article are accepted. The reference to a power to invest is meaningful if the distinction between a duty to invest and a power to invest is intended. But the effect then is that *Harries* will have too large a scope of application. This is because unless the charity's governing instrument indicates otherwise, the Trustees Act, which confers a power to invest (which, as defined, means invest in the passive sense), will probably be read to import such power into the charitable trust. Reference was made earlier to cases where it was held that charter charities and charities by special Act of Parliament are trustees subject to the TIA 1961.[96] There seems to be little doubt that charity directors and other charity trustees are likewise subject to the Trustees Act to the extent they seek to invest property for generating income for the intended charitable objects. *Harries* will govern all such trustees including, of course, those who are expressly empowered to invest. As was said, the limitation which the Trustees Act then imposed, requiring trustees to restrict themselves to authorised investments (following a list approach), has ceased to matter. What remains is that they are subject to the prudent investor norm by virtue of the amended Trustees Act. If *Harries* is general authority that trustees with power to invest must invest passively if they decide to invest, its scope will be considerable. However, the arguments already made propound that the duty to achieve charitable success is essentially a duty to exercise teleological or consequentialist judgment. Then, if trustees under a duty to spend can choose the option of strategic non-financial-return-generating investment according to the business judgment rule, it is anomalous that they will in the same breath be judged to have breached their duty of care to maximise financial return by the investment. In the present view, the context of charitable success rather implies that any investment, whether passive or active, will be undertaken only if strategic reasons for it exist, or *vice versa*. The rationality of the

94 See Charities (Protection and Social Investment) Act 2016 (c 4) (UK).
95 See para 31 above.
96 See *Re Manchester Royal Infirmary* (1889) 43 ChD 420 and *Soldiers', Sailors' and Airmen's Families Association v Attorney-General* [1968] 1 WLR 313.

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judgmental conduct will be the key question, not the implementation of any chosen course of passive or active investment. There has to be a teleological judgment to spend strategically before there can be passive investment and any decision made to invest in the passive sense for strategic reasons will simply be a decision not to spend the funds to be invested immediately. This exercise of judgment to spend strategically might seem to be negated if trustees were expressly placed under a duty to invest in the passive sense any surplus funds not immediately expendable for the designated purposes. *Harries*, it is submitted, was such a case.

47 As for the English Law Commission's commentary on the limitations imposed in *Rosemary Simmons*, the reference to a power to spend actually does not have a fixed meaning. Without being exhaustive, it could mean: expend charity funds functionally to pay necessary administrative expenses; expend the funds "in the field"; make donations to other charities carrying on the same or similar activities; or invest passively and accumulate the funds as capital reserves.[97] There is thus no necessary or entailed distinction between spending and investing. Moreover, the reference would appear to be superfluous as a general rule since spending on charity is the very object of charity duties.[98] It is incumbent on charity trustees that they deploy charity funds to promote charitable success. It was argued earlier in this article the decision, being one of *vires* and validity, has no relevance in Singapore.[99] So far as non-incorporated charities are concerned, the reasoning in *Rosemary Simmons* is also irrelevant. Trust law has no need of a common law doctrine of *ultra vires*. In its place, the use of property for the purposes specified by the settlor is assured by the distinction between transfers outside the terms of and transfers within those powers.[100] Charity trustees are simply, in essence, the legal owners of property. When charity trustees transfer property in pursuit of purposes clearly at variance with their mission, they will have done an act capable of passing legal title but incapable of overreaching the beneficial interest in the charity property.[101] The only question will be whether the act has been done in good faith in the best interests of the charity and the beneficial interest overreached.

97 *Cf Inland Revenue Commissioners v Helen Slater Charitable Trust Ltd* [1982] 1 Ch 49 on the meaning of "application to the charitable purposes".

98 It would be sensible in the rare case of an endowed charity which is given a power to spend out of the endowment in specified circumstances.

99 See para 14 above.

100 The same terminology of *ultra vires* and *intra vires* transfers may be used but it has a different equitable meaning.

101 The terminology of *ultra vires* is sometimes used but this should not be confused with the doctrine of *ultra vires* which results in a void act.

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48 In view of the above, there is only one real question of the limits of construction, namely, whether *Harries* should be accepted as a limitation on trustees charged with a duty to invest in the passive-income sense. *Harries* might, of course, be defended by some as applicable where charity trustees are obligated to passively generate income to advance the charitable purposes.[102] The basis for this defence is that they have a duty to obey the settlor's intentions unscrupulously. This article, however, will proceed to argue that the only effective limitation should not be that there is a duty to invest passively but a prohibition on active or strategic investment. Unless there is such prohibition, the imposition of a duty to invest passively simply means that if the trustees judge that active investment is strategic to the mission, they may thus spend the funds. Whatsoever is not needed for strategic purposes or for immediate deployment will of course be subject to the duty to invest passively.

49 The first argument to support the suggested limitation questions the tacit assumption on which *Harries* rests, namely, the settlor's intention to subject the charity trustees to a duty of passive investment is sacrosanct. That the settlor's intention is sacrosanct may be nearly the absolute truth where private trusts are concerned. However, the sacrosanct nature of a charitable trust intention has been more of an assumption than a settled truth. The authorities to effect that the charitable intention will be upheld exactly in every respect will be found upon examination to presuppose a time when charitable intentions were sometimes suspect devices for spiteful actions against persons morally entitled to the bounty of the settlor. A strict approach to construction allowed the courts to find that the charitable purposes had failed (this being done for the protection of the disinherited heir)[103] while a narrow *cy près* doctrine ensured that the courts would not be an instrument of oppression of a spiteful settlor. Those times have passed.[104] The narrow *cy près* doctrine has disappeared from the law books, replaced by a wide statutory doctrine aided by a generous doctrine of general charitable intention.[105] In more recent times, provisions have also been made available to ensure maintenance and other familial

102 It is not doubted that restraints or restrictions as to alienation of income and specific purpose are valid and not repugnant. See *Re Brunner's Declaration of Trust* [1941] 2 All ER 745.

103 See *Attorney-General v Downing* (1769) 21 ER 330.

104 The charitable intention, unlike the ordinary trust intention, is open to conservative judicial modification. The courts have authority to modify the settlor's charitable intention so as to make it more efficacious and more fully responsive over time.

105 See Charities Act (Cap 37, 2007 Rev Ed) ss 21 and 22. See also *Varsani v Jesani* [1999] Ch 219 and *Khoo Jeffrey v Life Bible-Presbyterian Church* [2011] 3 SLR 500.

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support for needy family members and dependants of the settlor.[106]

50 Later authorities are therefore more useful. These show that a general charitable intention is sufficient to constitute a valid charitable trust (so a trust for such charitable purposes as one's trustees shall select or for a stipulated category of charity is valid).[107] Those authorities that insist that charitable intentions be performed exactly will be found to relate to the objects. But courts are prepared to ascertain the true intention apart from the letter where the intentions pertain to the mode of accomplishing those objects as a means to an end. In *Re Weir Hospital*,[108] the court would not permit trustees to establish in a neighbouring place other than the place the settlor had designated. This was because the purpose was specifically tied to the settlor's designated locality and the funds he had separately furnished for maintenance of the charity.[109] In sharp contrast, where the charitable purpose could be carried on in another locality, it was held that the designated locality was merely a mode of administration to achieve the more abstract benefit.[110]

51 If then, the means to an end are *prima facie* construed to be subservient and dispensable, it would not be uncharacteristic for charity law to recognise a distinction between purpose and the source of funds to be deployed for its achievement as being the means or mechanics to the end. Of course, just as locality may be an element making up a charitable purpose, the source of funds for a charity may also be a constitutive element of the purpose specification.[111] However, where the specified source of funds is merely precatory or a mode, the direction that only income to be derived from corpus or the capital as a permanent endowment may be used ought not to be an unmodifiable requirement. If precatory, no legal restriction is intended. If a mode, a settlor may suppose that as then advised the mode he prescribed was best. Even where his purpose is paramount, he might be presumed to favour trustee intervention where the mode is not, under present economic conditions, the best mode open to the trustee.[112] Unlike pecuniary trusts, where the purpose is singularly to distribute the

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106 See Inheritance (Family Provision) Act (Cap 138, 1985 Rev Ed).

107 See *Re White* [1893] 2 Ch 41.

108 [1910] 2 Ch 124.

109 There are similar cases where the locality is essential to the charitable purpose such as "where there is a trust to retain for the public benefit a particular house once owned by a particular historical figure or a particular building for its architectural merit or a particular area of land of outstanding natural beauty": *Oldham Borough Council v Attorney General* [1993] Ch 210.

110 See *Re Manchester New College* (1853) 51 ER 916.

111 For a case where the source of funds is bound up with the purpose, see *Re Milton Hershey School Trust* 807 A 2d 324 (2002).

112 See *Clephane v Lord Provost of Edinburgh* (1869) UKHL 2 Paterson 1657 at 1663.

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pecuniary benefits, it is hard to imagine that the settlor of a charitable trust would intend and insist on the same rigid adherence to the means he has specified. This means that unless the settlor expressly or substantially prohibits any other mode of administration than the one he has specified, the courts should be free to construe his true intention including his putative intention. In particular, the court should be free to dispense with his imposition of a duty to make passive investments as being administrative in nature and open to administrative deviation. Thus, if the settlor requires the trustees to hold the corpus as endowment and to use the income from investing it not for the general purposes of the charity but for a specific purpose, his probable intention is that the corpus cannot be spent or utilised in any other manner than that he has specified. This is perhaps clearer where the does not give the principal to the charity but entrusts trustees to hold and invest the principal giving the income to the charity, as in the case of a charitable foundation.[113] However, if the settlor directs that the corpus be held as an endowment and the income from investing it be used for the general purposes of the charity, the trustees probably can administratively deviate from the duty to make passive investment without the need for court intervention to order a scheme by way of *cy près*. Even in connection with the doctrine of *cy près*, there is unmistakable indication of a less exacting judicial attitude. The courts applying the doctrine of general charitable intention are not willing to construe the donor's intention exactly where there is a charitable trust of income which fails to exhaust the beneficial interest in the income. In *Re King*,[114] the trustees were left with surplus income after employing the income to the charitable purpose of installing and maintaining a stained-glass memorial window in the designated church. It was held that the surplus should be applied *cy près* to maintain other similar windows of the chapel. Significantly, there was no inquiry into whether the settlor could have predicted that there would be a surplus after his purpose was carried out.

52 The second argument for rejecting a distinction based on duty to invest addresses concerns which arise when, exceptionally, the preservation of the corpus is intended partly for the benefit of non-charitable beneficiaries. These concerns are protective of such non-charitable persons. Those who advocate such protection say that non-charitable beneficiaries should be entitled to demand that any form of restriction whether of purpose or of mode be strictly observed since such restriction affects their beneficial entitlements. If, for example, the corpus must be kept intact for the conditional provision of an aliquot portion of the invested income to the non-charitable person, as a

113 See *Re Levy* [1960] Ch 346.
114 [1923] 1 Ch 243.

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condition of a trust of the income for the benefit of a charity, the non-charitable beneficiary should be entitled to restrain the charity from spending out of the corpus and thereby lowering the absolute income available to be paid to him.[115] Thus, objectors insist that there should be a qualification in the case of such restricted purpose trusts to protect the non-charitable person's interest. They would reject a construction that the restriction to income is merely an expression of the settlor's view as to how to achieve perpetuitous or indefinite benefit, that is, as to mode of administration. The objection has some appeal but again, to entertain the objection would be to prioritise the private conditional benefit above the charitable benefit. But a settlor who ties the private and public benefit together in the foregoing manner is more sensibly regarded as desiring that they should benefit symbiotically and not preferentially. It is different if the settlor settles the income on one determinable charitable trust and the corpus on a non-charitable trust. This is because the distinction between ends and means is insensible in such cases where there are two ends. Or, if the settlor reserves powers to modify or consent to any modification by the trustees, then he makes it clear that the terms should be adhered to strictly as a general rule, save as he should otherwise consent.

53 There are other concerns which objectors can raise. Charity fatigue is a concern. Requiring fidelity to the terms of dedication may serve as necessary means to arrest "mission drift" and charity fatigue. Some may therefore proceed to maintain that restrictions are primarily for the benefit of donors and that donor support requires clear signals that their intended terms of dedication to charity will be sacrosanct. This article expresses some scepticism whether this characterisation of restrictions is wholly adequate. Let it be supposed that restrictions are indeed for the benefit of donors. But then again, when the pros and cons are examined, those who stress enforcing restrictions exactly without regard to such distinctions as true and literal intention or intent as to objects and mode of administration will be found to be reacting to the very liberal treatment of non-profit directors in the US case law who are given the benefit of making subjective business judgments.[116] This article argues that the teleological judgments of charity trustees, be they directors or non-directors, must be held to objective scrutiny. There is no further need to stress a strict duty of obedience which will render otiose the distinctions employed to ascertain and implement the true donor intention.

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115 This article is not concerned with specifically limited charitable trusts with a gift over to a non-charitable beneficiary which must be determined within the perpetuity period. These are not endowment charities.

116 See Jeremy Benjamin, "Reinvigorating Nonprofit Director's Duty of Obedience" (2009) 30 Cardozo L Rev 1677.

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54 In conclusion, only one limitation is effective to rule out active investment, namely, a prohibition on active investment. Imposition of a duty of passive investment will not work as a prohibition because the duty to spend includes a duty to invest for strategic reason, whether actively or passively. Imposition of a duty to exhaust immediately whatever voluntary contributions are received will in effect be a prohibition on active investment. Imposition of a duty to keep intact an endowment will not necessarily have a prohibitive effect on active investment because it need not imply prohibition of active investment in all circumstances.

V. Conclusion

55 The distribution of social wealth requires the executive to specify the acceptable degree of tolerance for different measures of successful judgments, the acceptable extent of indirect and incidental benefit, and the permissible accommodation for deviations prompted by changed economic conditions for the sake of sustainability of charitable mission. The thesis of this article is first that charity law is an executive-based enterprise and the executive's conceptualisation of charitable duties for the sake of charitable success must address the problems of judgmental tolerance, indirect benefit and expedient deviation. These problems cannot be solved except by giving teleological or consequentialist judgment exclusive and preeminent field of operation over exercise of care. The article argues that exercise of care and exercise of judgment are two different ways of looking at the charity trustee in the situation of making investments. They are mutually exclusive frames of rationality which provide different assessments of expediency and exigency in different fields of operation. The two ways of looking at investments by charities align with the two frames. However, once the focus shifts from accuracy of propositional contents to promoting charitable success, there is an essential similarity in the manner in which business directors and charity trustees have to make teleological or consequentialist judgments. The results of comparing the nature and the context in which judgmental conduct is demanded of both offices support the conclusion that charity trustees should be encouraged to make teleological judgments in the same manner as business directors. One qualification is appropriate. Whereas the good faith of business directors is subjectively appraised, that of charity trustees should be objectively assessed to reflect the non-contractual quality of asset dedication in the case of charities and the indispensable executive provenance in charity success. There is one exception. Charity trustees may not make strategic investments when expressly prohibited by the governing instrument.

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