THE LAW ON CHARITY: A LAYMAN'S TRIBUTE

Peter Southwood*

Introduction

On 5th September 1995 the Charity Commissioners for England and Wales issued a Statement of Reasons concerning the Project on Demilitarisation ('Prodem') explaining why they did not consider this body to be a charity in law.[1] The layman who received this Statement and analysed its contents concluded that the reasoning was flawed. So there began an apparently mundane case of charity law which, five years later, was to end in a judgment of the Court of Appeal after he had used the legal process to test his method for analysing international conflicts by judicial standards of lawfulness and objectivity.

The current relevance of this case ('*Re: Prodem*') is threefold. First, the planned revision to charity law in England and Wales, following the publication of a draft Bill in May 2004,[2] is expected to lead to a new Act of Parliament outlining charitable purposes more comprehensively than at any time since the preamble to the Statute of Elizabeth (43 Eliz. 1 c. 4). Yet there is an apparent, though unintended, conflict with charitable purposes set out in *Re Prodem* that, by analogy, may affect other charitable purposes in the draft Bill which are or are not politically controversial, dependent on interpretation. Secondly, a key part of the draft Bill is the creation of a Charity Appeal Tribunal designed to enable laypersons to bring cases more easily without the expense of engaging lawyers. Consequently this lay person's experience may be relevant in identifying the potential for, and barriers to, undertaking such actions in person. Thirdly, allied to the previous point, the case may help to break down some of the mystique of law by illustrating the benefits of lay persons challenging professional lawyers and vice-versa which was, in essence, the educational method described in *Re Koeppler Will Trust* concerning the Wilton Park project.[3] Thereby a realistic appreciation of what such legal action can, and cannot, be expected to achieve may be acquired.

Further interest arises from the international development of charity law particularly in the United States of America, Australia and New Zealand. *Re Prodem* involved the citation of two US cases – *Parkhurst v Burrill*[4] and *Tappan v Deblois*[5] – that, as far as is known, had not previously been referred to in any English court. While not having direct authority, the former helped to clarify an area of English charity law, concerning peace and conflict resolution, on which there had been some difference of legal opinion.

Future Directions: A New Charities Act

As at October 2004 the Joint Committee of the UK Parliament on the draft Charities Bill has just reported.[6] This article is, therefore, written on the following assumptions:

---

* Consultancy Services Manager in Pensions & Investment Research Consultants Limited, London, England. He writes here in a personal capacity.

1. A new Charities Act for England and Wales (possibly being, or followed by a further, consolidation Act) will be passed by the UK Parliament in the next year or so with a list of charitable purposes substantially as set out in the draft Bill including, in particular, 'the advancement of human rights, conflict resolution or reconciliation'.[7] The explanatory notes to the draft Bill make clear, though, that these purposes are intended to be 'heads' of charity and not precise definitions which will be based on existing case law at the time of enactment.[8]
2. Public benefit will continue to be decided by reference to common law but non-exclusive criteria or non-binding guidance may be provided. Currently there is a consensus of opinion that a detailed statutory definition of public benefit would be too inflexible and might open the way to periodic interference by the government in the definition of what is charitable. A countervailing concern, though, is that if too much weight is given to existing case law then the new statutory list of charitable purposes may have no significant impact on the charity sector.[9]
3. While to achieve charitable status a trust must have purposes which are wholly and exclusively charitable in law, the courts will uphold the principle that this does not prevent trustees from having incidental powers, authorised by the trust instrument, to employ political means to further their charitable purposes. This, the third of the three requirements to meet charitable status as explained by Mr (later Lord) Justice Slade in *McGovern v Attorney-General*, has tended to be overlooked in the public debate and, even when it is mentioned, the caveat 'authorised by the trust instrument' is forgotten.[10]

On the basis that these assumptions are reasonable and sound, the ensuing discussion will focus on how the principles of law were applied to the facts in the case of *Re Prodem*. The author's contention from this case is that the continuation of the success of the last 400 years of English charity law will depend less on the legal principles themselves than on the degree to which they can be objectively applied. For this quality is what distinguishes the legal from the political process, just as it differentiates education from politics. This case indicates that objectivity is a matter not of appearance but of content.

Re Prodem: Grounds Of Appeal

The facts of the case were correctly stated by the Court of Appeal in its judgment of 28th June 2000, with one exception, so it will not be necessary here to give anything other than the briefest background. This can be done as part of the analysis to follow.

The grounds of appeal against the formal decision of the Commissioners not to register Prodem as a charity were set out in the plaintiffs' (amended) originating summons of 26th September 1995 as follows:

> ... if all the relevant legal cases and material facts presented had been fully and correctly taken into account then PRODEM would have been found to be for the public benefit in a manner which the law would regard as charitable.[11]

This understanding of the meaning of the term 'objectivity', derived from an educated person's experience, was not disputed by any lawyer or judge involved in this case. On the contrary, the Court of Appeal appeared to endorse it when stating:

> Dr Southwood does not quarrel with the [trial] judge's identification of the relevant principles of law. In his skeleton argument and at the hearing of the appeal, he accepted that the judge had fully and correctly taken into account all the relevant authorities.[12]

The importance of this layman's definition of objectivity is that, as General Editor of the Prodem Briefing No. 1, he had admitted that their approach appeared 'biased'.[13] Moreover, he acknowledged in his legal submission to the board of Charity Commissioners that the findings of the Prodem briefings appeared 'one-sided'.[14] Thus the entire case rested on his assumption that the findings of research could appear biased but, when the test for objectivity was applied, they could be found to be objective and politically impartial.

Analysis of the Commissioners' Statement of Reasons

The Declaration of Trust in 1994 purporting to establish Prodem as a 'charity' contained, in the view of the Commissioners, an ambiguity concerning the principal purpose, viz.

> 3.1 The advancement of the education of the public in the subject of militarism and disarmament…[15]

While, as the High Court later noted, the Trust Deed was professionally drafted the Commissioners were correct, in the light of cases such as *McGovern*, if it contained an ambiguity 'to look at the surrounding facts, including the activities of the promoters, both before and *after* the execution of the Deed.'[16] [Emphasis added.]

The main extrinsic evidence consisted of a background paper and six Prodem 'Briefings', as they were called, of which five were published before the Trust Deed was executed on 9th June 1994 and one in October 1995, i.e. a month after the Statement of Reasons. The specific aims of Prodem, as set out in the background paper, were as follows:

1. To fundamentally question the new forms of militarism arising in the West in relation to:

    - its recent record;
    - current official policies;
    - the likely consequences for the future.

2. To propose alternative policies to achieve disarmament and a conversion of resources from military to civilian purposes.[17]

The Commissioners accepted that '**Aim numbered (1)** could be charitable if carried out in a balanced and objective way' but neither did they accept, on the evidence of the Briefings, that it had been carried out in such a way while the addition of '**Aim numbered (2)** appeared to be political because it promoted a line of policy geared towards disarmament.'[18] However, the background paper alone did not prove fatal to Prodem's claim to charitable status before any of the three tribunals who considered it.

Yet it should be noted that Lord Justice Chadwick, in his Appeal Court judgment, stated:

> In my view Miss Taylor, when replying on behalf of the Charity Commission to one of Farrer's first letters in December 1992, was correct to state:
>
> > 'Although the Project claims to be charitable under the educational head, in fact what is intended… is the promotion of disarmament and the conversion of resources from military to civilian purposes, which is clearly a political purpose. Indeed, the whole thrust of the intended activities is political, for example Audiences (interested bodies/persons, the media and decision-makers), Nature of Briefing (useful for audiences' educational, lobbying or campaigning purposes), Outline Programme (briefing subtitles reflecting political stance).'[19]

On face value this looks like a judicial endorsement of the prima facie rejection of the case for registering Prodem as a charity, based only on the background paper of October 1992. This may be contrasted with the Prodem Trustees' submission of July 1994 arguing that '... there was no basis in law or equity for the *prima facie* rejection of our application for registration by the Commission (26.1.93).'[20] Lord Justice Chadwick, in citing this January 1993 letter, was underlining the point, admitted by this writer, that the approach of Prodem appeared 'biased' and the findings 'one-sided' whereas this writer, who alone wrote that Prodem submission, was objecting to the three-paragraph dismissal of Prodem's case as though there was nothing charitable within it. Furthermore, by approving Miss Taylor's view and not giving any approbation to the Commissioners themselves, the judge may have been sending a message to the Board about their handling of this case. The persuasiveness of this interpretation is reinforced when attention is turned to the conclusions in the Commissioners' Statement of Reasons.

The first two paragraphs of these conclusions helpfully distinguished between the promotion and the testing of a proposition:

> Overall, the evidence suggested that PRODEM has set out to advocate a certain line of policy. The style of the briefings was propagandist, assuming that the demilitarisation and disarmament were desirable and presenting arguments to support that view. Although there were occasional representations of views contrary to the prevailing message of the researchers, no serious attempt to analyse and discuss the issues had been made.

> The Commissioners concluded that the research was not objective but that the evidence suggested the organisation was set up to promote, rather than test, a particular hypothesis. On the evidence, the requirement of equipping the person being educated with neutral information had not been fulfilled and PRODEM was not charitable on that ground.[21]

If the conclusions had drawn to a close, then and there, in all probability there would have been no appeal to the High Court. However, the third paragraph introduced two new findings, which had not been derived from the Commissioners' preceding argument:

> Moreover, given the several references in PRODEM's submission to the institution's duty to address demilitarisation from an irenical perspective, it seemed that it was attempting to create a certain climate of opinion through its works. On the evidence of the briefings, it was even arguable that PRODEM was actually attempting to promote pacifism. In either case, this would amount to a political purpose and, for the reasons stated above, such a purpose is not charitable.[22]

The word 'irenical' is derived from a Greek term meaning 'aiming or aimed at peace'.[23] The plaintiffs noted, though, in their originating summons (as amended), that the Commissioners had done the very thing which they claimed the researchers were doing, i.e. 'presenting arguments to support [their] view', and had not taken into account certain judgments from higher tribunals which were relevant to this case:

(a) The promotion of peace can be a charitable object in the legal sense [*Re Harwood* (1936)] and even other vague aims deemed non-charitable, such as the formation of an informed international public opinion and promotion of greater co-operation in Europe and the West [*Re: Koeppler's Will Trusts* (1985)], can be carried out in legally charitable ways;

(b) Educational activities in the legally charitable sense, even when they touch on political matters, should constitute genuine attempts in an objective manner to ascertain and disseminate the truth [*Re Koeppler's Will Trusts* (1985) 2 ALLER 869, at 878];

(c) The creation of a certain climate of public opinion can be a legally charitable objective e.g. *Jackson v. Phillips* (1867).[24]

Grounds (a) and (c) of the appeal were based on the Commissioners' rejection of the promoters' preconceived view about the desirability of peace, as the basis for education in the charitable sense, and not the contention that the promotion of disarmament is a political purpose. Both *Re Koeppler Will Trusts*[25] and *Jackson v Phillips*[26] are also good authority for the proposition that activities may appear, at first sight, politically biased yet once the objective test has been applied a court can decide that they are educational. It is against this analysis that the fourth and final paragraph of the Statement stands:

> The Commissioners came to the conclusion that PRODEM's research had been undertaken to support a preconceived position and not to advance public education (in the charitable sense) in militarism and disarmament. In their opinion, the Briefings promoted the concept of demilitarisation and disarmament rather than advanced education in those issues as a subject. The requirement of public benefit was not satisfied, therefore.[27]

Analysis of the High Court Judgment

The trial judge noted in his judgment of 9th October 1998 that

> Dr Southwood tells me that the decision to appeal was made by his casting vote as chairman and was not agreed by the other trustee Dr Schofield, whose place has been taken by another trustee, Mr Parsons. Dr Southwood is continuing the appeal as a matter of principle, and intends to resign as trustee once the court's decision is known.[28]

The principle at stake was the educational basis (in the charitable sense) for the promotion of peace, linked to the rule of law which should ensure that the law on charity is not applied arbitrarily. For the affidavit evidence demonstrated that the Commissioners had registered various educational bodies as charities, even though they seemed to be based on the premise of peace including the Council on Arms Control[29] whose title also suggested the promotion of arms control. Moreover, Prodem's research activities had been incorporated within the University of Leeds by the time that the Trust Deed was executed and its two trustees were then Research Fellows in that institution.

Mr (now Lord) Justice Carnwath's statement of relevant legal principles, concerning education and politics, needs to be quoted at length because of its likely relevance to the interpretation of charitable purposes in the anticipated Charities Act. He began by noting:

> The authorities to which I have been referred illustrate the difficulty which the courts have found in drawing a clear distinction between 'educational' purposes, which are accepted as charitable, and 'political' purposes which are not. The line is not clearcut. A trust described as 'educational' may be disqualified, if the subject matter is not of sufficiently educational value, or the purpose is predominantly political or propagandist in character (see Tudor Charities 8th Ed p50 - 51).[30]

After reviewing the earlier authorities the judge went on to consider trusts directed to promoting the security of the nation by military means, which have generally been held to be charitable, and also trusts to promote national security by peaceful means which, he noted, 'perhaps surprisingly' has proved a more controversial subject. He concluded:

> … it seems that the promotion of good international relations as such is not a charitable purpose; but education as to the benefits of good international relations, and the means of achieving them, will qualify. By the same token, whether or not

> the promotion of peace in itself is charitable, there is no reason to exclude, from the scope of charity, education as to the benefits of peace, and as to peaceful methods of resolving international disputes.[31]

The judge then went on to consider the United States authorities to which the plaintiffs had referred him and, in particular, a case in which the Supreme Court of Massachusetts upheld as charitable a gift to the World Peace Foundation. That body had as its purpose:

> The purpose of educating the people of all nations to a full knowledge of the wasteful destructiveness of war and of preparation for war... to promote international justice and the brotherhood of man; and generally by every practical means to promote peace and good will among all mankind.[32]

The judge concluded his statement of relevant legal principles in this case:

> The importance of *Parkhurst - v - Burrill*, for Dr Southwood's purposes, is that it accepts that a purpose may be educational, even though it is based on the premise that people should be educated as to the 'evil effects' of war, and has therefore what the Commissioners referred to in the present case as an 'irenical perspective'. Although it is not direct authority for the purposes of English law, I do not see any reason to take a different view. I see nothing controversial in the proposition that a purpose may be educational, even though it starts from the premise that peace is preferable to war, and puts consequent emphasis on peaceful, rather than military, techniques for resolving international disputes; and even though one purpose of the education is to 'create a public sentiment' in favour of peace. The important distinction, from the 'political' cases mentioned above [*Re Hopkinson* and *Re Bushnell* respectively], is that the merits or otherwise of the Labour Party's views on education, or (in the early 1940s) of a state health service were matters of political controversy. The desirability of peace as a general objective is not.[33]

The plaintiffs had plainly succeeded on grounds (a) and (c) of their appeal.

The obvious difficulty with respect to the new Charities Act and the charitable purpose of 'the advancement of human rights, conflict resolution or reconciliation' is that these subjects are clearly matters of political controversy. A key test which the courts apply, as above, is whether reasonable persons who consider these subjects would be likely to arrive at differing conclusions.[34] If so, the promotion of one political view, as against another, can never be held to be a good charitable purpose. Since it is not the purpose of the new Act to replace existing case law or to define precisely the charitable purposes listed, it follows that the advancement of conflict resolution must mean, as in *Re Prodem*, the advancement of the benefits of conflict resolution. As observed by a judge at the Appeal hearing on 10th March 2000, it is a fine distinction between promoting the benefits of a policy and saying that that policy should be pursued. Nevertheless, it preserves the distinction between educational and political purposes fundamental to the

nature of charity. By analogy with the purpose of the advancement of human rights, and on the authority of the *McGovern* case and *Re Koeppler Will Trusts* on appeal, which were relied on by the judges in *Re Prodem*, the same interpretation would apply in that instance. However, there is one further consideration that needs to be discussed below.

Returning to the case in hand, the trial judge, following the line of reasoning suggested to him by Counsel for the Attorney-General, who as the public's protector of charity was defending the case, concluded that Prodem's aim no. 1 was political rather than potentially charitable as the Commissioners had accepted.

Referring to the terms of Prodem's Trust Deed, the judge concluded:

> ... the stated purpose is the 'advancement of the education of the public in the subject of militarism and disarmament and related fields…' As a description of an academic subject, the expression 'militarism and disarmament' is obscure…
>
> To understand what is meant by that expression, one has to turn to the background material. From that it is clear that the purpose is not limited to educating the public in the peaceful means of dispute resolution, or even to creating 'a public sentiment' in favour of peace. The term 'militarism' is intended to define the current policies of the Western governments, and the purpose of Prodem is specifically to challenge those policies ('to fundamentally question the new forms of militarism arising in the West'). That is the clear and dominant message, which in my view can only be described as political...[35]

Importantly, though, the trial judge qualified his conclusion by adding:

> There remains the point that, since the Commissioners' decision, the Trust has produced a framework for a future briefing series [in October 1995], which on its face would be more objective and closer to the concept of education as explained in the cases. As I understand the Court's jurisdiction (although this was not the subject of detailed discussion), the Court is not confined to the material which was before the Commissioners, and may exercise its judgment afresh on the new material (see Order 55 and cf. *Jones - v - Attorney-General* [1974] Ch 148). However, those suggestions do not overcome the problem posed by the wording of the Trust Deed itself. Furthermore, the Trust is in effect in abeyance at the present, and it is not possible to see how the ideas would work in practice.[36]

The plaintiffs issued a notice of appeal to the Court of Appeal dated 8th November 1998 on ground (b) of their originating summons.[37] Surprisingly, in this notice the appellants were able to identify various material errors of fact in the judgment including a quotation from Dr Schofield, defining 'common security', which was wrongly attributed to Dr Southwood (who had another definition) and question, on the evidence available, the judge's view of what the term 'militarism' was intended to define.

The Court of Appeal did not attempt, after close textual analysis of the dictionary definitions of 'militarism' helpfully supplied by the Attorney-General, to maintain the trial judge's direct link between the use of the term 'militarism' and the policies of the Western governments. It did, though, on the basis of the judge's finding that the purpose of Prodem was to challenge those policies state that he was bound to hold that the Commissioners had been right to refuse to recognise the Prodem Trust Deed as charitable. In so doing, the Court upheld an important principle, based on a well-known passage from the House of Lords in the *Bowman* case,[38] in the following terms:

> That was not, as the judge made clear, because those policies were unchallengeable – or because to challenge them was in any way unlawful or improper – but because the court cannot determine (and should not attempt to determine) whether policies adopted by the government of the United Kingdom and other Western governments are or are not for the public benefit.[39]

The question arises as to whether the Court is making a distinction between the policies of the UK government and the laws passed by Parliament. On the basis of *Re Hopkinson* it cannot be.[40] There are those who argue that, following the enactment of the Human Rights Act 1998, the promotion of human rights is now a charitable purpose and then proceed to define the various ways in which this can be done by a charity.[41] However, it was never argued in *Re Prodem* (or even discussed) that the Arms Control and Disarmament (Inspections) Act 1991 (c. 41), linked to the Treaty on Conventional Armed Forces in Europe, now means that the promotion of arms control and disarmament is a charitable purpose so the various activities by means of which a charity could promote public benefit might be defined. This author contends that there is currently no basis in law for treating the advancement of human rights any differently to the advancement of conflict resolution or reconciliation, except in so far as the former affects individual rights under existing law and the latter collective rights[42] – both enforceable by the State.

This writer suggests that the true significance of the apparently semantic distinction between promoting the benefits of a policy and promoting the policy in itself lies in the third of the three requirements to be met by an intending charity, as explained in the *McGovern* case. For the latter, but not the former, interpretation of those charitable purposes in the new Charities Act, which could be politically controversial, would also make it easier for charities to employ political means to further their charitable purposes, even though Parliament has stated no such legislative intention to date.

Analysis of the Court of Appeal Judgment

The Court of Appeal's judgment of 28th June 2000 - in which Lord Justice Kennedy, Lord Justice Chadwick and Lord Justice May reached a unanimous decision - cited the same authority as the High Court in applying the relevant principles to the facts of this case. For Mr Justice Scott pointed out in *Attorney-General v Ross* [1986]:

> The skill of Chancery draughtsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour.[43]

However, the Court of Appeal left out the next sentence which the High Court had cited:

> In a case where the real purpose for which an organisation was formed is in doubt, it may be legitimate to take into account the nature of the activities which the organisation has since its formation carried on.[44]

The trial judge noted that Mr Justice Scott made two qualifications to that proposition: first that the activities must be intra vires, and secondly, that the activities -

> … are of a nature and take place at time which gives them probative value on the question whether the main purpose for which the organisation was formed was charitable or non-charitable.[45]

The High Court made clear, and the Court of Appeal affirmed, that Prodem's activities were limited to charitable means, i.e. intra vires.[46] The significance of the above omission became apparent when the Court of Appeal quoted extensively from the Prodem background paper but only from the briefings published before the Trust Deed was executed in June 1994. Consequently the October 1995 Briefing (with its framework for a future briefing series), which had probative value as to the real purpose for which the organisation was formed, was omitted despite clear authority for its consideration.

In applying the three tests, set out in the *McGovern* case, to determine Prodem's charitable status the Court of Appeal accepted, as against the Solicitor General's view, that the Trust met the first requirement in so far as the advancement of education is of charitable nature.[47] However, the advancement of education in the manner intended had to promote public benefit. As explained by Mr Justice Slade, proof is normally required:

> The question whether a purpose will or may operate for the public benefit is to be answered by the court forming an opinion on the evidence before it: see *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] 31, 44, *per* Lord Wright. No doubt in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point. In many other instances, however, the element of public benefit may be much more debatable. Indeed, in some cases the court will regard this element of being incapable of proof one way or the other and thus will inevitably decline to recognise the trust as being of a charitable nature.[48]

Although Lord Justice Chadwick did not address this point explicitly in his judgment, it may be argued that the charitable nature of the Trust objects obviates any requirement to take into account its activities since its formation on 9th June 1994 because the second of Mr Justice Scott's conditions is not met. However, a careful reading of his remarks in

Attorney-General v Ross makes that doubtful. For in that case it was held that 'since the main objects of the [students'] union and its constitution were to further the educational purposes of the polytechnic, the union's activities were irrelevant in determining its purposes…'[49] The public benefit was not in doubt, as it was in *Re Prodem*.

The Court then quoted extensively and accurately from the background paper and also the 'Statement of Purpose' and conclusions of the first five Prodem briefings - with one material exception. It cited 'The general editors Dr Schofield and Dr Southwood' of Briefing No. 1 even though the affidavit evidence clearly demonstrated that the only Dr Southwood was General Editor and only he edited Briefing No. 1. Moreover this inaccuracy was pointed out to the court at the draft judgment stage, when parties to a case are expected to highlight obvious factual errors and typing mistakes. The change the Court made to the draft – from 'authors' to 'general editors' – was immaterial[50] which suggested that the Court had deliberately misstated a material fact in its own judgment in order to arrive at the decision it felt bound to arrive at in this case. The significance of this point will shortly become clear. Although in itself apparently unlawful, an explanation in law for the Court's course of action will also become apparent.

The Court drew its conclusions from the passages in the briefings which it had set out. To Lord Justice Chadwick's mind:

> ... it is impossible to read the briefing papers - as I have done - without reaching the conclusion that what the first trustees (Dr Schofield and Dr Southwood) had in mind when they executed the declaration of trust in June 1994 was that the 'education' of the public should be advanced by the dissemination of their own views in relation to the evils of militarism, the need for disarmament, and the curtailment of the role of NATO and of the support of United Kingdom for collective security through an alliance of that nature.[51]

These findings, though, need to be set against the view of the trial judge, whose identification of the relevant principles of law in this case the Court of Appeal has upheld. As will be recalled, the judge accepted the premise that people could be educated as to the 'evil effects' of war. Moreover, he cited with approval a passage from *Parkhurst v Burrill* emphasising Chief Justice Rugg's opinion that the work done by the World Peace Foundation was 'all charitable in the accurate legal sense':

> It consisted chiefly in the publication of literature and the employment of speakers and writers of ability, widely respected for their character and attainments, to attempt to propagate an opinion among the peoples of earth in favor of the settlement of international disputes through some form of international tribunal and to cultivate a belief in the waste of warlike preparation, and *in the practical wisdom of reductions in the armaments of nations*, and in the education of children as well as of adults in the knowledge of peace and *the superior advantages of peaceful solutions of international difficulties*… It cannot justly be

> said that the purpose was political, or the means other than educational.[52] [Emphasis added.]

In any event, the Court of Appeal then proceeded to make a crucial assumption, (after implicitly removing the Commissioners' censure in their Statement of Reasons):

> That is not to denigrate those views; nor to suggest that they are not sincerely held and defensible. But it is to recognise – as it seems to me it must be recognised when the papers are read (as they are intended to be read) as a sequential whole – that the purpose of the authors was to advocate alternative policies to achieve disarmament and a conversion of resources from military to civilian purposes. Their advocacy of those policies was to be directed towards the audiences identified in the background paper prepared in October 1992 – pressure groups, politicians, journalists and decision-makers. It is, I think, beyond argument that the aim of the PRODEM initiative was to bring about a change in the policy of the United Kingdom government – and, perhaps, other Western governments – in relation to disarmament and the role of NATO.[53]

The Court had previously mentioned in paragraph 9 that 'There were some slippage in the programme' for publishing the briefings thereby acknowledging that intentions are not always translated into practice. The significance of the deliberate misstatement of fact, referred to previously, now becomes apparent. For if Briefing No. 1 was the responsibility of one General Editor only, and the work of each promoter of Prodem could be separately identified, then an assumption of joint interest may be erroneous.[54] Thus the evidence of the October 1995 Briefing was decisive both as to content and timing. Written only by the General Editor, having probative value on the conclusions of the Commissioners, it was one of the four out of six Briefings he alone edited, and proposed a future briefing series which the trial judge could agree in principle because:

> The main text would consist of two contrasting analyses, one person offering a common security perspective and another a realist military security perspective. If the analysts were to be of similar ability, then over time and across regions it may become evident which analytical approach is proving superior in terms of foreseeing the dangers of military adventurism and proposing a path to peace…
>
> In short, the reader could decide whether the military aspects of security are being emphasised out of all proportion to the non-military and thus to the detriment of security as whole.[55]

If the Court of Appeal had considered that the evidence from this Briefing supported, rather than refuted, its findings from the previous Briefings then it could have said so. This would, then, have potentially put the first trustees of Prodem in breach of trust.[56]

Instead, Lord Justice Chadwick, when turning to the appellants' case on appeal, stated in an apparent reference to the Christian beliefs of the first plaintiff affirmed in his affidavit:

> Dr Southwood will, I trust, forgive me if I do not deal expressly with each of the many points which he develops in a closely reasoned argument. The reason why I do not do so is that I am unable to find in that argument any *real* appreciation of the reasoning which led the judge to reach the decision which he did. In those circumstances it is not surprising that the argument does not address the point on which Dr Southwood needs to satisfy this Court if this appeal is to have any chance of success.[57] [Emphasis added.]

The emphasis on 'real' is important because his skeleton arguments did, in fact, acknowledge explicitly '… why the Court does not know whether specific policies aimed at disarmament will or will not be for the public benefit…'[58] The Court asked him to acknowledge 'reality', knowing that he already did. It is now that the Court's necessary misstatement of fact and omission of the October 1995 Briefing can be explained.

Mr Justice Slade in the *McGovern* case stated that:

> ... in any case where it is asserted that a trust is non-charitable on the ground that it introduces non-charitable as well as charitable purposes, a distinction of critical importance has to be drawn between (a) the designated purposes of the trust; (b) the designated means of carrying out those purposes; and (c) the consequences of carrying them out…
>
> …trust purposes of an otherwise charitable nature do not lose it merely because the trustees, by way of furtherance of such purposes, have incidental powers to carry on activities which are not themselves charitable.[59]

An argument, such as that adopted *In re Hood* [1931],[60] with respect to Dr Schofield's Briefings which the appellants defended on the grounds of academic freedom under the law but acknowledged might be non-charitable, could not be deployed successfully in this case because as everyone it seemed, apart from the appellants themselves, understood the Court could not uphold as charitable a trust that did not appear so even if the appellants had succeeded on the objective test set out in their originating summons, which no lawyer or judge had disputed the correctness thereof.

The reason that the Court of Appeal had to dismiss the appellants' appeal, even if technically this was done unlawfully, lay in Mr Justice Slade's condition (c) above concerning the consequences of carrying out the Trust's designated purposes. While his discussion of this condition does not apply here, it is readily apparent that if the Court of Appeal, unable to find a lawful and objective basis for dismissing the appeal, had allowed it the political unacceptability of the decision would have overwhelmed Prodem.

Thus Lord Justice Chadwick provides an alternative and an exit strategy for the plaintiffs from these proceedings – indeed, insists they take it. First, he defines a public benefit that would be within the scope of charity and, in so doing, provides the precise wording of the objects clause of an educational trust that would pass the third test of charitable status:

> The point, as it seems to me, is this. There is no objection - on public benefit grounds - to an educational programme which begins from the premise that peace is generally preferable to war. For my part, I would find it difficult to believe that any court would refuse to accept, as a general proposition, that it promotes public benefit for the public to be educated to an acceptance of that premise. That does not lead to the conclusion that the promotion of pacifism is necessarily charitable. The premise that peace is generally preferable to war is not to be equated with the premise that peace at any price is always preferable to any war. The latter plainly is controversial. But that is not this case. I would have no difficulty in accepting the proposition that it promotes public benefit for the public to be educated in *the differing means of securing a state of peace and avoiding a state of war.*[61] [Emphasis added.]

The Court of Appeal has endorsed thereby the promotion of peace as being self-evidently for the public benefit, implicitly rejecting as irrational the Commissioners' objections to education based on an irenical perspective and also their claim that it was arguable that Prodem was actually trying to promote pacifism. Finally it offers the precise wording of the objects clause of a trust that would be wholly and exclusively charitable.

Lord Justice Chadwick goes on to explain the court's reasons for dismissing the appeal and, in so doing, both illustrates the differences of approach between the two original Prodem trustees and then offers the appellants a testable proposition for their contentions:

> The difficulty comes at the next stage. There are differing views as to how best to secure peace and avoid war. To give two obvious examples: on the one hand it can be contended that war is best avoided by 'bargaining through strength'; on the other hand it can be argued, with equal passion, that peace is best secured by disarmament – if necessary, by unilateral disarmament. The court is in no position to determine that the promotion of the one view rather than the other is for the public benefit. Not only does the court have no material on which to make the choice; to attempt to do so would be to usurp the role of government. So the court cannot recognise as charitable a trust to educate the public to an acceptance that peace is best secured by 'demilitarisation' in the sense in which that concept is used in the Prodem background paper and briefing documents.[62]

Yet the example used to illustrate the Court's difficulty does not, in fact, fit the contrast which it had cited from Prodem Briefing No. 1. The first of the 'three basic assumptions of Western foreign policy' cited by the Court judgment at paragraph 11 is '(i) that "bargaining from strength" and multilateralism [**not** unilateral initiatives] were the way to achieve arms reductions'.[63] The contrast the Court has chosen is a political one, which is

not testable against subsequent events, whereas that in Briefing No. 1 between two forms of power is potentially testable over time in terms of Mr Justice Carnwath's definition of peace, i.e. a condition which 'puts consequent emphasis on peaceful, rather than military techniques for resolving international disputes.'[64] The General Editor's four briefings were intended to provide a prima facie case that a climate for war (or peace) could be predicted by his method of analysing conflict – judged by the 'Court of history'.

However, the Court's own testable proposition comes in its conclusion:

> The reason why Dr Southwood's contentions failed below – and the reason why, to my mind, they must fail in this Court – is not because he starts from an irenical perspective that peace is preferable to war. It is because it is clear from the background paper in October 1992, and from the briefing papers to which I have referred, that Prodem's object is not to educate the public in *the differing means of securing a state peace and avoiding a state of war*. Prodem's object is to educate the public to an acceptance that peace is best secured by 'demilitarisation'. I have no reason to doubt Dr Southwood's sincerity when he protests to the contrary; but the evidence is firmly against him.[65] [Emphasis added.]

Likewise, this writer has no doubt as to the sincerity of the judges in considering that they were bound to arrive at their adverse decision in this case, albeit on the basis of a flawed summary of the evidence. The issue of principle which the appellants took up, concerning education from the perspective of peace, had been won; the first plaintiff's method of analysing conflicts survived his test of objectivity through three tribunals; and the Court of Appeal offered the appellants the opportunity to test the Court's conclusions. So, on 6 February 2004, the International Peace Project^{2000} was established as a registered charity on an irenical perspective, with the objects defined by the Court of Appeal, and on the basis of a background paper differing in little material respect from the original Prodem paper, but taking forward the future briefing series outlined in October 1995 now called the 'Peace Games 2004'; the key difference being the greater clarity in charity law.[66]

Quod erat demonstrandum.

Conclusions

Ironically, the case of *Re Prodem*, which the regulatory authorities were concerned might undermine the foundations of English charity law could instead secure it for years ahead. The trial judge's authoritative identification of relevant legal principles provides the basis for ensuring that potentially controversial charitable purposes in the new Charities Act are interpreted in keeping with existing case law. The Court of Appeal judgment ensures that while the existing laws, policies and administrative decisions of the UK government provide a litmus test as to whether or not a trust has political purposes – as explained in the *McGovern case* – the promotion of government policies or of existing laws cannot constitute charitable purposes unless they are, like the promotion of peace – politically uncontroversial at the relevant time. The independence of charities is thus assured.

This layman's experience of acting in person can give confidence to others contemplating bringing a case before the new Charity Appeal Tribunal without professional representation: all three tribunals were scrupulously fair in their conduct of the legal process; where the reasoning of a lower tribunal is plainly flawed then a higher tribunal will seek to rectify it through a commitment to objectivity (as defined in this article) when arriving at its decision; this results in judgments that are generally comprehensible to educated people. The barriers to undertaking such actions are now, in this writer's opinion, equally evident: cases begun by originating summons, where the facts are not essentially in dispute, can usually only be won against the regulatory authorities where their decisions are not simply unreasonable but such as no reasonable body could have come to decide – irrationality being a form of illegality;[67] but while judicial standards of objectivity bear favourable comparison with academic peer reviews the courts operate in the real world and cannot oblige governments to accept decisions they do not wish to accept whatever the consequences; and, on costs, if a principle is worth defending it is worth paying for and history will offer the final judgment on where right lay.

Moreover, a Charity Appeal Tribunal in which legal experts would be faced by laypersons need by no means be a one-sided affair because, as in *Re Prodem,* plaintiffs' mastery of the facts may offset their more limited knowledge of the law.

In applying the relevant law to the material facts of a case a good rule for laypersons to rely upon is to be found in *Re Prodem*. For the test of objectivity, which the plaintiffs used, was derived from no legal case yet it not only supplied a basis for deciding the case but ascertaining how far the rule of law pertains in England and Wales. For this presupposes that politically impartial judges can, in practice, decide cases strictly in accordance with the principles of lawfulness and objectivity.[68]

The role of education in achieving a state of peace was recognised as central by the judge in *Parkhurst v Burrill*.[69] Similarly, it is the contention of this writer that *Re Prodem* illustrates the genius of the law on charity, as it has evolved down through the centuries and across the common law world, in that an educated man has no more to do but to keep firmly in mind at all times what other educated people would regard as being educational and he will not stray too far from the law's own understanding of what is educational. This was, after all, the definition of education arrived at in a case not cited in these legal proceedings but decided by the highest English tribunal (*IRC v McMullen*).[70] If this practice persists, once the new Charities Act comes into being, the essential character of charity can be preserved – with occasional help, perhaps, from informed laypersons.

Acknowledgement

I am would like to record with gratitude the part played by David Parsons in *Re Prodem*.

References and End Notes

[1] . Letter dated 5 September 1995 from Charity Commission to Mr P. Southwood.
[2] . Draft Charities Bill, Cm 6199 (27 May 2004) downloaded from www.parliament.uk
[3] . *Re Koeppler Will Trusts* [1984] Ch 243 at 248D-G.
[4] . *Parkhurst v Burrill* (1917) 117 NE 39, 228 Mass. 196.
[5] . *Tappan v Deblois* (1858) 45 Me 122.
[6] . The Draft Charities Bill, Joint Committee on the Draft Charities Bill, HL Paper 167 and HC 660, 3 vols (The Stationery Office, 30 September 2004).
[7] . Note 2 above, Draft Charities Bill, clause 2(2)(h).
[8] . Note 2 above, Explanatory Notes, pp. 104-5. The one exception is the advancement of amateur sport.
[9] . Note 6 above, paras 75-6, 94-102.
[10] . *McGovern v Attorney-General* [1982] Ch 321 at 341E-F.
[11] . Originating summons in the matter of the trust deed of 9 June 1994 of an organisation called the Project on Demilitarisation, CH 1995. S No 5856 (26 September 1995, amended 9 December 1997).
[12] . Chadwick LJ in *Re Prodem; Southwood & Parsons v H M Attorney General*, Court of Appeal Case No: CHANF 98/1405/CMS3 (28 June 2000) at para. 25. Available in EWCA Civ 00-1179.
[13] . Peter Southwood (ed.), with Steve Schofield and Ian Davis, The Triumph of Unilateralism: The Failure of Western Militarism, Briefing No. 1 (Project on Demilitarisation, March 1993), p. 68.
[14] . Peter M. Southwood (on behalf of the Project on Demilitarisation), Submission to the Charity Commissioners Sitting as a Board, Ref. DFT-P33213-LD (July 1994), p.6.
[15] . Note 1, Statement of Reasons, p. 1. See also note 12 above, para. 3.
[16] . Carnwath J in *Re Prodem; Southwood & Parsons v H M Attorney General*, High Court Case No: CH 1995 S No. 5856 (unreported judgment of 9 October 1998) at para. 27. The case is discussed in Hubert Picarda Q.C., The Law and Practice Relating to Charities, 3rd ed. (Butterworths, 1999), at p. 171 citing *Southwood v A-G* (1989/1999) [sic] 1 ITELR 119.
[17] . Note 12 above, at para. 8.
[18] . Note 1 above, Statement of Reasons, pp. 2-3. (Emphasis in the original.)
[19] . Note 12 above, at para. 16.
[20] . Note 14 above, p. 7.
[21] . Note 1 above, Statement of Reasons, p. 3.
[22] . *Ibid.*
[23] . The Concise Oxford Dictionary of Current English, 7th Ed. (Oxford University Press, 1984).
[24] . Note 11 above. In the case of *Re Koeppler* the official *Law Reports* rather than the *All England Law Reports* should have been cited (see note 25 below).
[25] . Note 3 above. The decision of Gibson J. was reversed on appeal by the Court of Appeal. See Slade LJ in *Re Koeppler Will Trusts* [1986] Ch 423.
[26] . Gray J. in *Jackson v Phillips* (1867) 96 Mass (14 Allen) 539. The famous case of the charitable gift for the circulation of books to create a public sentiment that would secure the abolition of slavery. In addition the 5th Article of the testator's will at p. 541-2 would bear re-reading because it appears to countenance methods of assisting fugitive slaves that were illegal when the will was executed (pp. 568-9). This bequest was also held to be a valid charity. Rugg CJ in *Parkhurst v Burrill* regarded a gift to the World Peace Foundation as standing on the same footing as those in *Jackson v Phillips* (see note 4 above, at p. 201).
[27] . Note 1 above, Statement of Reasons, p. 3.
[28] . Note 16 above, at para. 4.

[29] . The Council for Arms Control, charity registration no. 283712. This author has no reason to doubt that it was a good charity. (The organisation was voluntarily removed from the Central Register of Charities on 6 December 1999.)
[30] . Note 16 above, at para. 12.
[31] . *Ibid,* at para. 22.
[32] . *Ibid,* at para. 23.
[33] . *Ibid*, at para. 26 referring to *Re Hopkinson* [1949] 1 AllER 346, a gift for the advancement of adult education, and *Re Bushnell* [1975] 1 WLR 1596, a fund established in 1941 for 'the advancement and propagation of the teaching of socialised medicine'.
[34] . See, for instance, note 3 above, at p. 251A-D.
[35] . Note 16 above, at paras 29-30.
[36] . *Ibid*, at para. 31.
[37] . Notice of Appeal in the Court of Appeal on appeal from the High Court of Justice Chancery Division in the matter of the Trust Deed dated 9 June 1994 of an organisation called the Project on Demilitarisation, Ch 1995 S No. 5856 (8 November 1998).
[38] . Lord Justice Parker in *Bowman v Secular Society Ltd* [1917] A.C. 406 at 442.
[39] . Note 12 above, at para. 24.
[40] . Note 33 above. Vaisey J in *Re Hopkinson* at 350A-D who, after quoting the passage from Lord Justice Parker (note 38 above), ventured to add as a corollary to that statement 'that it would be equally true to apply it to the advocating or promoting of the maintenance of the present law, because the court would have no means in that case of judging whether the absence of a change in the law would or would not be for the public benefit.' *Re Prodem* did not concern the purpose of promoting either changes in existing law or the maintenance of the present law.
[41] . See, for example, the Charity Commissioners' 'RR12 – The Promotion of Human Rights' (Version 04/03) at www.charity-commission.gov.uk
[42] . Cf. Charter of the United Nations and Statute of the International Court of Justice (UN Department of Public Information, September 1993), Preamble ('… to save succeeding generations from the scourge of war…'), Article 26 ('In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments') and Article 51 ('Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member…').
[43] . Note 12 above, at para. 4 citing Scott J. in *Attorney-General v Ross* [1986] 1 WLR 252, at 263F.
[44] . Note 16 above, at para. 28 citing *Ibid*, at p. 263G.
[45] . *Ibid*, p. 264.
[46] . Note 16 above, at para. 30; note 12 above, at para. 24.
[47] . *Ibid*, at para. 5. Cf. Skeleton argument on behalf of H.M. Attoney-General by Rt Hon Ross Cranston Q.C., H.M. Solicitor General, with Mr W.H. Henderson (15 October 1999), at para. 1.2(1) and para. 5.
[48] . Note 12 above, at para. 5 citing Slade J. in *McGovern v Attorney-General* [1982] Ch 321 at 333G-334B.
[49] . *Attorney-General v Ross* [1986] 1 WLR 252H-253A (headnote).
[50] . Letter dated 26 January [*sic*, actually June] 2000 with 'List of corrections' from Dr P.M. Southwood to Clerk to The Right Honourable Lord Justice Chadwick; letter dated 29 June 2000 with attachments from Dr P.M. Southwood to Clerk to The Right Honourable Lord Justice Chadwick; letter dated 3 July 2000 from Philippa Parsons, Clerk to The Right Honourable Lord Chadwick to Dr P.M. Southwood.
[51] . Note 12 above, at para. 16.
[52] . Note 4 above. p. 200 cited by Carnwath J. in *Re Prodem* (note 16 above) at para. 24.
[53] . Note 12 above, at para. 16.
[54] . *Ibid*, at para. 7.
[55] . Peter Southwood (ed.), Military Adventurism: Learning from the Past – Looking to the Future, Briefing A/3 (Prodem, University of Leeds, October 1995), pp. 78-9.
[56] . Note 48 above, at p. 264G.
[57] . Note 12 above, at para. 28.

[58] . Skeleton Argument of Peter Martin Southwood on behalf of the Trustees of the Project on Demilitarisation (25 January 2000), p.6.
[59] . Note 10 above, at pp. 340G and 341B.
[60] . *Ibid*, at p. 341B-E.
[61] . Note 12 above, at para. 29.
[62] . *Ibid*.
[63] . Note 13 above, p. v. The words in square brackets are the full text from p. 2. (Emphasis in the original.)
[64] . Note 16 above, at para. 26.
[65] . Note 12 above, at para. 30.
[66] . See www.charitycommission.gov.uk Central Register of Charities under 'International Peace Project 2000', charity registration no: 1101966. Based, inter alia, on an IPP background paper, 28 December 2002.
[67] . As defined in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[68] . In this respect it may also be apposite to note the intended abolition of the Charity Commissioners for England and Wales. See note 2 above, clause 4(3).
[69] . Note 4 above, at pp. 200-1. In particular, though, at p. 198 where Rugg CJ affirms 'The final establishment of universal peace among all the nations of the earth manifestly is an object of public charity.'
[70] . *Inland Revenue Commissioners v McMullen* [1981] A.C. 1 at p. 15C-E, H.L.(E). The case was, though, cited by Miss D. F. Taylor of the Charity Commission in a letter dated 28 June 1993 to Mrs J.H. Hill of Farrer & Co., Prodem's legal advisers.