



*Registered Social Landlord - objects for "benefit of the community" - whether charity  
- no - availability of relief under s 505 Taxes Act - no*

**FTC/42/2010**

**IN THE UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**ON APPEAL FROM THE FIRST -TIER TRIBUNAL (TAX)**

**BETWEEN**

**HELENA PARTNERSHIPS LIMITED**

**Appellant**

**(FORMERLY HELENA HOUSING LIMITED)**

**AND**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS  
Respondent**

**TRIBUNAL: The President, the Hon Mr Justice Warren  
Judge Alison McKenna**

**Sitting in public in London on 1 and 2 February 2011**

**Christopher McCall QC and Matthew Smith of counsel, instructed by  
McGrigors for HHL**

**William Henderson of counsel, instructed by the General Counsel and Solicitor  
to HM Revenue and Customs for the Respondent**

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## DECISION

**The Appeal is dismissed.**

## REASONS

1. This is an appeal from the decision of the Tax Chamber of the First-tier Tribunal (Judge Michael Tildesley OBE - “the Judge”) released on 1 February 2010 (“the Decision”)<sup>1</sup>. Permission to appeal was given on 12 April 2010 by the Judge. We will refer to the Appellant as “HHL” and to the Respondents as “HMRC”. HHL is a company limited by guarantee and not having a share capital.

### The facts

2. We have been provided with an agreed statement of facts. It provides a useful summary. We also have the facts as found by the Judge which add some flesh to the somewhat skeletal summary. As an introduction, we take the following from the parties’ agreed statement of facts:

- a. HHL was incorporated on 16 January 2001 under the name Housing St. Helens Limited. Following a change of name, it is now called Helena Housing Limited.
- b. The original Memorandum and Articles of Association of HHL were replaced in October 2001 by new provisions (“the New M&A”). The objects clause of the New M&A stated as follows:

“4. The Company’s objects shall be the business of providing:-

- 4.1 housing;
- 4.2 accommodation;
- 4.3 assistance to help house people;
- 4.4 associated facilities and amenities; and
- 4.5 any other object that can be carried out by a company registered as a social landlord with the Housing Corporation

for the benefit of the community.

The Company shall not trade for profit.”

- c. On 31 October 2001, 12 new directors of HHL company were appointed, the existing directors retired and a number of new persons, including appointees of St Helens Metropolitan Borough Council (“the Council”), were admitted as members and/or directors of HHL.

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<sup>1</sup><http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j4749/TC00384.doc>

*Agreements between HHL and the Council relating to the Council's Housing Stock*

*Background*

- d. HHL has been registered as a registered social landlord ("RSL") with the Housing Corporation at all times since 1 July 2002.
- e. In 1988 the Government established the "Large Scale Voluntary Transfer Programme" ("LSVT") under which housing stock can be transferred from local authorities to RSLs. The Council transferred some of its housing stock (the "Housing Stock") to HHL under the LSVT in July 2002.
- f. Since acquiring the Housing Stock from the Council in July 2002, HHL has undertaken a significant programme of repairs and refurbishment pursuant to the terms of the agreement under which the Housing Stock was acquired.

*Transactions*

- g. By an agreement in writing dated 30 June 2002 referred to as the Development Works Agreement ("the DWA") between HHL and the Council, in consideration of the payment to HHL of £104,000,000 plus VAT (payable in accordance with clause 4) HHL undertook to carry out, or to procure the carrying out, of the Qualifying Works set out in the schedule to the DWA.
- h. By an agreement in writing dated 1 July 2002 ("the Transfer Agreement") between HHL and the Council, HHL agreed to purchase certain property (including the Housing Stock) owned by the Council.
- i. The Transfer Agreement stated that the price to be paid was £133,058,361. It was stated in clause 1.1 that this comprised:
  - (i) £28,888,361, representing the agreed value of the Property (as defined) in its then condition;
  - (ii) £170,000, representing the price paid for certain office premises; and
  - (iii) £104,000,000, representing the value of the Council's covenant contained in the Transfer Agreement to carry out the Qualifying Works (as defined in the DWA) in respect of the Housing Stock which it had been agreed would be transferred to HHL.
- j. Clause 1.1 of the Transfer Agreement provided that the £104,000,000 represented the value of the Council's covenant contained in the Transfer Agreement to carry out the Qualifying Works, and that payment of it might be set off against the payment due from the Council to HHL under the DWA.

- k. Completion took place on 1 July 2002 and, on that date, pursuant to the DWA, HHL issued a VAT invoice to the Council for £104,000,000 plus VAT “for the supply of services in accordance with the Schedule of Works set out in the development agreement dated 30 June 2002”.
- l. The obligation to pay the £104,000,000 in the Transfer Agreement, representing the value of the Council’s covenant contained in the Transfer Agreement to carry out the Qualifying Works, was in fact set off against the amount due pursuant to the invoice, resulting in the Council actually paying to HHL only a sum equal to the VAT payable in respect thereof.

*Recovery of the VAT*

- m. By letter dated 16 April 2002, KPMG LLP (“KPMG”) had written to HM Customs & Excise seeking confirmation of the VAT treatment of the following supplies proposed to be received and made:
- n. recovery by the Council of the VAT charged by HHL on what would be the taxable supply of Qualifying Works by HHL under the DWA; and
- o. recovery in due course by HHL of the VAT that would be payable to the sub-contractors that it would employ to perform its obligations under the DWA. (The VAT so payable would not have been recoverable by HHL had it (rather than the Council) directly carried out the repairs and refurbishment of the Housing Stock).

*HHL*

*Housing Corporation*

- p. HHL is and has at all material times since 1 July 2002 been and continues to be subject to the regulatory control of the Housing Corporation.

*The Council*

- q. Pursuant to the terms of the Transfer Agreement, HHL took on obligations to the Council under a deed of covenant, under a nomination rights deed, and under a housing agency agreement each entered into on 1 July 2002 in the forms of drafts scheduled to the Transfer Agreement.
- r. The nomination rights deed (at Clause 2) gave the Council the right to nominate tenants to 75% of vacant properties held by HHL.
- s. The terms of the housing agency agreement related to services that were primarily the responsibility of the Council but which it was allowed to contract out to HHL.
- t. An amended nomination rights deed was signed on 24 December 2004 which permitted HHL to reject a nomination in the event the nominee was not a charitable beneficiary.

*Allocation of Social Housing*

- u. The criteria HHL applied to determine housing need are set out in its housing allocation policy. At the time when HHL accepted the transfer of the Housing Stock, it adopted the Council's allocation policy (the "Original Policy"). The Original Policy determined housing need by reference to a points based system; points acting cumulatively as indicators of an applicant's housing need.
- v. The allocation policy used by HHL changed on 1 December 2004.

*Rents*

- w. HHL is in receipt of rents from land and is for the material accounting periods to be treated as carrying on what was a Schedule A business of exploiting, as a source of rents or other receipts, estates, interests or rights in or over land in the United Kingdom, within the meaning of what was section 15 (1) Income and Corporation Taxes 1988 ("the Taxes Act").

*Charitable Status*

- x. By a written resolution on 19 November 2004, the members of HHL passed a Special Resolution to amend the Memorandum of Association of HHL. Clause 4 inter alia was deleted and replaced.
  - y. HHL was registered as a charity with effect from 1 December 2004 under registered charity number 1107073.
3. Some more detail of the background is given in paragraphs 2 – 10 of the Decision under the heading "Setting the Scene". We do not need to repeat or refer further to it. The same applies to paragraphs 11 to 17 under the heading "The Acquisition of the Housing Stock".
4. There are some other provisions of the New M&A which we need to mention:
- a. Clause 2 (of the Memorandum) contains definitions one of which is of "Member" which means any person or body admitted to membership in accordance with the Articles.
  - b. Clause 5 provides a wide range of ancillary powers to achieve any of its objects.
  - c. Clause 7 provides that HHL's income and property shall be applied solely towards the promotion of its objects. But nothing is to prevent any payment in good faith by the Company of the items listed in clause 7.1 to 7.7 (on the detail of which nothing turns in the present appeal).

- d. Clause 11 provides for the disposal of assets on a winding-up of HHL. Surplus assets are not to be paid to or distributed amongst the Members but
- “shall be given or transferred to one or more institutions having objects similar to the objects of the Company, which objects prohibit the distribution of its or their income and property to an extent at least as great as is imposed on the Company by Clause 7 hereof.”
- e. Article 1 is a definitions provision. “Local Authority Member” means the Council or any successor body. “Tenant” means an individual who holds an assured tenancy from and occupies a property belonging to HHL. “Tenant Member” means a Member who is a Tenant. And “Independent Member” means a Member who is not the Local Authority Member or a Tenant Member. There is no restriction on who may apply to be a Member.
- f. Articles 44 to 47 deal with the composition and size of the board of directors. Excluding co-optees, there are to be 12 directors comprising 4 Local Authority Directors (directors appointed by the Council) 4 Tenant Directors (directors who are Tenants and appointed as such) and 4 Independent Directors (directors who are neither Local Authority Directors or Tenant Directors.
- g. Article 68 deals with proceedings of the Board. The board may regulate their proceedings as they see fit with a quorum of 4, including one director of each class.
5. It is convenient to mention, at this point and as part of the background, the relevant provisions of the Housing Act 1996. This deals, among other matters, with registered social landlords (an “RSL”). Section 1 requires the Housing Corporation to keep a register of RSLs. Section 2(1) sets out the eligibility criteria for registration as an RSL. A body is eligible for registration if it is:
- a. a registered charity which is a housing association,
  - b. a society registered under the Industrial and Provident Societies Act 1965 which satisfies the conditions in subsection (2), or
  - c. a company registered under the Companies Act 1985 which satisfies those conditions.”
6. The conditions set out in section 2(2) are:
- “that the body is non-profit-making and is established for the purpose of, or has among its objects or powers, the provision, construction, improvement or management of –
- (a) houses to kept available for letting,
  - (b) houses for occupation by members of the body, where the rules of the body restrict membership to persons entitled or prospectively entitled

(as tenants or otherwise) to occupy a house provided of managed by the body, or  
(c) hostels  
and that any additional purposes or objects are among those specified in subsection (4)”

7. Subsection 2(4) provides as follows:

“(4) The permissible additional purposes or objects are—  
(a) providing land, amenities or services, or providing, constructing, repairing or improving buildings, for its residents, either exclusively or together with other persons;  
(b) acquiring, or repairing and improving, or creating by the conversion of houses or other property, houses to be disposed of on sale, on lease or on shared ownership terms;  
(c) constructing houses to be disposed of on shared ownership terms;  
(d) managing houses held on leases or other lettings (not being houses within subsection (2)(a) or (b)) or blocks of flats;  
(e) providing services of any description for owners or occupiers of houses in arranging or carrying out works of maintenance, repair or improvement, or encouraging or facilitating the carrying out of such works;  
(f) encouraging and giving advice on the forming of housing associations or providing services for, and giving advice on the running of, such associations and other voluntary organisations concerned with housing, or matters connected with housing.”

8. It can be seen that the New M&A must have been drafted with the provisions of section 2(1)(c) and (2) Housing Act 1996 in mind. That is not to say that HHL could not also have charitable status. It was not, however, a registered charity and its inclusion on the register of RSLs therefore needed to rely on section 2(1)(c) rather than section 2(1)(a). It is accepted by HHL that it had not, in 2002, intended to establish a charitable RSL, had not sought registration with the Charity Commission and had not complied with the relevant regulatory requirements for charities. The intentions of HHL are not, however, a relevant consideration for us in deciding whether, as a matter of law, HHL was established for exclusively charitable purposes.

### **The Decision**

9. The appeal was against assessments for Corporation Tax for the accounting periods 1/7/02 – 31/3/03 and 1/4/03 – 31/3/04. The tax in issue amounts to some £6 million plus interest. HMRC issued the tax assessments on the basis that HHL was, during the relevant accounting periods, running two businesses: a Schedule A business (concerned with the provision of housing) and a distinct Schedule D business (concerned with the provision of works to the Council under the terms of the DWA). HMRC’s approach meant that HHL could not offset the

refurbishment costs against the Schedule A profits, and that those profits were liable to Corporation Tax during the relevant accounting periods, which pre-dated HHL's registration as a charity.

10. The appeal before the Judge involved three main points, described briefly as follows:

a. *The Technical Issue*

This dispute concerned whether the expenditure incurred by HHL on the refurbishment of the properties was a deductible expense for the purpose of HHL's Schedule A business (refurbishment of its housing stock) or whether it was expenditure incurred in the course of providing building services to the Council under the DWA.

b. *The Charity Issue*

HHL argued that, notwithstanding that it was not registered as a charity, it in fact had charitable status. It argued that the profits in question were applied for charitable purposes only. Accordingly, it argued that it was entitled to an exemption from Corporation Tax pursuant to sections 505 and 506 of the Taxes Act.

c. *The Application of Income Issue*

This dispute concerned whether, if HHL did have charitable status, HHL had applied its profits to charitable purposes only.

11. The Judge decided that:

a. As to the *Technical Issue*, HHL had two sources of income, its rental business and its sub-contracting business. The expenditure incurred on refurbishment arose from HHL's obligations under the DWA, thus the refurbishment expenditure was incurred for the purposes of its Schedule D and not its Schedule A business. There is no appeal from this decision.

b. As to the *Charity Issue*, the Memorandum and Articles of Association should be construed from the perspective of a reasonable person having all the background knowledge. Whilst the Objects clause as drafted did not promote any one object above the others, on a proper construction of the Memorandum and Articles in this case, HHL had an overall purpose of the management and provision of housing to tenants for the benefit of the Council. There are circumstances in which extrinsic evidence might be of assistance in determining the purposes of an institution, but these are limited to cases of doubt and ambiguity so that evidence of post-formation activities for the purpose of construing the objects was inadmissible in this case. Extrinsic evidence was, however, admissible for the purpose of determining whether HHL's purpose was charitable under the "fourth head" of charity (as to which see below). HHL's purposes, properly construed, enabled it to confer private benefit on individual tenants and the benefits to the Council were subsidiary and remote so that it was not established for purposes that were exclusively charitable and it was not

entitled to the corporation tax exemption for charities under sections 505 and 506 of the Taxes Act 1988.

- c. In view of the Tribunal's finding on the *Charity Issue*, no decision was made on the *Application of Income* issue, although it was left open in the event of an appeal to the Upper Tribunal.
12. HHL appealed to the Upper Tribunal on the *Charity Issue* only but the Judge had left open the *Application of Income Issue* to be considered in the event of an appeal. HMRC, in their Response to the Notice of Appeal, argued that the *Application of Income* issue should now be determined by the Upper Tribunal in their favour on the basis that this would be consistent with the Judge's decision on the *Technical Issue* and for other reasons to which we will turn to in due course. Alternatively, HMRC submitted that the *Application of Income* issue should be remitted to the First-tier Tribunal for determination on the facts. HHL resisted these submissions in oral submissions. The *Application of Income* issue is considered later in this decision.

### **The Issues for the Upper Tribunal**

13. The issues for us in relation to this appeal are essentially these:

- a. In relation to the *Charity Issue*
  - (i) What were the objects and purposes of HHL?
  - (ii) Were those objects and purposes exclusively charitable?
- b. In relation to the *Application of Income* issue:

If HHL's object of improvement or repair of houses (for the public benefit) was not of itself charitable but merely ancillary to its main objects which were charitable (so that HHL did have charitable status) then in applying its income for the purpose of fulfilling its obligations under the DWA, was HHL applying its income to charitable purposes only within the meaning of s.505 Taxes Act?

14. In addressing these issues, we must apply the law of charities as it stood prior to the commencement of the Charities Act 2006. We need to consider whether HHL's purposes, properly construed, fell within the fourth head of Lord Macnaghten's well-known classification of charitable purposes in *Pemsel's* case (*Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531) - "trusts for other purposes beneficial to the community").

### **The New M&A: construction. What were HHL's objects and purposes?**

15. The first task is to ascertain what, on a true construction of the New M&A, the objects of HHL were. Only then can the second task be undertaken, namely to determine whether those objects are exclusively charitable.

16. The general approach to the construction of documents is now well established. We do not need to cite yet again from the speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-3. The Judge cited the most relevant passages at paragraph 75 of the Decision. We would only add that Lord Hoffmann qualified what he said about the admissible background including “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”: it had to be something which the reasonable man would have regarded as relevant (see *BCCI v Ali* [2002] 1 AC 251 at 269).
17. Lord Hoffmann had more to say about these principles as applied to the Memorandum and Articles of Association of a company in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. The Judge set out paragraph 16 of Lord Hoffmann’s speech at paragraph 74 of the Decision. What he said there was directed at the implication of terms, but he saw implication as simply part of the exercise of construction. We repeat part of it:

“[The court] is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.”

18. In that case, the Court of Appeal of Belize had held certain background facts inadmissible in construing the articles of association. Lord Hofmann had this to say at [36] – [37]:

“36 The decision of the Court of Appeal was that these background facts were not admissible to construe the meaning of the articles. Without them, there was not the slightest basis for implying such an obligation. Because the articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company.

37 The Board does not consider that this principle has any application in the present case. The implication as to the composition of the board is not based upon extrinsic evidence of which only a limited number of people would have known but upon the scheme of the articles themselves and, to a very limited extent, such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation.”

19. Lord Hoffmann does not cast any doubt about the principle relied on by the Court of Appeal. The reason for reaching a different conclusion from the Court of Appeal was that the principle had no application on the facts.
20. In accordance with well established principle, the motives and intentions of the founders of HHL are irrelevant to the exercise of construction. Further, it is not generally relevant to consider evidence about the activities of a company in construing its memorandum and articles of association, any more than it is permissible in the case of a contract to see how the parties have in fact acted under it. However, where there is a doubt or ambiguity about whether the objects of an institution are charitable, the court may examine the activities of the institution. This is done, not for the purpose of construing its constitution, but for the purpose of assisting in assessing whether the implementation of the objects would achieve a charitable end result: see *Incorporated Society of Law Reporting for England and Wales v A-G* [1972] Ch 73 at p 99E. After pointing out that motives and intentions of the founders are irrelevant, Buckley LJ said this:

“But in order to determine whether an object, the scope of which has been ascertained by due processes of construction, is a charitable purpose it may be necessary to have regard to evidence to discover the consequences of pursuing that object. It would be immediately evident that a body established to promote the Christian religion was established for a charitable purpose, whereas in the case of a body established to propagate a particular doctrine it might well be necessary to consider evidence about the nature of the doctrine to decide whether its propagation would be a charitable activity.”

21. Applying those principles, there is no doubt that the following matters are admissible in construing the New M&A. Indeed, the parties agreed as much before the Judge, who set them out at paragraph 76 of the Decision:
- a. HLL was formed at a time when the Government’s LSVT Programme was in existence.
  - b. HHL was formed against the background that the Council was considering the transfer of some or all of its residential housing to the HHL as an RSL under Part 1 Housing Act 1996.
  - c. RSLs could either be charitable or non-charitable (section 2(1) of the Housing Act 1996).
  - d. Some of the Council’s residential housing was let to those in need. Some of the Council’s housing was let to those who were not in need.
  - e. Parts but nothing like the whole of St Helens or adjacent areas of North West England suffered from poor socio-economic conditions.
  - f. In 2000 the DETR Index of Multiple Deprivation scores showed St Helens as 42<sup>nd</sup> most deprived of the 354 authorities in England.
22. Mr Henderson submits, and we agree, that the following is inadmissible background:

- a. Evidence of intentions of founders/subscribers.
- b. The fact that HHL was formed on the instructions of the Council.
- c. All evidence as to post-formation activities and intentions, including evidence as to intention or to the actual taking over of the Council's housing stock.
- d. Detailed evidence as to deprivation in St Helens.

The third and fourth items would be admissible for the purpose of discovering the consequences of pursuing the objects in particular circumstances (that is to say whether their pursuit would operate for the public benefit in a charitable way in the circumstances then existing); but are not admissible for the purpose of examining what is and what is not within the scope of the objects or what is and what is not a “main”, “dominant” or “foremost” purpose.

23. Turing to the New M&A themselves, the objects clause, Clause 4, contains five paragraphs setting out what it is the business of HHL to provide (see paragraph 2.b above). Those paragraphs identify the various objects of HHL. The fifth paragraph identifies, by reference, a number of different objects namely any other object which can be carried out by an RSL. This incorporates the activities mentioned in section 2(2)(a) and (c) Housing Act 1996 to the extent that they are not already included within Clause 4. It also incorporates each and every one of the activities listed in section 2(4).
24. As a matter of construction of the New M&A we consider it to be clear that each of those objects (that is to say the ones listed in Clause 4 and incorporating all of the objects found in section 2(2)(a) and (c) and section 2(4)) is an independent object. It cannot be said, in our view, that any one of those objects is ancillary or subservient to another. We accept that the principal activity of HHL was intended to be, and has in fact been, the acquisition of the Housing Stock from the Council, its refurbishment and its letting to tenants. That is not to say, however, that such principal activity is the, or a, “main” object as that word has been used in some of the cases to distinguish between objects which can on the one hand be pursued independently of other objects or powers and, on the other hand, purposes which although sometimes described as objects, cannot be pursued independently but are essentially ancillary purposes more properly referred to as powers.
25. It may also be the case (we do not know) that all of HHL's other activities have in fact been carried out in furtherance of that principal activity. But that is not the point. The point is that HHL could, if it chose to do so, pursue any of the other permissible objects or purposes without reference to its current activities. Thus, by reference to section 2(4)(b) it could acquire a house to be disposed of on sale, by reference to section 2(4)(d) it could manage houses or blocks of flats and by reference to section 2(4)(f), it could give advice about the forming of housing associations or the running of such associations. Of course, in carrying out those activities, HHL must be doing so “for the benefit of the community” within the meaning of Clause 4 of its Memorandum of Association and must not be trading for profit.

26. The conclusion that each object is independent and that none is ancillary to another is supported by the way in which the New M&A contains, in a separate clause (clause 5) the powers which HHL has. Clause 5 provides that HHL “shall have power to do anything lawful which is necessary or desirable to achieve any of its objects”. It then sets out a non-exclusive list of ancillary powers. If any one of the objects had been seen as ancillary to another, we would have expected the relevant provision to have appeared, not as an object in Clause 4, but as a power in Clause 5. Further, Clause 5 states that the powers which it expressly confers are those which are necessary or desirable to achieve any of its objects. That must be a reference back to Clause 4. The words which we have underlined emphasise the distinction between objects and powers, with objects being found in Clause 4 and powers in Clause 5.
27. In paragraph 100 of the Decision, the Judge recorded HHL’s contentions that on a proper construction, all of its objects were united to secure a benefit to the community and that its foremost purpose was the provision of housing to tenants. In paragraph 101, he recorded HMRC’s contrary view to the effect that the objects in Clause 4 stood on their own and were all main objects.
28. The Judge accepted, in paragraph 102, that on the face of the Memorandum no one object was explicitly identified as dominant. The objects stood on their own, including those incorporated by reference to section 2(4) Housing Act 1996. But he saw as he put it “the force in [HHL’s] construction of a foremost purpose, which was connected with housing provision to tenants”. The Judge considered these opposing positions in paragraphs 102ff. He recorded HMRC’s contention that the novel concept of “foremost purpose” did not fit the classic construct of dominant or main purpose with a number of ancillary purposes. The classic construct was concerned with seeking a dominant purpose with other supposed “purposes” being limited and confined to carrying out the dominant purpose. He then encapsulated HHL’s riposte in paragraph 106. We quote that paragraph in full, together with paragraphs 107 and 109:

“106. The Appellant’s riposte to HMRC’s contention of each Object being a main Object was “so what, each of the Objects including those incorporated by section 2(4) of the Housing Act was qualified and united by the words for the benefit of the community. The implication of the Appellant’s riposte was that it did not matter whether the Appellant’s purpose was ten separate purposes or one foremost purpose the critical words were for the benefit of the community which according to the Appellant gave its purposes the colour of a charity. Further the consolidation of purposes into a foremost purpose was permissible under the general rules of construction, and made sense in crystallising the dispute on whether the Appellant’s overall purpose was charitable.

107. The Tribunal considers that the Appellant’s approach of formulating a foremost purpose was adopted by the Court of Appeal in *Council of Law Reporting*. The identified purpose for the *Council* of *to further the development and administration of law and to make it known or accessible to all members of the community* did not appear to be one of the stated Objects in

the Council's Memorandum but more a construct adopted by the Court of Appeal to sum up the overall purpose of the Council of Law Reporting. Somervell LJ in *Tennant Plays* at page 513 emphasised that in construing the clauses of a memorandum the first thing is to see what they say without having any preconceived notion in one's mind of what one is going to find. Although the observation of Somervell LJ was made in the context of a dominant purpose, it seems to the Tribunal that there is no rule prohibiting the formulation of a foremost purpose in the sense applied by the Court of Appeal of an overall purpose.

.....

109. The Tribunal decides that Lord Hoffmann's reasonable man informed of the admissible background would conclude from the Appellant's Memorandum and Articles of Association that it had an overall purpose of the management and provision of housing to tenants for the benefit of St Helens Metropolitan Borough. The Tribunal has adopted a slightly different formulation from that advocated by the Appellant. The Tribunal has added the word "management" to reflect the wide powers given to the Appellant in its Memorandum. The Tribunal applied the syntax used in the Memorandum, in that the phrase *for the benefit of the community* was at the end of the purpose, not at the front."

29. There are some observations which we need to make about those paragraphs. The formulation of a "foremost purpose" test was presented by HHL as something permissible under general rules of construction. It seeks to identify an "overall purpose" and then – the next stage of the argument – to characterise that overall purpose as charitable. As we have said, we do not dissent from the view that the purpose which HHL suggests is "foremost" – managing and providing housing stock....for the benefit of St Helens Metropolitan Council - was intended to be its principal activity in practice. Nor of course do we dissent from the proposition made by HHL to the Judge and repeated to us, that all of the objects have to be implemented for the benefit of the community which is what, after all, Clause 4 expressly requires. In that sense, the objects are all linked under one umbrella and must be carried out for the benefit of the community. But it does not follow that the objects which fall within that umbrella are subsidiary or ancillary to some foremost purpose, having no independent existence of their own.
30. We do not think the Judge was right to rely on *Law Reporting* in reaching his conclusion. The word "foremost" is not used in any of the judgments. The Court did nothing like that which the Judge did in his Decision. The Judge took a set of apparently independent objects, detected an overarching purpose, or foremost purpose as he put it, and subsumed those objects to the foremost object. It must follow, if the point is to take one anywhere, that the apparently independent objects could not in fact validly be effected save and to the extent that they promoted this foremost purpose. *Law Reporting* provides no support for such an approach. In that case, there was a single relevant object – the preparation and publication of law reports. Although Russell LJ referred, at page 87E-F, to the main purpose of the council to further the sound development and administration

of the law, that description of the purpose came after he had rejected two contentions of the Commissioners of Inland Revenue, namely (i) that the objects of the Council were simply to carry on the trade of publishing and (ii) that the main purpose was to advance the interests of the legal profession by supplying it with the tools of its trade. Further, he had already, at p 875E-F concluded that the publication of law reports was beneficial to the community.

31. Moreover, after identifying the purpose of the Council in that way, he went on, in a part of his judgment we will consider in more detail later, to discuss what it was necessary to establish in order to show that a purpose beneficial to the community was also charitable. He did not apply the incremental approach, building analogy on analogy, but looked to the “equity” or “mischief” of the Statute. Thus at the end of his judgment at p 89C-D he concluded that the Council’s objects fell within the fourth head. And whilst rejecting the conclusion that the purpose was purely the advancement of education, he did add that “in determining that the purpose is within the equity of the Statute I by no means ignore the function of the purpose in furthering knowledge in legal science”.
32. It is clear that the reason why Russell LJ described the purpose in the way in which he did was that he saw the actual object (publication of law reports) as a facet of that wider public benefit. Thus the Council’s objects would be charitable if, but only if, the wider public interest in the sound development (including furthering knowledge in legal science) and administration of the law was itself charitable.
33. Sachs LJ approached the matter slightly differently. At p 95 he identified the first question as being whether the advancement of the administration of the law in its broad sense is something beneficial to the community. Having given an affirmative answer to that question, he then asked whether the particular purpose of the council’s activities sufficiently contributed to that advancement and if so whether the contribution was made in a charitable manner. Buckley LJ dealt with the point very briefly, at page 104 E-G, having decided the case primarily on the basis that the objects of the council were valid charitable educational purposes. However, he described Russell LJ’s decision as based on the wider ground that

“the publication of accurate reports of judicial decisions is beneficial to the community not merely by assisting that administration and development of the law in the courts but by making the law known, or at least accessible, to all members of the community, including professional lawyers whose advice on legal matters other members of the community are likely to seek, thus making a sound knowledge and understanding of the law more available to all”.

Accordingly, the council was to be regarded as established for exclusively charitable purposes under the fourth head of *Pemsel’s* case.

34. Accordingly, we cannot agree with the conclusion expressed by the Judge in paragraph 107 of the Decision. We consider that his conclusion was wrong as a matter of law if he is to be read as saying that the overall purpose, which he attributed to the understanding of a reasonable man namely the management and provision of housing to tenants for the benefit of St Helens Metropolitan Borough,

was a purpose by reference to which all of the activities of HHL had to be assessed. If he was only saying that the predominant purpose of HHL was the overall purpose identified, but that other purposes could have an independent existence, we do not need to differ; but then the identification of such a predominant purpose takes one nowhere since the objects are then all independent and the status of HHL as a charity or not must be assessed on the basis of such independent objects.

35. HHL submits, on the appeal to us, that contrary to our conclusion, the Judge had in truth no option but to conclude as he did that HHL had “the foremost purpose” of managing and providing housing to tenants for the benefit of St Helens Metropolitan Borough. We do not agree if the identification of a “foremost purpose” is intended to lead to the conclusion that the various objects set out in Clause 4 and, by reference, in section 2(4) are not independent of one another. If by “foremost purpose” is meant no more than that the overall purpose identified is one of the purposes, and indeed even the most important purpose, of HHL, we do not need to express a view. If that was the finding of fact, it is probably one with which we cannot interfere.
36. In this context, HHL submit that it is plain that holding housing stock managed for the purpose of providing accommodation to tenants was of the essence of the HHL’s existence. That may or may not be so as a matter of fact, but what we are concerned with is construction of the New M&A and what it is that HHL is able to do. HHL says that it is positively fanciful to say, as appears to be the contention of HMRC when taken to its logical extreme, that HHL would have been working within its constitution if it had not held any housing stock at all. We doubt very much that this would be fanciful: facts on the ground may change to such an extent that HHL might (in accordance with its old constitution under the New M&A in contrast with its present charitable constitution) dispose of the Housing Stock and carry on other authorised activities. But we do not need to decide that point either. It is, we think, clear that HHL could manage housing which it does not own, or provide advisory services to housing associations, as part of its activities. Those activities might form only a small part of its overall business. But they could be carried out and carried out independently of its other mainstream activities and not as subsidiary or ancillary to them (provided, of course, that it was for the benefit of the community to do so). We reject the submission that HHL “could scarcely have pursued any of its objects, nor been a landlord at all (much less a RSL) without holding housing stock”.
37. There is disagreement about the extent of the “community” referred to in Clause 4. HHL submits that it is the community served by the Council whereas HMRC submits that it is the public at large. The Judge concluded in paragraph 98 of the Decision that the “community” should be construed as referring to the Council. In the context of his reasoning, that must be read as shorthand for the community served by the Council: he cannot have meant that the word “community” was to be read as a reference to the Council. He found the existence of entrenched rights of the Council “within the membership and management” of HHL to the exclusion of any other Local Authority as particularly persuasive. These are references to the Council’s representation of the board (having the power to appointing one third of the directors).

38. For reasons which will become apparent (essentially because it makes no difference to the argument concerning the charitable status of HHL whether the “community” is narrow or wide, the citizens of the area of the Council being a sufficient section of the public for the purposes of the fourth head of charity) we do not need to decide which view is correct. We are, however, doubtful that the Judge was correct in his conclusion. There are two related matters which concern us. The first is that the Local Authority Member is the Council “or any successor body”. There has been sufficient reorganisation of local authorities over the last 25 years to make us wonder whether a successor body might have a much wider geographical extent than the area of the Council. If the “community” does not include the public at large, is it then fixed by reference to the Council’s area or does it expand to fit with the enlarged area of the successor authority? The second related matter is to observe what actually happened when HHL changed its constitution to make itself charitable. A new definition was introduced: the Benefit Area, which means the North West of England. HHL’s objects were to be carried out for the benefit of the community in the Benefit Area. The “foremost purpose” which we have discussed and which is at the forefront of HHL’s case, does not appear to have been so overwhelming as to prevent the extension of its area of benefit from St Helen’s to the wider community of the North West. We do not for a moment suggest that the extension was invalid. Mr McCall in his skeleton argument says that “it is clear that it was the interests of the community served by [the Council] to which [HHL] was dedicated”. He may be right as a matter of fact that that was the intended focus of its activities, but if he is saying that this focus leads to the conclusion that “community” means the community of St Helens, we do wonder how the extension is to be justified. We have not heard argument on these points and, as we have indicated, make no decision.

### **Charitable status**

39. It is common ground that, for a body to be registered as a charity and to attract the tax reliefs available to a charity, it must be established for purposes which are exclusively charitable. Accordingly, if HHL had an object which was not charitable, then, unless that object was subsidiary or ancillary to other charitable objects, HHL was not a charity. We have held that, as a matter of construction of the New M&A, each of HHL’s objects was independent whilst recognising that HHL was only entitled to carry out such an object for the benefit of the community (whether the community of St Helens or the public at large). The question for us, then, is whether each of HHL’s objects, being restricted as it was so as to be of benefit to the community, is charitable within the fourth head of *Pemsel’s* case. It is not enough, of course, that an object should be for the benefit of the community to qualify as charitable. What else is required is something which we examine in the following paragraphs of this Decision.

40. But before we do so, we mention one question to which we will return later. It is the extent to which the phrase “for the benefit of the community” in Clause 4 of HHL’s Memorandum under the New M&A corresponds with “trusts for other purposes beneficial to the community” or “objects of public utility” as used to describe the fourth head of charity. They are not necessarily the same thing. If any of HHL’s objects could have been implemented in a way which was “for the benefit of the community” within Clause 4 but where that object was not a

### **The authorities**

41. We now turn to some of the cases which have been cited to us, making some observations on the submissions made to us as we go along. We must, unfortunately, include some fairly lengthy citations.
42. We start with *Scottish Burial Reform and Cremation Society Ltd v. Glasgow City Corporation* [1968] AC 138. Mr Henderson relies on this to demonstrate the well-established proposition that at common law charitable purposes are purposes which (i) are within the spirit and intendment of the Preamble to the Statute of Elizabeth, such spirit and intendment being assessed by reference to the Preamble itself and to the decided cases, and (ii) are for the benefit of the public or the community or appropriate sections of them. Thus we find Lord Wilberforce saying this at p.154 (and bear particularly in mind the last sentence of the citation):

“On this subject, the law of England, though no doubt not very satisfactory and in need of rationalisation, is tolerably clear. The purposes in question, to be charitable, must be shown to be for the benefit of the public, or the community, in a sense or manner within the intendment of the preamble to the statute 43 Eliz. 1, c. 4. The latter requirement does not mean quite what it says; for it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied. Lord Macnaghten's grouping of the heads of recognised charity in *Pemsel's case* [*Income Tax Special Purposes Commissioners v. Pemsel* [1891] AC 531 at p.583] is one that has proved to be of value and there are many problems which it solves. But three things may be said about it, which its author would surely not have denied: first that, since it is a classification of convenience, there may well be purposes which do not fit neatly into one or other of the headings, secondly, that the words used must not be given the force of a statute to be construed; and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891.”

43. Later in his speech, at p 156B to E, he referred to the evolutionary process which has carried charity from repair of churches to the maintenance of burial grounds in a churchyard or cemetery and which he thought should carry it further to embrace the company's objects, the dominant purpose being to encourage and provide facilities for cremation. But he preferred another approach on the facts of the case which was to regard the provision of cremation services as falling naturally and in their own right within the spirit of the preamble. That was because he saw the provision of cremation services as within the group including the “repair of bridge, ports, havens, causeways, churches, sea bands and highways”. This group had a common element of public utility. We can readily see why Lord Wilberforce would have regarded the provision of cremation services as having that same element of public utility. The “advancement of objects of general

public utility” was, he noted, the original label of the fourth category affixed by Sir Samuel Romilly in argument in *Morice v Bishop of Durham* and which he, Sir Samuel, had described as “the most difficult of all”.

44. Lord Reid was perfectly satisfied on the facts that the requisite public benefit was established for the reasons given at p 146E-G. At p 147A-D he said this:

“The preamble specifies a number of objects which were then recognised as charitable. But in more recent times a wide variety of other objects have come to be recognised as also being charitable. The courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. and then they appear to have gone further and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable. and this gradual extension has proceeded so far that there are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the Statute of Elizabeth I. Counsel in the present case were invited to search for any case having even the remotest resemblance to this case in which an object was held to be for the public benefit but yet not to be within that spirit and intendment. But no such case could be found.”

45. Next, we refer to the earlier case of *Williams’ Trustees v. IRC* [1947] AC 447. Mr Henderson refers us to this to demonstrate another well-established proposition, that benefit to the community or a section of it is a necessary, but not a sufficient condition for a purpose to be charitable. Lord Simonds said this at p.455:

“My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers, unless it is within the spirit and intendment of the preamble to the statute of Elizabeth (43 Eliz. c. 4), which is expressly preserved by s. 13, sub-s. 3 of the Mortmain and Charitable Uses Act, 1888. The second is that the classification of charity in its legal sense into four principal divisions by Lord Macnaghten in *Income Tax Commissioners v. Pemsel* must always be read subject to the qualification appearing in the judgment of Lindley L.J. in *In re Macduff*: “Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be.” This observation has been expanded by Lord Cave L.C. in this House in these words: “Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust. See *Attorney-General v. National*

*Provincial & Union Bank of England.*" But it is just because the purpose of the trust deed in this case is said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail."

46. In *Macduff* [1896] 2 Ch 451, Lindley LJ also referred to *Kendall v Granger* where Lord Langdale had concluded that the purpose "for encouraging undertakings of general utility" was not charitable, a decision which he observed had never been overruled or questioned. In *Williams*, Lord Simonds referred to a number of cases at pp 455 to 457. We note in particular his approving reference to *Farley v Westminster Bank* [1939] AC 430 where a gift to the vicars and churchwardens of two named churches for "parish work" was held to be not charitable. Lord Simonds clearly thought there could be no doubt that the purpose of the gift was beneficial to the community. As he said:

"Yet the gift failed. It was, in the words of Lord Russell of Killowen, "for the assistance and furtherance of those various activities connected with the parish church which are to be found in .... every parish." It would be unduly cynical to say that that is not a purpose beneficial to the community. Yet it failed and it failed because it did not fall within the spirit and intendment of the preamble to the Statute of Elizabeth."

47. Lord Simonds also addressed, at p 457, another aspect of the case, namely the requirement that a charitable trust must be of public character. We can best explain the issue by quoting Lord Simonds again. He said this at p 457:

".....It is not expressly stated in the preamble to the statute, but it was established in the Court of Chancery, and, so far as I am aware, the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble. The rule is thus stated by Lord Wrenbury in *Verge v. Somerville*: "To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public - whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot." It is, I think, obvious that this rule, necessary as it is, must often be difficult of application and so the courts have found. Fortunately perhaps, though Lord Wrenbury put it first, the question does not arise at all, if the purpose of the gift whether for the benefit of a class of inhabitants or of a fluctuating body of private individuals is not itself charitable."

48. It is clear from *Williams* (and indeed it was clear before) that it is not sufficient to say that the objects in question are of benefit to the community in order to establish charitable status. It must also be the case that the objects fall within the

spirit and intendment of the preamble. *Williams* appears to say that it is for the body in question to demonstrate that that is so. This is not simply a pleading point; it is a question of where the onus to establish charitable status lies. HHL submits, however, that, once it is established that an object is obviously for the benefit of the community, then that purpose is automatically to be seen as charitable unless there are grounds for holding that it is outside the spirit and intendment of the preamble. This is something of a peripheral point, but it is not wholly irrelevant to the thrust of HHL's argument and we should deal with it. HHL's argument is that (a) the over-arching requirement was to benefit the community (b) that the pursuit of HHL's purposes was obviously beneficial for the community in question and (c) that there was no reason to suppose that the nature of the Appellant's work was outside the equity of the Statute

49. HHL relies on *Law Reporting* in support of its submission. In his judgment, at pp 87 to 88, Russell LJ referred to the examples in the preamble which were from an early stage regarded merely as examples or guideposts. Sometimes the courts looked for analogies with those examples or with a previous decision, itself justified by analogy. He described *Scottish Burial* as such a case – provision of crematoria by analogy with the provision of burial grounds by analogy with the upkeep of churches by analogy with the repair of churches. In other cases, a decision was based on a more general question whether the purpose is within “the spirit and intendment” of the Statute of Elizabeth or its preamble (which was, we note, the basis of Lord Wilberforce's actual decision in *Scottish Burial*). He referred to other touchstones (whether the purpose was within the equity or the mischief of the Statute, or whether it is charitable in the same sense as purposes within the purview of the statute). Russell LJ expressed considerable sympathy for the view that such phrases do little to elucidate any particular problem. They teach little. But his sympathy did not go much further than just that, sympathy. Thus:

“I say I have much sympathy for such approach: but it seems to me to be unduly and improperly restrictive. The Statute of Elizabeth I was a statute to reform abuses: in such circumstances and in that age the courts of this country were not inclined to be restricted in their implementation of Parliament's desire for reform to particular examples given by the Statute: and they deliberately kept open their ability to intervene when they thought necessary in cases not specifically mentioned, by applying as the test whether any particular case of abuse of funds or property was within the "mischief" or the "equity" of the Statute.

For myself I believe that this rather vague and undefined approach is the correct one, with analogy, its handmaid, and that when considering Lord Macnaghten's fourth category in *Pemsel's case* [1891] A.C. 531, 583 of "other purposes beneficial to the community" (or as phrased by Sir Samuel Romilly (then Mr. Romilly) in argument in *Morice v. Bishop of Durham* (1805) 10 Ves. 522, 531: "objects of general public utility") the courts, in consistently saying that not all such are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (e.g. a political

purpose) which could not have been within the contemplation of the Statute even if the then legislators had been endowed with the gift of foresight into the circumstances of later centuries.

In a case such as the present, in which in my view the object cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute: and I think the answer to that is here in the negative.”

50. Sachs LJ adopted the same approach (see p 95E) and it appears that Buckley LJ did so too (see p 105G).

51. Mr Henderson says that the approach was and remains wrong: the point is covered by the decision in *Williams* so that, unless and until that decision is overruled by the Supreme Court, we are bound by it (as was the Court of Appeal). Mr Henderson relies for support for this conclusion on the decision of Dillon J in *Re South Place Ethical Society* [1980] 1 WLR 1565 at 1574C-1575D. Dillon J said this:

“Russell L.J., in [*Law Reporting*] at pp. 88–89, seems to have taken the view that the court can hold that there are some purposes “so beneficial or of such utility” to the community that they ought prima facie to be accepted as charitable. With deference, I find it difficult to adopt that approach, in view of the comments of Lord Simonds in [*Williams*] at p 455, where, in holding that the promotion of the moral, social, spiritual and educational welfare of the Welsh people was not charitable, he pointed out that it was really turning the question upside down to start with considering whether something was for the benefit of the community.”

Dillon J then quoted part of the passage which I have already set out. He goes on:

“Therefore it seems to me that the approach to be adopted in considering whether something is within the fourth category is the approach of analogy from what is stated in the preamble to the Statute of Elizabeth or from what has already been held to be charitable within the fourth category.

The question is whether the trust is within the spirit and intendment of the preamble, and the route that the courts have traditionally adopted is the route of precedent and analogy, as stated by Lord Wilberforce in *Brisbane City Council v A-G for Queensland* [1979] AC 411, 422. One of the difficulties of this approach is that it is often difficult to say which of Lord Macnaghten's categories has been held to cover some particular decided case.”

And he then goes on to consider some of the cases.

52. We have some observations to make on that. First, Dillon J took the words “so beneficial or such utility” divorced from their context. It is clear, it seems to us, reading those words in context that “so” and “such” were not used in a descriptive sense so as to emphasise that there is a great deal of benefit or utility. Rather, they

were a reference back to the phrases in which those words had been used, that is to say “purposes beneficial to the community” and “objects of general public utility”. The words or reference are a shorthand so that Russell LJ is to be read as saying “...that if a purpose is shown to be so beneficial [*ie* to be beneficial to the community] or of such utility [*ie* of general public utility]....”. We do not read Russell LJ in the way that Dillon J read him.

53. Russell LJ is, accordingly, not restricting himself to cases where it is, in effect, obvious that there is a purpose beneficial to the community when he says that such purposes is *prima facie* charitable. We therefore agree with Mr McCall that Russell LJ is indeed saying that once you have an object which is beneficial to the community or an object of general public utility, it is *prima facie* charitable and it is necessary to rely on the line of retreat based on the equity of the of the Statute if the purpose is to be held to be not charitable. This does not mean that it is no longer necessary for the purpose to fall within the spirit and intendment of the Statute but Russell LJ did see the proper question to ask as being whether there any grounds for holding it to be outside the equity of the Statute.
54. Returning to what Dillon J said in *South Place Ethical Society*, he saw Lord Simonds as saying that it was really turning the question upside down to start with considering whether something was for the benefit of the community. With respect, that is not what Lord Simonds said. Rather, he simply repeated the interpretation which Lindley LJ had put on Lord Macnaghten’s words, an interpretation expanded on by Lord Cave. Lord Macnaghten said that to be charitable (under the residual fourth head) the purpose had to be beneficial to the public. All that Lord Simonds was doing was repeating that it does not follow that because a purpose is beneficial to the public, it is therefore charitable. He certainly did not say that it was turning things upside down to start with the question of benefit to the community. Indeed, we see that as a perfectly sensible starting point in many cases, for if there is no sufficient public benefit, that is an end of the enquiry.
55. Finally, Dillon J appears to consider that the only relevant guide to charitable status is to apply the approach by analogy: see the first paragraph of the second quotation at paragraph 51 above. But that is not the only approach. It is clear that as an alternative it is possible to look to the equity or mischief of the Statute and preamble. This is what Lord Wilberforce himself did in *Scottish Burial* in regarding the provision of cremation services as “falling naturally, and in their own right, within the spirit of the preamble”.
56. All in all, we have to say that we do not gain much assistance from this case.
57. We nonetheless share Dillon J’s disquiet about *Law Reporting*. Notwithstanding that Lord Browne-Wilkinson has said that the approach in *Law Reporting* has much to commend it (see his *obiter* remarks in *Attorney General of the Cayman Islands and others v Wahr-Hansen* [2001] AC 75 at p82), it is not clear to us how the Court of Appeal can have arrived at that approach consistently with authority if it goes as far as Mr McCall suggests that it does. As we have already noted, Lord Wilberforce’s alternative approach in *Scottish Burial* was to move away from analogy to the spirit and intendment of the preamble, perceiving purposes

beneficial to the community as the same as objects of general public utility and detecting in the group of public works he identified a spirit sufficient to include the objects in question in *Scottish Burial*. It is that alternative approach which Foster J identified, at the end of his decision at first instance in *Law Reporting* (see [1971] Ch 626 at 647), as the wider test; and he saw the preparation and publication of law reports as “naturally in their own right, with the spirit of the preamble”. But his decision did not turn on an object of public utility being, without more, *prima facie* charitable.

58. Russell LJ did not anywhere in his judgment refer to this aspect of Foster J’s judgment nor, more importantly, did he refer to that test as it was articulated by Lord Wilberforce himself. He did not refer, either, to what Lord Simonds said in *Williams*. *Farley* was not cited. Although decided in 1939, *Farley* was not a crusty old decision perhaps carrying less weight than a comparatively recent decision. And yet applying Russell LJ’s approach, the purposes found in *Farley* would surely *prima facie* be charitable. Unless the line of retreat is open in a case where words similar to those found in *Farley* are found, that approach would lead to inconsistency with *Farley* and with the reasoning in *Williams*.
59. It is the identification of the line of retreat which, we think, provides the resolution of this apparent conflict. Russell LJ does not anywhere in his judgment suggest a different approach to the identification of what is, and what is not, within the spirit of the preamble. He formulates, it is true, the proper question as being whether there are any grounds for holding a purpose to be outside the equity of the statute. The formulation of the question in that way no doubt reflected a desire on his part to indicate that the courts might take a more lenient approach than hitherto, but once the charitable status of a body has been challenged (for instance by HMRC) on the basis that the case does not fall within the spirit of the preamble, the court must decide the case according to the law. If one asks, applying Russell LJ’s approach, by what test is it to be ascertained whether there are any grounds for holding the purposes to be outside the equity of the Statute, the reply must be that the answer is to be found in the case-law and its application, in modern circumstances, to the facts of the case. The line of retreat therefore allows the spirit of the Statute to be observed and whilst it may be more narrow than previously it must admit the passage of that which has gone before unless changes in society and the circumstances of the present time require that which was not charitable now to be charitable.
60. It is true that Russell LJ (at p 88G-H) identified the proper question to ask as being whether there are any grounds for holding the object in question to be outside the equity of the Statute. But that question was formulated in the context of an object which could not “be thought otherwise than beneficial to the community and of general public utility”. It does not follow that that is the correct question to ask in all cases.
61. Thus, we see a change of emphasis but not a real change of substance. This, as we see it, is the way in which to interpret what Russell LJ was saying; to adopt a different interpretation would lead to inconsistency with authority binding not only us but the Court of Appeal in *Law Reporting* too.

62. We find support for our interpretation in the judgment of Sachs LJ in *Law Reporting*. It is, perhaps, not the easiest judgment to understand on close analysis; and we do not propose to go into the difficulties which we have with it. What we do note, however, is that Sachs LJ saw the correct approach as that adopted by Foster J, that is to say the alternative test propounded by Lord Wilberforce. But that is a test concerning the spirit of the preamble and has nothing to say about the identification of what is and is not for the benefit of the community let alone that such benefit is the *prima facie* test for compliance with the spirit of the preamble. It is true that, having identified that test, Sachs LJ immediately went on to describe the wider test as “advancement of purposes beneficial to the community or objects of general public utility”. But when one reads on, it is clear that he did not contemplate the radical shift in the law which might be imputed to Russell LJ. This can be seen from his reference to the wisdom of Parliament in not providing a detailed definition of charity, instead “preferring to allow the existing law to be applied”.
63. It is, in any case, clear in our view that Russell LJ is not to be read as restricting the line of retreat to wholly novel types of public benefit (he gave the example of a political purpose, but even that is now outdated since many political purposes can be seen today as being far from being for the public benefit). As we have already mentioned, the line of retreat must cater for cases such as *Farley*.

#### **Private versus public benefit**

64. Further, the overall analysis must cater for other types of case where the object in question is in a broad sense for the good of the community but where the element of private benefit disqualifies the object from being charitable. There is a distinction to be drawn between (a) objects which confer a benefit on the public or a community because they are by their very nature beneficial to the community as a whole (such as the provision of sea-wall or street lighting) or provide only incidental benefit to individuals and (b) objects which in their nature confer benefits on individuals. In the latter case, there may be some general “good” in the provision which is made, but if there is insufficient benefit to the community and substantial benefit to the individual then there is no charity.
65. In this context, Mr Henderson has referred us to some more authorities, some of which we now consider.
66. The first is *Re James* [1932] Ch 25. In that case, a “Home of Rest” for the Sisters of a Community and certain other persons was held to be charitable. That was so because the judge decided, on the facts of the case and on a true construction of the will in question, that the gift was providing for the impotent and thus charitable; but Mr Henderson relies on it for support for the proposition that the provision of housing, even if for the benefit of the community, is not charitable unless restricted to those in need. In that context, Farwell J said this: “It may be that to provide a Home of Rest for a particular class of persons, who could not be in any sense described as in need of such a house would not be charitable....”. This was a case, however, where there was no benefit to the community (*ie* the public) in the sense required for an object to fall within the fourth head of charity. The judge did not have anything to say about a case where the Home of Rest

could take its residents from the community generally rather than from a particular class of persons.

67. In *Re Sanders* [1954] Ch 265, Harman J was concerned with a gift by will giving his trustee power to apply a share of his estate “in any manner in which he in his absolute discretion considers to be in furtherance of my general charitable intention with regard to the disposal thereof, namely “to provide or assist in the providing of dwellings for the working classes and their families resident in the area of Pembroke Docks...or within a radius of five miles therefrom....”. It was held that a gift for “the working classes” was not a gift for the relief of poverty as that expression did not indicate poor persons and that no general charitable intention could be inferred notwithstanding the use of the words he had used. We see no reason to think that the residents of the area defined in the gift would not have been wide enough to form a “community” for the purposes of the fourth head. Further, we would have thought that a gift to provide housing for the working classes would be for the benefit of the community in a general sense. But it was not suggested that the gift could be validated under the fourth head. We do not find that surprising; given that relief of poverty could not be established, the element of private benefit would have precluded an overall charitable purpose.
68. Mr Henderson referred next to *Joseph Rowntree Memorial Housing Association v. A-G* [1983] Ch 159. The provision (by a charitable housing association) of small self-contained dwellings for sale to elderly people on long leases in consideration of a capital payment was held to be within the charitable objectives of the association. The housing schemes concerned were designed to provide accommodation to meet the disabilities and requirements of the elderly. All five schemes required the applicants to have attained the age of 65 if male, and 60 if female, to be able to pay the service charge, to lead an independent life and to be in need of the type of accommodation provided. The essential points for present purposes are these. The words describing the beneficiaries within the first head of charity in the preamble had to be read disjunctively so that beneficiaries could be either aged, impotent or poor. But in order to be considered charitable the gift to such people had to have as its purpose the “relief” of a need attributable to the condition of the beneficiaries. Since the provision of special accommodation relieved a particular need of the elderly, whether poor or not, attributable to their aged condition, the schemes were within the scope of the charitable purpose of providing relief to the aged.
69. Again, in general terms, it could be said, we think, that the schemes were for the benefit of the community. There was, however no suggestion in the judgment (or so far as we know in argument) that the application of charitable funds in the provision of the schemes could be justified under the fourth head of charity. If there had been, the scheme could have been regarded as a proper application of charitable funds under the fourth head only if the private benefit to the residents was both (a) insufficient to take a broad benefit to the community outside purposes “beneficial to the community” as that phrase is understood in charity law in relation to the fourth head and (b) insufficient to take the case outside the spirit and intendment of the preamble. In the absence of the sort of need which brought the case within the first head of charity, it is not easy to see how the fourth head could have been satisfied either.

70. The distinction between cases where the benefit to individuals is incidental (such as the provision of seawalls or street lighting) and cases where the private benefit to individuals is not simply subsidiary to a public benefit, is illustrated in *IRC v. City of Glasgow Police Athletic Association* [1953] AC 380. In that case, the Special Commissioners had been entitled to find that among the Association's purposes were the encouragement of recruiting, the improvement of the efficiency of the police force and the public advantage, a purpose which they were entitled to hold was charitable as a direct benefit to the public. But the Association had other purposes namely to provide recreation to its members. The question was whether this non-charitable purpose was incidental to the charitable public purpose. It was held that the private benefit to the individual members of the Association was so significant ("pre-dominant") as to cause the Association not to be established for charitable purposes only: see Lord Normand at pp395-396, Lord Morton at pp 400, Lord Reid at pp 402 and Lord Cohen at pp 405-407. It is worth quoting a passage from the speech of Lord Reid to which we will return when stating our conclusions. He said this at p 402:

"The peculiarity of this case is that the same activities have a double result. They are beneficial to the public by increasing the efficiency of the force and they are beneficial to the members themselves in affording to them recreation and enjoyment: and all the relevant facts appear to me to indicate that the purpose was to produce this double result. It may well be that considerations of public interest were the primary cause of the association being established and maintained: but I think that it is clear that all or most of the activities of the association are designed in the first place to confer benefits on its members by affording to them recreation and enjoyment. It is only as a result of these benefits that the purpose of increasing the efficiency of the force is achieved. In some cases where the end is a charitable purpose the fact that the means to the end confer non-charitable benefits may not matter; but in the present case I have come to the conclusion that conferring such benefits on its members bulks so largely in the purposes and activities of this association that it cannot properly be said to be established for charitable purposes only. I therefore agree that the appeal should be allowed."

71. Next we refer to *IRC v. Oldham Training and Enterprise Council* [1996] STC 1218. The public to be benefited, in order for a case to fall within the fourth head, may be a section of the public and no doubt the community of St Helen's would be wide enough. But as Lightman J put it at p.1234a,

"the object must be to promote a purpose beneficial to the community, and not to the interests of individual members of the community. But an object may none the less be charitable as beneficial to the community though its fulfilment either directly or indirectly incidentally may benefit such individuals."

72. In that case, the objects clause of Oldham TEC (in its unamended form) contained as its second main object "to promote industry, commerce and enterprise of all forms for the benefit of the public in and around Oldham". This became (in the amended form) "to promote the development of industry, commerce and enterprise of all forms for the benefit of the community in and around Oldham", the change from "public" to "community" being described by Lightman J as "inconsequential". As to that, Lightman J said this:

“Under the unamended objects clause, the second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them ..... Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits, regardless of the motive or the likely beneficial consequences for employment must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote. The position in respect of the third main object clause and the third and fourth subsidiary object clauses of the amended objects clause is exactly the same.”

73. The objects clause provided for Oldham TEC to carry out the second main object for the benefit of the public or the community. In a general sense, that is no doubt what Oldham TEC actually did in carrying out its objects and what it would be doing when providing the private benefits described by Lightman J. He nonetheless saw the provision of private benefit of this type as precluding charitable status; and clearly did not feel constrained to say that Oldham TEC’s activities were limited to charitable objects by the need for there to be benefit to the public or community.

#### **Application of principles to HHL**

74. We have addressed the proper construction of the New M&A in some detail already and concluded that each of the expressed objects is an independent object. It is clear to us that, were it not for the presence of the words “for the benefit of the community” in Clause 4, HHL’s objects could not be seen as being exclusively charitable. Thus, to take but one example, the giving of assistance to housing associations would not be charitable even if carried out not for profit since not all housing associations are charitable. Quite apart from that, the object (which HHL sees as its foremost object) of providing housing is not *per se* charitable whether or not restricted to provision of housing in St Helens. The material on which Mr McCall relies – including the policy for allocation of dwelling units to tenants, the evidence of housing need in St Helens and how HHL operated in practice - in arguing that HHL was established for exclusively charitable purposes would be inadequate, in the absence of the words “for the benefit of the community” to lead us to reject our clear view that HHL was not a body formed for charitable purposes only.
75. We do not propose to restate or review the Judge’s findings of fact let alone the evidence on which he relied. We do, however, make two observations.
76. The first is that the evidence and findings about St Helen’s position in the table of deprived areas in the UK do not establish that St Helen’s is uniformly deprived. Like all areas, it must surely have pockets of relative prosperity and relative poverty. The Judge declined to reach a finding, as he was invited to do by HHL,

that “although St Helen’s was not uniformly deprived, it was deprived across the Borough”. He was not convinced by the evidence of Mr Brown (HHL’s Deputy CEO and Director of Resources) which he regarded as an exaggeration.

77. The second is that there is no finding that the allocation policy in fact resulted in homes being allocated only to persons in need in the sense of being financially deprived or otherwise deserving of charitable support. Quite the reverse. The Judge dealt with this at paragraph 85(3). HMRC, he recorded, had concluded from their analysis of HHL’s allocation policy that persons not in need could get on HHL’s housing list. He stated that he “preferred the analysis of HMRC” and that Mr Brown’s statement that “HHL never let property to anyone other than a person unable to obtain adequate housing left to their own devices was a sweeping statement which carried limited evidential weight”. It is difficult to read the Judge’s words as other than a rejection of HHL’s case and a finding that it did sometimes let to persons not in need.
78. In our judgement, the presence of the words “for the benefit of the community” do not lead to a different conclusion. It was, in our view, permissible for HHL acting under the New M&A to fulfil its objects in a way which was not wholly charitable. It could carry on activities which were neither charitable in themselves nor ancillary to a main object which was charitable. Whatever the correct reading of *Law Reporting*, the detailed consideration of that case which we have carried out shows that it does not represent a radical departure from *Williams*. It is still the law that the objects of the body in question must be examined and it is still the law that the objects must be (a) for the benefit of the community and (b) within the spirit of the preamble. There may be a change of emphasis and an increasing willingness for the courts to find that a new object is indeed within the spirit of the preamble. But it still remains necessary to ask whether the object is indeed within the spirit and to answer that question by reference to the well-established principles.
79. It is of course the case that the words of “for the benefit of the community” do qualify the objects contained in the New M&A. HHL’s argument asks us in effect to read the New M&A as if the words had been “in so far as charitable”. Had they been, then HHL would have had charitable status (albeit that questions might then arise as to whether it had acted outside its charitable objects or whether everything which it did could be seen as ancillary to those objects). But those were not the words used. And the words actually used permit an application of funds for objects not of themselves charitable but which are for the benefit of the community of St Helens.
80. In that context, we return to what Lord Reid said in *IRC v. City of Glasgow Police Athletic Association* and the double result which he referred. This shows clearly how an object can be beneficial to the community but not charitable. As in that case, there is in the present case a dual benefit; the provision of housing to tenants was the medium through which HHL sought to benefit the community. The fact that what is an essentially private benefit, which may be divorced from any need, can be conferred indicates to us that the benefit to the community referred to in the New M&A is not necessarily a benefit conferred pursuant to a charitable object. To put it another way, the benefit to the community contemplated by the words in the New

M&A can be an indirect benefit in the same way that the benefit to the members of the athletic association was an indirect benefit to Glasgow; but because of the scope in the present case for the provision of private benefit which is not simply ancillary to a charitable objective, HHL was not itself formed for exclusively charitable objects.

81. The *Glasgow Police Athletic Association* decision seems to us to emphasise the need for such primacy of the public purpose that the private benefits are such as to be almost inconsequential. Lord Reid found that equality between the public and private purposes was such as to render the institution non-charitable and Lords Normand and Cohen found that the private benefit must be either an “*unsought consequence*” or a benefit given with a view only to achieving the public purpose. It does not seem to us that either the purposes or the activities of HHL fall into the category of conferring a merely incidental benefit on its tenants. It rather seems to us that the provision of housing to the tenants was the medium through which HHL sought to benefit the community, so that HHL’s activities fall closer to Lord Reid’s “double result” category.
82. We do not need to rely on Lightman J’s decision in *Oldham TEC* although we do consider that in fact it supports our conclusion. Mr McCall says that it is necessary to take great care in approaching the case. He says that the case was unusual. There was no real contest in that the body concerned was (like the IRC) seeking to establish that it was not a charity. There was no-one present with an interest to argue to the contrary. It is therefore not a strong authority.
83. But, in any event, he submits that the critical factor was that (unlike the present case) the objects in *Oldham TEC* were not qualified by a requirement that they be pursued for the benefit of the community. He suggests that Oldham TEC was a body dedicated to work that was said to be work for the benefit of the community but it was required to do that work *by pursuing specific objects* in such manner as it might think fit, which is quite different. The constitution pre-supposed that to pursue those objects would achieve a benefit for the community. (To put it another way, the memorandum of association made its own dictionary that the consequence of pursuing the specified objects would be a benefit to the community *within the meaning of* the constitution). In the present case, there was an express requirement that the Appellant benefit the community. Mr McCall says that in contrast one of the objects in *Oldham TEC* plainly did allow a general primary objective of conferring individual benefits so Lightman J was entitled to say that this meant that the body was not charitable since it could pursue an object of benefiting individuals whether or not it benefited the community. In the present case, the Appellant’s constitution expressly required that the Appellant could do nothing unless it was ultimately for the benefit of the community.
84. We do not accept that analysis of the difference between *Oldham TEC* and the present case. Looking at the unamended memorandum, the second main object was qualified by the words “for the benefit of the public in and around Oldham”. The third subsidiary object envisaged provision of private benefits. Mr McCall refers to the memorandum making its own dictionary as just described. He does so to suggest, we think, that the ordinary concept of “benefit to the public” would not have included the third subsidiary object. We do not see why not. It would be an indirect benefit, we accept: but so too was the benefit in *Glasgow Police*

*Athletic Association* and yet there was benefit none the less. When Lightman J said that the benefits were “too remote” he can only have meant that they were too remote to amount to a benefit by way of charity. In other words, he was applying the well-established law that provision of a private benefit (except perhaps in cases of relief of poverty about which we say nothing) other than as an ancillary benefit, is not charitable. Further, when one reads the words in the New M&A “for the benefit of the community” against the list of purposes set out in section 2(4) Housing Act 1996, we consider that a similar “dictionary” point can be made. We do not say that any of those purposes would be devoid of practical fulfilment if restricted to fulfilment in a way which was exclusively charitable, but we are bound to say that their scope in terms of public benefit would be curtailed. Paragraphs (c) (construction and disposal on shared ownership terms), (e) (services in arrangement of repairs *etc*) and (f) (advice on forming housing associations) in particular could be implemented in ways which are, we consider, of benefit to the community without necessarily being charitable. Take one example. The encouragement by HHL of the formation of (non-charitable) housing associations may be seen as a good thing for the community generally and thus “for the benefit of the community”. But financial support to a group of individuals to form a housing association for their own benefit would have involved such an element of private benefit as to preclude HHL having charitable status.

85. Although we do not agree with all aspects of the Judge’s reasoning and disagree with his conclusion about “foremost” purpose, he was correct, in our judgment, on the central issue in deciding that HHL was not established for purposes which were exclusively charitable.

### **The Application of Income Issue**

86. If, contrary to our view, HHL was in fact charitable, the issue arises whether HHL applied its profits to charitable purposes only within the meaning of section 505(1)(a)(ii) Income and Corporation Taxes Act 1988. HHL says that the profits were so applied. HMRC say that they were not since, in applying its income for the purpose of fulfilling its obligations under the Development Works Agreement, HHL was not applying it to charitable purposes only within the meaning of s.505 Taxes Act 1988. In the light of our decision on charitable status, the Application of Income Issue does not arise. Since our provisional view is that HHL is correct to say that exemption is available, we do not propose to deal with the issue as it cannot be seen as an alternative route to allowing the appeal. It is enough to record that, in agreement with Mr McCall, we consider the answer (and reasoning) of the Judge in relation to the Technical Issue to be of no assistance in answering the question.

87. In summary, our provisional view flows from these central considerations.

88. First, it seems to us at present that, absent the DWA, HHL would have been entitled to claim exemption on the basis that the expenditure was wholly ancillary to the main object of the provision of housing and accommodation; indeed, it can be seen as necessary for the effective achievement of that objective. Secondly, it seems to us at present that the presence of the DWA makes no difference to that conclusion. Rather, the expenditure was incurred for a wholly charitable purpose

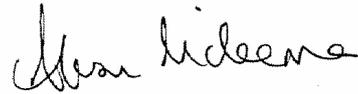
(fulfilment of objects which, on the hypothesis under consideration, were charitable, namely the provision of housing and accommodation); the fact that the effect of that expenditure was to discharge the obligation of HHL to the Council does not mean that there was a non-charitable purpose.

**Conclusion**

89. The appeal is dismissed on the basis that HHL was not, as constituted under the New M&A, formed for exclusively charitable purposes.

Handwritten signature of Mr Justice Warren, consisting of a stylized 'W' followed by the name 'Warren' in cursive.

**Mr Justice Warren**  
**President**

Handwritten signature of Alison McKenna in cursive.

**Alison McKenna**  
**Upper Tribunal Judge**

**Release Date: 6 April 2011**