THE ATTORNEY GENERAL'S ROLE IN RELATION TO CHARITIES

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This article considers the origin and extent of the role of the Attorney General of Jersey in respect of the protection of charities and charitable interests.

Introduction

1 The Attorney General of Jersey has many roles. Some are well known, such as Legal Adviser to the Government and to the States Assembly; Chief Prosecutor; Titular Head of the Honorary Police. Others are less well known, including the Attorney General's role in respect of charities. This article is devoted to considering this aspect of the Attorney General's role.

2 I propose to describe the source and general role of the Attorney General in respect of charities; to give specific examples of the exercise of the Attorney General's powers and common questions and problems that arise in the course of exercise of those powers; to consider this role in respect of trusts established under the *Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations* ("the 1862 Law"), and finally under the Charities (Jersey) Law 2014.

The source and nature of the Attorney General's role

3 It is perhaps unsurprising that the role of the Attorney-General of England and Wales and that of the Attorney General of Jersey are described in similar terms having regard to the common Norman origin of the Crown's role in respect of charities. Thus *Tudor on Charities*[1] states—

> "Under the feudal system imposed following the Norman conquest the Crown was liege lord to all citizens.[2] This quasi-parental relationship, which formerly imposed upon the Crown

[1] Paras 13.001 and 13.002 of the 10th edition.
[2] *Calvin's Case* (1608) 7 Co Rep 1a, at 5a.

the duty of watching over the interests of wards[3] makes it the protector of charity in general.[4] Therefore, as Lord Eldon said:

> 'Where money is given to charity generally and indefinitely, without trustees or objects selected, the King as parens patriae is the constitutional trustee.[5]

The duty of the Crown as *parens patriae* to protect charity property is executed by the Attorney General."

4 *Tudor* says[6]—

"The Attorney General's function in relation to charities is to represent the Crown as *parens patriae* and thus to act as the protector, both of charity in general and of particular charities."

5 And[7]—

"The Attorney General's role in relation to charities has been described in a number of ways—

- He is the representative of the Sovereign whose duty it is as *parens patriae*, to protect property devoted to charitable uses.[8]
- He acts on behalf of the Crown as *parens patriae* and represents all the objects of the charity.[9]
- As a rule, the Attorney General is a necessary party to all actions relating to charities.[10] It is the duty of the Queen, as *parens patriae*, to protect property devoted to charitable uses,

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[3]. *Eyre v Countess of Shaftesbury* (1724) 2 P Wms 103.

[4] *Att-Gen v Gleg* (1736) 1 Atk 356; *Att-Gen v Brown* (1818) 1 Sw 265, at 291; *Wellbeloved v Jones* (1822) 1 S & S 43; *Att-Gen v Compton* (1842) 1 Y & CCC 417 at 427; *National Anti-Vivisection Society v IRC* [1947] AC 31 at 63; *Re Belling* [1967] Ch 425; *Hauxwell v. Barton-upon-Humber UDC* [1974] Ch 432.

[5] *Moggridge v Thackwell* (1803) 7 Ves 36, at 83. And see *Incorporated Society v Richards* (1841) 1 Dr & W 258, at 390.

[6] At 13.013.

[7] At 13.016.

[8] *Per* Mr Leach in argument in *A-G v Brown* (1816) 1 Swans 265, at 291.

[9] *Att-Gen v Bishop of Worcester* (1851) 9 Hare 328, *per* Sir George Turner VC, at 361).

[10] This is only "as a rule"; it is not always the case that the Attorney General is and when he is not a necessary party. As to when the Attorney General is and when he is not a necessary party to proceedings relating to charities, see 13.023–13.028, 16.023, 16.044–16.051, 16.069–16.075.

> and that duty is executed by the Attorney General as the officer who represents the Crown for all forensic purposes. He represents the beneficial interest, in other words the objects, of the charity.[11]
>
> - His duty (as representative of the Crown as *parens patriae*) is to intervene for the purpose of protecting charities and affording advice and assistance to the court in the administration of charitable trusts.[12]
> - He represents all absent charities; where those charities are identified individual charities and are not parties, the Attorney General is in the nature of a trustee for them.[13]
> - Where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the Crown should be entitled to intervene by its officer for the purpose of asserting, on behalf of the public generally, that public interest and that public right which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it.[14]
> - It is the duty of the Attorney General to assist the court, if need be, in the formulation of a scheme."

The Trusts (Jersey) Law 1984

6 The Trusts (Jersey) Law 1984 ("the Trusts Law") does not purport either to codify or to limit the customary law role of the Attorney General in respect of charities.

7 However, it does contain provisions of relevance to the role. Under art 51 of the Trusts Law the Attorney General, with the trustee, enforcer or a beneficiary, is one of the class of persons who are entitled to make applications to the Royal Court in relation to, *inter alia*, the execution or administration of a trust, without leave of the court.

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[11] *Halsbury's Laws*, 3rd ed, vol 4, at 446, approved by Pennycuick J in *Re Belling* [1967] Ch 425, at 432.

[12] *Wallis v Solicitor-General for New Zealand* [1903] AC 173, *per* Lord Macnaghten at 181–182.

[13] *Ware v Cumberledge* (1855) 20 Beav 503, *per* Sir John Romilly MR, at 511.

[14] *Att-Gen v Compton* (1842) 1 Y & CCC417, *per* Sir John Knight Bruce VC at 427.

8 Further, at art 47A of the Trusts Law, it is provided that where trust property is held for charitable or non-charitable purposes and (*inter alia*) the purpose has been fulfilled, has ceased to exist, or is no longer applicable, then the court may, on the application of the Attorney General or trustee, declare that the property shall be held for such other charitable or non-charitable purposes as the case may be, as the court considers to be consistent with the original intention of the settlor. This is (in part) a statutory codification of the *cy-près* rule. The Royal Court recognised the *cy-près* rule prior to the Trusts Law being enacted in cases such as the *Jersey Dispensary and Infirmary*[15] and in *Meaker v Picot*.[16]

9 In *Meaker v Picot*, the Royal Court considered passages in *Basnage* which appeared to recognise that, for the purposes of Norman law, a general gift for the relief of poverty was an exception to the rule that a testator needed to provide in his will for the specific destination of his property, which was evidently treated by the court as clear evidence that charitable gifts were respected under Norman law.

10 The Royal Court went on to find that the *cy-près* rule was not a feature of Norman law, and went on to adopt the following test for identifying a charitable purpose—

> "To be charitable a purpose must satisfy the following test:
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> 1. Is the purpose enforceable by a Court?
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> A crucial test whether a purpose is charitable is whether it would be competent for the Court to control and reform it and for the Attorney General, on behalf of the Sovereign who, as '*parens patriae*', is the guardian of charity, to intervene and inform the Court in order to secure due performance of the purpose.
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> 2. Is the purpose within either the express terms or the 'spirit and intendment' of the preamble to the ancient statute of Elizabeth (sometimes known as the Charitable Uses Act, 1601)?"

11 The Attorney General is most frequently notified of or convened to Jersey proceedings in respect of applications under art 47 of the Trusts Law to approve the variation of the terms of a Jersey trust by the court. On such an application, the court's powers to give its approval on behalf of beneficiaries is limited to, *inter alia*, minors, the unborn and the unascertained.

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[15] (1955) 249 Ex 495.
[16] (1972) 1 PD 337.

12 The Attorney General is often convened or notified of such proceedings where there are charitable beneficiaries. This often arises when charitable purposes are the default beneficiaries or may become the sole beneficiaries at the end of the trust period. Here an issue often arises. The Attorney General has a power and the duty to represent the inchoate interests of general charity under any default trust and, if necessary, the interests of unascertained charities who might be added as beneficiaries in due course. This is distinct from his duty to intervene to protect a charity that has been managed badly.

13 But could he and should he act for named charities (*i.e.* identified beneficiaries) without their consent?

14 It might be convenient for him to do so, particularly where there are many named charities which have not yet benefitted under a trust or a where there are a number of connected trusts which are the subject of an application to vary.

15 This issue was considered by Sir John Romilly MR in *Ware v Cumberledge*.[17] What he said remains good law and has influenced the policy of successive Attorneys General of Jersey when considering this issue. He said—

> "It is difficult to lay down any general rule, which shall be adapted to every case; there must be a great deal of discretion in these matters. The general principle which regulates them I take to be something of this description: the Attorney General represents all absent charities, and it is sufficient to have him here to represent all absent charities. But absent charities may obviously be of two different characters: they may either be under gifts to specified individual charities, or to charity generally. In case the gift is for charity generally, no one can represent it but the Attorney General, and he must be here to represent such general charities. When there are specified individual charities, then the Attorney General's presence is not universally necessary; but it is required by the Court upon various occasions, as, for instance, where any rules are required for the regulation of the internal conduct of the charity itself, such as the establishment of a scheme and the like; there the Attorney General is necessary for the purpose of aiding and assisting the Court in directing and sanctioning the general system and principle that ought to govern charities of those descriptions. But there are other cases where there is no question as to the conduct or management of the charities, but only whether the charity is entitled to a particular

[17] (1855) 20 Beav 503, at 510 and 511.

> legacy or not. In those cases, the Attorney General is rather in the nature of a trustee for those charities, and the Court prefers having before it the charities beneficially interested, for the purpose of putting their interests before the Court in the light which they consider most favourable to them. In those cases I think it preferable that the charity itself should appear, rather than that the Attorney General should represent it. This appears to me to be one of that latter class of cases, and therefore it would be better that the charity should appear. Having stated that as my general view of the case, it is very obvious, as counsel will see, that there may be mixed cases in which it is impossible to lay down a rule beforehand, and in which the Court must act on the matter before it in such manner as, according to the best exercise of its discretion and judgment, it may think best calculated to promote justice."

16 Accordingly, generally (although there is no hard and fast rule) it is preferable that a specified individual charity represent itself. However, the judgment of Sir John Romilly does not answer the question whether, in the course of representing absent charities, the Attorney General can or should consent to a variation of their interests under trusts, or whether he can or should do so without the absent charities having been given an opportunity to be parties, or receiving a warning that their existing rights might be affected by the actions of the Attorney General.

17 This question was dealt with by Younger J in *Re King*.[18] This was a case where two named charities were cited and had chosen not to appear. The Attorney General was a party and there had been no order in the probate action under the equivalent of Royal Court Rules, r 4/4 appointing the Attorney General to represent the two charities, but the Attorney General took upon himself the duty of representing them and compromising the proceedings on their behalf. Under the compromise the two charities obtained less than they would have done had the probate action been fought. The compromise was held to bind the named charities. Younger J referred to the judgment of Sir John Romilly MR in *Ware v Cumberledge* and said—

> "The Attorney General did, in the compromise which was arrived at, take upon himself the duty of protecting not only the charitable purposes indicated—the unnamed charities interested in residue—but he also took it upon himself to protect and bind the interests of the charities which were specially named as pecuniary legatees, and he compromised the proceedings on

[18] (1917) 2 Ch 420.

> behalf of all. That compromise was duly notified to all of these charities, and no objection was ever taken (nor is now taken) to the propriety of that compromise. Accordingly it appears to me clear that it is binding upon them all."

18 In respect of general charitable interests, the better view is that the Attorney General has a power to agree to a variation of a trust on behalf of such interests. This is consistent with *Re King*.

19 Indeed, if a variation agreed to by the Attorney General is not, in fact, for the benefit of or in the interests of a general charity represented by him, the only person able to challenge the decision of the Attorney General would be the Attorney General himself or one of his successors. This is extremely unlikely and a variation agreed to by the Attorney General in respect of the general charitable interests should therefore be binding upon those interests.

20 The Attorney General needs to be satisfied prior to giving his consent on behalf of such interests that the proposed variation would be to the benefit of that interest.

21 Different principles apply in circumstances where there are named beneficiaries and the Attorney General is invited to give consent to a variation on their behalf.

22 There are two quite different but related jurisdictions under which the Attorney General might represent the named charities.

(i) as representative of the Crown as *parens patriae*; and

(ii) pursuant to an order made under r 4/4 of the Royal Court Rules.

23 As to the first, when the Attorney General is made a party to proceedings he is, by reason of that rôle, automatically representing the interests of the charities as representative of the Crown as *parens patriae*. If the named charities are not parties in their own right, then no order under r 4/4 is necessary for the Attorney General to represent them. The Attorney General would represent the interests of named charities simply by reason of his status as representative of the Crown. This follows *Re King* where the Attorney General took upon himself the duty of representing the charities and compromising the proceedings on their behalf.

24 However, although the Attorney General has standing as representative of the Crown to represent the interests of the named charities, he would not be able to consent to the proposed variations on behalf of named charities as he would be purporting to agree to disposal or variation of the interests of named charities under the trust. This is a power that he is unlikely to have unless in a particular case the named charities agree to him having that power on their behalf.

This could arise (for example) if the trustees of a named charity were conflicted for one reason or another and decided to leave it to the Attorney General to determine the merits of the application as he would not be disabled by the same conflict.

25 A distinction may be drawn between agreeing a compromise of a probate action on behalf of named charities on terms upon which their *possible* right to a legacy is compromised (see *Re King*) and the disposal or variation of an existing right which is undoubtedly vested in the named charities. The beneficial interests of the named charities might be represented by the Attorney General in the latter case, but they do not belong to him so he cannot dispose or deal with them where their existence is not contested. Under art 47 proceedings, the court is not concerned with the interests of the named charity—it is approving the variation on behalf of other persons.

26 Further, in the context of a compromise of interests under a trust, the Attorney General should not agree to it on behalf of named charities (unless perhaps they were very numerous) without at least first warning the named charities that he intended to do so. In *Re King*, the charities were aware of the proceedings but had elected not to appear. In that case counsel for the Attorney General of England said—"He [the Attorney General] cannot bind a charity by compromise behind its back . . ."

27 Another way of looking at the nature of the contrasting beneficial interests is to consider that a general charitable interest cannot enforce a trust because is not a legal person. Such an interest can only be advanced by the Attorney General. By contrast, specific named charities are entitled to enforce a trust. As referred to above, the Attorney General may interfere with the exercise of a charities power if it is exercised on an improper basis.

28 As to r 4/4, it is possible that the requirements of r 4/4(2)(c) could be satisfied. That is that, although the named charities can be ascertained and found, it appears to the court to be—

> "expedient (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to exercise the power [under para (1) of the rule] for the purpose of saving expense"—

to order that the Attorney General represent a charity or charities.

29 If there were 50 named charities to be represented by the Attorney General without the need for him to communicate with them, significant costs savings could be made, and it might be expedient to appoint the Attorney General to represent the named charities for the purpose of saving expense. However, if it was necessary for the

Attorney General to take account of the views of the 50 charities, the saving of expense might be small in comparison with the overall costs of effecting the variations proposed.

30 However, even if the requirements of r 4/4(2)(c) could be satisfied, the provisions of r 4(3) or r 4(4) probably could not be, at least under an application made under art 47.

31 By r 4/4(3), where a representative has been appointed under the rule, a judgment or order of the court given or made shall be binding on the person or persons represented by the person or persons so appointed. However, this would not appear to assist in the case of a variation under art 47 as the court is only entitled to make orders giving its approval on behalf of persons listed at art 47(1) of the Trusts Law—which does not extend to the interests of charities. The order of a court is an approval of a variation under art 47 on behalf of persons specified in art 47(1)—not an order approving the variation on behalf of persons who consented to the variation, whether they were charities or not.

32 For the purposes of r 4/4(4), which deals with "compromise", generally an application for approval of a variation will not amount to a compromise. It may be that what has been negotiated and agreed between beneficiaries and others, possibly including the named beneficiaries, might be described as a "compromise" but it is not a compromise of the proceedings for which approval is sought under art 47.

Human rights considerations

33 Finally there is the question of human rights. Named charities will have rights under art 1 of the First Protocol to the European Convention on Human Rights. Article 1 of the First Protocol provides that every natural and legal person is entitled to the peaceful enjoyment of his possessions. This rule is qualified by the provision which holds that "no-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

34 It could be argued that the qualification permits the Attorney General to consent to proposed variations on behalf of named charities; the Attorney General would be acting in the public interest and as provided for by law. However, there is a good argument that in the absence of a clear rule of law permitting interference, the primary rule should prevail.

Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations

35 The 1862 Law is concerned, *inter alia*, with trusts of immoveable property falling within four categories—

(i) for any cause of public utility;

(ii) for commercial or industrial associations, benevolent societies and cultural and sporting associations;

(iii) to the purpose of furthering the Anglican or other religion;

(iv) for the founding of schools and places of learning.

Trusts under (i) and (ii) might in part go beyond the Statute of Elizabeth test for charitable purposes.

36 The Attorney General is, in effect, a gate-keeper for the purpose of trusts created under the 1862 Law as, pursuant to art 3, persons wishing to create a trust must deliver the relevant documents to the Attorney General in advance of making a request to the Royal Court, and the court will only make an order authorising the creation of a trust/incorporation having heard the Attorney General's conclusions. Further, pursuant to art 10 of the Law, if the objects of the trust or incorporation can no longer be fulfilled, either wholly or in part, the Royal Court has the power, on the application of interested parties, again having heard the conclusions of the Attorney General, to allow the property and funds belonging to the trust or incorporation to be applied to another object, preferably an object related to that for which the trust or association was originally constituted.

Charities (Jersey) Law 2014

37 Substantial parts of the 2014 Law are yet to come into force. However, important provisions are now in force, in particular the new "charity test" under art 5 and the new definition of "charitable purposes" under art 6, which is extensive.[19]

38 Article 40 is also in force, providing that nothing in the Law shall derogate from the Attorney General's powers or functions which exist independently of the Law, whether under customary law or otherwise in respect of charities.

39 The following provisions are not yet in force; they will give the Attorney General a number of significant powers in relation to charities registered under the Charities Law.

40 In respect of such charities, the Attorney General's customary law powers to intervene in the case of misconduct in the administration of a charity is placed on a statutory footing under art 14. This article

[19] See art 44 of the 2014 Law.

provides that on the application of the Attorney General or the Commissioner (the Jersey Charity Commissioner established under art 3 of the Law) the court may grant relief if it appears to the court that there has been misconduct in the administration of a charity or it is necessary to exercise powers for the purpose of protecting the property of the charity. The orders that the court may make under art 14 are extensive.

41 The restrictions on persons disclosing information received for the purposes of the Charities Law under art 29 do not preclude disclosure of information under art 31 to the Attorney General for the purpose of discharging his functions in relation to charities "whether under this Law, a constitutional law, the customary law or any other law . . ."

42 Furthermore, under art 33(4), the Attorney General is entitled to appeal any decision of the Commissioner to the Charity Tribunal and, whether or not he is a party to a case before the Charity Tribunal, the Attorney General is entitled to appeal any decision of the Charity Tribunal to the Royal Court on the grounds the decision was unreasonable.

Conclusion

43 Accordingly, the Attorney General's powers in respect of charitable trusts are extensive.

44 In respect of the most common application of the Attorney General's powers in respect of charitable trusts, namely by way of acting as a respondent to proceedings in relation to trust applications before the Royal Court, the position can be summarised thus—

(i) the Attorney General can represent general charitable interests for all purposes including giving his consent so as to vary the extent of such interests;

(ii) it is more difficult for him to represent named charities unless they consent to him doing so or they choose not to appear having been convened the Court appoints him to do so under r 4/4.

45 However, in the event of the Attorney General being appointed to represent the interests of charities under r 4/4, it is difficult for him to consent to variations of a trust affecting the beneficial interests of named charities absent the consent of the charities in question or them choosing not to appear and he electing to represent them nonetheless.

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