

Analysis of law underpinning ADVANCEMENT OF AMATEUR SPORT FOR THE PUBLIC BENEFIT

This analysis is not intended to be a comprehensive legal digest but a useful summary of the law relating to charitable purposes in connection with amateur sport and public benefit. It is intended to be read in conjunction with the consultation on amateur sport.

Introduction:

1.1 To be established as a charity an organisation must have charitable purposes only. That requires its purpose to be one which:

- falls within the description of purposes in section 2(2) of the Charities Act 2006, and
- is for the public benefit.¹

1.2 The list of description of purposes includes, at 2(2) (g) 'the advancement of amateur sport'. This inclusion in the description of purposes has the effect of recognising for the first time that the advancement of amateur sport, as partially defined in the Act, is capable of being a charitable purpose in its own right if it is for public benefit. Prior to the Act the advancement of sport was only capable of being recognised as a means to further some other charitable purpose.

1.3 Sport was recognised as a means by which a number of other purposes may be promoted:

- The advancement of education and physical development of young persons.²
- The provision of public amenities for sport.³
- The provision of facilities for healthy recreation under the Recreational Charities Act 1958. This has included facilities such as sports centres and an ice rink.⁴
- The promotion of community participation in healthy recreation by providing facilities for playing particular sports⁵. This purpose specifically extended charitable status to many community based amateur sports clubs.⁶

1.4 The promotion of games had only been considered by the court to a very limited extent. It had been recognised that the game of chess had educational value and promoting the playing of the game of chess within school was charitable being for the advancement of education of young

¹ S2(1) Charities Act 2006

² Re Mariette [1915] 2 Ch 284, IRC v McMullen above.

³ Re Hadden [1932] 1 Ch 133; Re Morgan [1955] 1 WLR 738

⁴ Oxford Ice Skating Association, Charity Commission Annual Report 1984.

⁵ RR11 Charitable Status and Sport

⁶ An alternative system of fiscal benefits was also available to Community Amateur Sports Clubs under Schedule 18 to the Finance Act 2002.

persons.⁷ It was not recognised as charitable for the advancement of education beyond young people.

1.5 The Act continues to recognise those purposes which were recognised as charitable prior to the passing of the Act or which were charitable by virtue of the Recreational Charities Act.⁸

Meaning of the description of purpose of advancement of amateur sport.

2.1 The Act establishes the advancement of amateur sport as a purpose in its own right. The Act defines 'sport' to mean 'sport or games which promote health by involving physical or mental skill or exertion'⁹. The definition contains a number of key components:

- it must be a sport or game
- the sport or game must promote health by involving physical or mental skill or exertion
- it must be for the advancement of amateur sport

2.2 The Act does not further define 'sport', 'game' or 'amateur' which continue to bear their ordinary and natural meaning, having no particular meaning in charity law¹⁰.

2.3 Prior to the Act the advancement of sport was not recognised as being capable of being a purpose in its own right. The authority for this was the decision of the Court of Appeal in **Re Nottage [1895] 2 Ch 649**. That authority was specifically recognised by the House of Lords in **McMullen**¹¹:

"In saying this I do not in the least wish to cast doubt on Re Nottage. The mere playing of games or enjoyment of amusement or competition is not per se charitable, nor necessarily educational, though they may have an educational or beneficial effect diligently practised."

2.4 **Re Nottage** will remain good law in relation to the promotion of sport other than that promotion that falls within the statutory definition of the promotion of amateur sport.

Sport or game:

2.5 'Sport or game' are not defined terms in law other than the new partial statutory definition for amateur sport and are potentially capable of having a wide definition. There is no all embracing definition of sport. The Shorter OED¹² defines sport as:

⁷ *Re Dupree's Deed Trusts* [1945] 1 W.L.R. Ch 16.

⁸ Charities Act 2006 s2(4)(a)

⁹ s2(3)(d) of the Act

¹⁰ s2(5) of the Act provides that where any of the terms used in any of paragraphs (a) to (l) of sub-section 2(2) of the Act has a particular meaning under charity law, the term is to be taken as having the same meaning where it appears in that provision.

¹¹ [1980] 1 All ER 884

¹² Fifth edition

“an activity involving physical exertion and skill, esp. one in which an individual competes against another or others to achieve the best performance. Later also, participation in such activities; such activities collectively.”

2.6 In assessing organisations for recognition Sport England look to dual criteria of sporting activity based upon the definition in the Council of Europe’s European Sports Charter¹³ and also that it has an established and robust governance structure¹⁴.

2.7 Competition would appear to be an essential part of both definitions and distinguishes sport from other forms of physical activity as recreation.

2.8 In the original drafting of the Bill reference was originally made simply to ‘sport’. ‘Game’ was subsequently added to the definition by amendment¹⁵ following parliamentary debate and specifically with reference to the benefits which arise from the playing of chess. The Shorter OED definition of game gives a wide range of meanings which include **“Competitive sport or past times. A (form of) contest played according to rules and decided by skill, strength or luck (as opp.sport esp. one in which the opponents actively engage to defeat each other).”**

2.9 Sport or game would appear to require both a certain level of physical or mental activity, competition, and a formal structure of governance.

Promotes health

2.10 The advancement of amateur sport as defined by the Act requires the sport or game to promote health by involving skill or exertion. Not every sport or game which involves physical or mental skill or exertion will promote health and fall within the definition. It is necessary to show the link to health from the exercise of skill or exertion. The link to physical health from physical exercise was considered by the Commission when it recognised the promotion of community participation in healthy recreation as a charitable purpose. A ‘healthy’ sport may be one which makes participants fitter and less susceptible to disease.¹⁶

2.11 The link between mental skill and exertion and health is less easy to demonstrate. However it is clear from the inclusion of the reference to mental

¹³ The sporting activity must meet the definition of sport contained in the Council of Europe’s European Sports Charter 1993, which is:

“Sport means all forms of physical activity which, through casual or organised participation aim at expressing or improving physical fitness and mental well-being forming social relationships or obtaining results in competition at all levels.”

¹⁴ **Criteria:** The governing body should have a constitution or memorandum and articles of association relevant to the jurisdiction in which it operates (ie England, Wales, Scotland or Northern Ireland). The governing body should show robust management and governance procedures in accordance with good practice promoted by the Sports Councils. [[Sports Council Recognition: pre application form.](#)]

¹⁵ Hansard, House of Commons 25 October 2006

¹⁶ *Charitable Status and Sport* (RR11) paragraph 9

skill and exertion in the definition contained in the Act that Parliament considered that there were certain games, such as chess, involving mental skill or exertion which could promote health.

2.12 A body of evidence produced to the Commission¹⁷ specifically identified the potential health benefits of playing bridge in lowering the risk of developing Alzheimer's disease and other dementia. Research also identified the potential link between the cerebral cortex and the immune system. The Franklin Institute summarise the research by concluding that "**mental stimulation improves brain functions and actually protects against cognitive decline, as does physical exercise.**"¹⁸

2.13 Although it is necessary to establish the link between the sport or game and the promotion of health it should be noted that the advancement of amateur sport as a description of purpose is a distinct purpose from the advancement of health. The advancement of health is a separate description of purpose under the Act.¹⁹ It is necessary to demonstrate the sport or game is one which promotes health. The evidence needed to demonstrate that it is capable of promoting health benefits may be different to that required to demonstrate that the promotion of health is advanced where for example clear evidence of efficacy of treatment is required for some therapies or treatment.²⁰

Amateur

2.14 There is no all embracing definition of amateur. The Shorter OED defines amateur as:

"a person who practices something, especially an art or sport, only as a pastime: an unpaid player, performer etc. (opposite professional)."

2.15 Different governing bodies have different rules for participation and the Olympics have long since ceased to apply criteria of amateur status. 'Amateur' in this context of the advancement of amateur sport is capable of referring to the sport itself, or the organisation or the participants.

2.16 There are a number of factors which may indicate whether the purpose of an organisation is to advance *amateur* sport. These include considering the aim of an organisation, its structure and membership, the allocation of its resources and any payments made to its participants. The payment of players or participants will also be relevant in assessing whether the aim is of an organisation is for the advancement of amateur sport.

Purposes promoting sport which do not fall within the advancement of amateur sport.

2.17 As set out in paragraph 1.3 above, sport may be used as the means of achieving a wide range of purposes the law has recognised as charitable.

¹⁷ See *Final Decisions of the Charity Commission: Hitchin Bridge Club*

¹⁸ www.fi.edu/learn/brain/exercise.html

¹⁹ s(2)(2)(d) Charities Act 2006

²⁰ *Key Decisions of the Charity Commission: National Federation of Spiritual Healers* paragraph 6.

2.18 There are, however, some purposes connected with the promotion of sport that the law has not recognised as charitable and which remain not charitable after the passing of the Act.

2.19 The training of young persons to high standards of achievement has been accepted as charitable in the context of advancing education. Education covers a wide range of subjects including physical education and sport. However the training of young persons for professional sport has not been recognised as charitable. The provision of an academy or nursery for the training of professional cricketers was held by the Court not to be charitable.²¹ It was considered not to fall within the purpose of setting out in life or support of young tradesmen or handicraftsmen. The training of professional sportspersons appears to be distinguished from more general vocational training. The reason for the decision may be based more on the purpose being directed towards the benefit of professional clubs rather than a benefit of a charitable nature. The provision of vocational training in sport may be charitable though not under the description of purpose of advancement of amateur sport.

2.21 The promotion of national prestige through sporting success does not appear to have been recognised as charitable. In *McMullen*, Walton J observed:

“A trust whose real purpose is the early discovery and encouragement of budding soccer stars, however necessary from the point of view of national prestige in view of our present disastrous international showing, would not appear to me to be charitable on any footing.”²²

2.22 It is necessary to distinguish between achievement of success as an incidental consequence of the advancement of amateur sport and the pursuit of success as a purpose in itself.

2.23 Where any part of a purpose of an organisation is not charitable then the organisation purpose itself will be not be a charity.²³

Principles of public benefit.²⁴

3.1 In order to be a charity an organisation in addition to advancing a purpose falling within the description of purposes set out in the Act must be established for the public benefit. It must provide both a benefit and a benefit which is available to either the public as a whole, or a sufficient section of the public.

Principle 1. There must be an identifiable benefit.

²¹ *Re Patten* [1929] 2 Ch 276

²² [1978] 1 All ER 230 at 240

²³ *McGovern v Attorney General* [1982] Ch 321

²⁴ Further more detailed guidance on public benefit is available in [Charities and Public Benefit](#) and [Analysis of the Law Underpinning The Prevention or Relief of Poverty for the Public Benefit](#)

It must be clear what the benefits are.

3.2 A benefit must be beneficial in a way that the law recognises²⁵, must be identifiable and where necessary be demonstrated as fact. The benefit must be capable of proof through factual and positive evidence where necessary.²⁶

3.3 The definition of the purpose requires that one of the benefits flowing from the purpose is the promotion of health. This is one of the principal recognised benefits of advancing amateur sport. The Commission of the European Communities outlines the benefit:

3.4 Lack of physical activity reinforces the occurrence of overweight, obesity and a number of chronic conditions such as cardio-vascular diseases and diabetes, which reduces the quality of life and puts individuals' lives at risk and are a burden on health budgets and the economy²⁷.

3.5 The benefit to health from participation in sport was acknowledged in the decision of the Commissioners recognising the promotion of promoting participation in healthy recreation. It concluded on the evidence before it that participation in sport will tend to make the public fitter. Fitness includes elements of stamina, strength and suppleness.

3.6 The Commission has also recognised the potential health benefit which arises from the regular playing of a game involving high level mental skill and exertion.²⁸

3.7 Although the definition of the purpose requires that one of the benefits must be an impact on health, there may be other identifiable benefits. The Commission of the European Communities White Paper on Sport²⁹ considers wider 'societal' benefits of sport as:

- enhancing formal and non formal education
- promoting volunteering and active citizenship
- promoting social inclusion, integration and equal opportunities
- strengthening the prevention of and fight against racism and violence

3.8 In many cases these are pursued as distinct aims through the medium of sport but in other cases the benefits may result from the advancement of amateur sport as a purpose.

Benefit as a spectator

3.9 The Court has identified the benefit to the public from the viewing of high quality art or listening to performances of high quality.³⁰ However there is

²⁵ Sir Howell Jones *Williams Trustees v IRC* [1947] AC 447

²⁶ *In Re Pinion Decd Westminster Bank Ltd v Pinion and another* [1965] Ch 85, *In Re Coats' Trust v Gilmour* [1948] Ch 340

²⁷ Commission of European Communities White Paper COM (2007) 391 at 2.1

²⁸ *Hitchin Bridge Club*

²⁹ COM(2007) 391

no legal authority which suggests that being a spectator of high quality sport promotes a charitable purpose for the public benefit.

3.10 In contrast to the arts, the maintenance of the highest standards of performance and the training of individuals to maintain such standards in sport is not recognised as charitable. The courts have not recognised that being a spectator at a sporting event furthers a charitable purpose in the same way that the advancement of the arts may be furthered by watching or viewing high quality art.³¹

Benefit from international success

3.11 It is argued that international sporting achievement promotes national prestige and pride. The Court does not appear to have recognised this as a benefit to the public for the purposes of charity law³². Any benefit would have to be established based on evidence which could be considered by a court.³³

Benefits must be balanced against harm

3.12 An overall net benefit must be shown. Where the detriments are so significant such as risk of physical harm in a dangerous sport, then they are more likely not to result in an overall benefit to the public and not, consequently, promote health. If the level of risk of harm is high then it will be more difficult to establish the overall benefit. In determining overall benefit the Courts will weigh up the detriments on the one hand and the benefits that are provided in the other.³⁴

Principle 2: Benefit must be to the public or a section of the public.

- **Principles 2a and 2b: The beneficiaries must be appropriate to the aims and where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted.**

3.13 Every charity must provide a benefit which is available to either the public as a whole or a sufficient section of the public.³⁵ Where the link between the purpose and beneficial class is irrational the restrictions on beneficial class will not be acceptable³⁶. Neither is it acceptable to limit arbitrarily a beneficial class by reference to criteria which are unrelated to its charitable purpose.³⁷

3.14 However that does not mean that facilities have to be provided for all levels of performance. For example, where a club with limited facilities operates within a league structure and with a single or small number of teams

³⁰ Royal Choral Society v IRC [1943] 2 All ER 101

³¹ Royal Choral Society v IRC [1943] 2 All ER 101

³² IRC v McMullen at 20 above

³³ Re Hummeltenberg [1923] 1 Ch 237

³⁴ National Anti-Vivisection Society v IRC [1948] Ch 31

³⁵ Verge v Somerville AC 496

³⁶ IRC v Baddeley [1955] AC 572

³⁷ More detailed analysis is set out in paragraphs 3.3 - 3.52 of the [Analysis of the law underpinning Charities and Public Benefit](#)

it may be unable to provide facilities for all levels of expertise. In assessing whether the opportunity to benefit is unreasonably restricted it will be appropriate to consider the structure in which the organisation operates. What is important is that the class of persons for whom the facilities are provided represent a sufficient section of the public.

3.15 A club may still meet the requirement of public benefit where it operates a membership structure. The Court of Appeal has considered issues of private benefit in membership organisations on a number of occasions.³⁸ If the membership structure is used for administrative convenience to enable the club to operate effectively, the benefit to the members would be legitimately incidental and would not of itself suggest a collateral non charitable purpose to benefit the membership. Factor such as whether the membership is open to all who want to join on a first come first served basis will be relevant. Case law recognises that where the link between purpose and beneficial class is irrational, the restriction on the beneficial class will not be acceptable.³⁹

- **Principles 2b and 2c: The opportunity to benefit must not be unreasonable restricted by the ability to pay fees and people in poverty must not be excluded from the opportunity to benefit.**

3.16 The fact that fees are charged for the use of facilities does not prevent an organisation from being charity⁴⁰. However where high fees are charged then there must be sufficient opportunity to benefit. Some sports which might be considered as expensive either because of the fees charged, or the cost of equipment or participation may mean that organisations that promote these sports will not be able to demonstrate public benefit unless they can demonstrate that sufficient opportunity to benefit is provided for those who cant afford the fees or costs including those in poverty where the ability to meet the fees or cost is a restriction on participation.

3.17 More detailed public benefit guidance in relation to fee charging is available in [Public Benefit and Fee Charging](#).

- **any private benefit must be incidental**

3.18 Private benefits will be incidental if it can be shown that are legitimately incidental in the way the law understands this⁴¹ that is to say they directly contribute towards achieving the charity's aims and/or are a necessary result or by-product of carrying out those aims. The payment of players or the provision of accommodation are benefits. The promotion of support for a

³⁸ See cases referred to in paras 3.87 - 3.90 of the [Analysis of the law underpinning Charities and Public Benefit](#)

³⁹ A more detailed analysis of the impact of restrictions on a beneficial class is set out in Part 3 of the [Analysis of the law underpinning Charities and Public Benefit](#)

⁴⁰ A more detailed analysis of fee charging and public benefit can be found in paragraphs 3.53 - 3.76 above at 38

⁴¹ See paras 3.77 – 3.95 in the [Analysis of the law underpinning Charities and Public Benefit](#)

professional club or promotion of reputation or standing of a professional club may also be indirect benefits that need to be taken into account.

3.19 For any private benefit to be incidental, it must come about either in the direct delivery of some reasonable and appropriate benefit to a properly chosen beneficiary or in, or as a result of, an action by charity trustees directed to some main charitable aim. Objectively speaking it must not be an independent benefit.

3.20 The action of the charity trustees giving rise to the private benefit (and the course of action of which it is part) must be one which furthers the charitable object. The purpose must not be to promote some collateral purpose. A club established for the benefit of its own members and which lacks the necessary features of public benefit and is essentially 'self-regarding' will not be established for charitable purposes.⁴²

3.21 A small payment to a player or one which is insufficient to mean that the player does not need to have another source of income is not necessarily incidental. Neither is it clear that the private benefit is incidental where an individual receives funding and sponsorship to allow them to train/participate full time (even if it can still be said the individual remains within the definition of 'amateur' used by the sporting body for that particular sport).

3.22 The training of an individual for the purpose of becoming a professional is directed towards private benefit of that individual and not for the advancement of amateur sport for the public benefit. If part of the purpose of a club is to seek to train players for the benefit of a professional club then the benefit cannot be incidental but would itself form a collateral purpose.⁴³

3.23 If one of the aims of a community programme is to promote interest in and support for a professional club this is not an incidental benefit. It should, however, be distinguished from any incidental benefit which might arise to a professional club from undertaking work in the community for the purpose of promoting recognised charitable purposes.⁴⁴

3.24 Any private benefit to be conferred must be justifiable in terms of the duty of charity trustees to act solely in the best interests of furthering the purpose of the charity for public benefit.

3.25 Although as set out earlier the size of a benefit doesn't dictate whether it is incidental, where the benefit or potential benefit is substantial, for example in terms of the potential commercial rewards from success, then it will be necessary to consider the extent to which the benefit goes beyond what is necessary in order to meet the charitable aim.⁴⁵

⁴² IRC v City of Glasgow Police Athletics Association [1953] AC 380; Re Lipinski's Will Trust [1976] Ch 235

⁴³ Re Patten 18 above and see also Decision of OSCR – Dundee United Football in the Community Scheme

⁴⁴ *Public Benefit Assessment report: Birmingham City Football in the Community Scheme*

⁴⁵ Joseph Rowntree Memorial Trust Housing Association Ltd V A G [1983] Ch 159