



Neutral Citation Number: [2019] EWHC 3436 (Ch)

Case No: BL-2018-000302

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 12/12/2019

**Before:**

**MR JUSTICE MORGAN**

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**Between:**

**DERBY TEACHING HOSPITALS NHS  
FOUNDATION TRUST  
AND 16 OTHERS**

**Claimants**

**- and -**

**DERBY CITY COUNCIL  
AND 44 OTHERS**

**Defendants**

**-and-**

**CHARITY COMMISSION FOR ENGLAND AND  
WALES**

**Intervener**

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**Christopher Tidmarsh QC and Francesca Quint and Luke Wilcox (instructed by Addleshaw  
Goddard LLP) for the Claimants**

**Amanda Tipples QC and Matthew Smith (instructed by Sharpe Pritchard LLP) for the  
Defendants**

**Christopher McCall QC and Naomi Hart (instructed by Charity Commission for England  
and Wales) for the Intervener**

Hearing dates: 4 – 8 November 2019

## **MR JUSTICE MORGAN:**

### *Introduction*

1. There are 17 Claimants in these proceedings. The Claimants are all NHS foundation trusts which are duly authorised under Chapter 5 of Part 2 of the National Health Service Act 2006. The Claimants accept that they occupy properties (mostly hospitals) on which they are liable to pay non-domestic rates to their local rating authorities.
2. Section 43(5) of the Local Government Finance Act 1988 (hereafter “the 1988 Act”) provides that where section 43(6) of the 1988 Act applies, the ratepayer is entitled to a reduction in the amount payable by way of non-domestic rates, so that the ratepayer is only liable for 1/5 of the sum otherwise due. Section 43(6) applies where: (1) the ratepayer is a charity; and (2) the relevant property is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities).
3. Each of the Claimants asserts that: (1) it is a charity; and (2) the relevant property is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities).
4. There are 45 Defendants. They are the rating authorities in whose areas the 17 Claimants occupy relevant properties. In relation to a Claimant in the area of a particular Defendant, that Defendant denies that: (1) the relevant Claimant is a charity; and (2) the relevant property is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities).
5. On 26 July 2018, Chief Master Marsh gave directions which led to the exchange of pleadings in the claim brought by the first-named Claimant, Derby Teaching Hospitals NHS Foundation Trust, against Derby City Council. On 12 November 2018, Master Clark referred to Derby Teaching Hospitals NHS Foundation Trust as the “Lead Claimant” and directed the trial of a preliminary issue in the following terms:

“Whether the Lead Claimant is a charity for the purposes of section 43(6) of the Local Government Finance Act 1988?”
6. This preliminary issue is directed only to the first issue which arises under section 43(6) of the 1988 Act and does not refer to the second issue as to whether, at a relevant time or times, the relevant property is wholly or mainly used for charitable purposes.
7. The preliminary issue raises a point of considerable importance to NHS foundation trusts and to rating authorities. The foundation trusts say that if they succeed in establishing that they can rely on section 43(6) of the 1988 Act, then not only will the issue be cleared up for the future and they will only pay 1/5 of the rates which are otherwise due but they also claim to recover from the rating authorities rates which they have paid in the past (without the 4/5 discount). In the case of Derby Teaching Hospitals NHS Foundation Trust alone, it claims to recover in excess of £17 million in respect of the period of 6 years prior to its claim. Plainly, if a foundation trust can rely on section 43(6) of the 1988 Act and if every foundation trust in the country were to claim repayment of the rates it had paid in the last six years, the sums involved would be very significant.

8. On 30 July 2019, Barling J permitted the Charity Commission for England and Wales to intervene in these proceedings.
9. When Master Clark directed the above preliminary issue in this case, the parties agreed that the issue involved certain questions and only those questions. The agreed questions (as slightly modified by Barling J on 30 July 2019) were as follows:
  - “1. Is a ratepayer required to be subject to the control of the High Court exercising its jurisdiction relating to charities in order to qualify for mandatory relief from non-domestic rates pursuant to sub-section 43(5) and 43(6) of the Local Government Finance Act 1988?
  2. If the answer to question 1 is in the affirmative, is each of the Claimants so subject?
  3. What are the purposes of the Claimants?
  4. Does each of those relevant purposes fall within section 3(1) of the Charities Act 2011? [“Relevant purposes” means “purposes relevant for the law of charities so as to exclude, for example, purposes that are merely subsidiary or incidental to a charitable object and which cannot be pursued independently of a charitable object.”]
  5. Are the Claimants “established” for charitable purposes only notwithstanding that their assets on dissolution might not be applied for charitable purposes?
  6. Are each of the purposes identified in answer to question 3 above for the public benefit within the meaning of section 4 of the Charities Act 2011?”

### *The evidence*

10. Derby Teaching Hospitals NHS Foundation Trust, Derby City Council and the Charity Commission filed short witness statements. The primary purpose of these statements was to exhibit certain documents which were said to be material to the determination of the preliminary issue. The witness statement for the Foundation Trust stated that the name of the Foundation Trust had been changed on a number of occasions and its current name was University Hospitals of Derby and Burton NHS Foundation Trust. The proceedings have not yet been amended to reflect this change of name. I will refer to the Foundation Trust as “the Derby FT”. The witness statement for the Charity Commission was prepared in support of its application for permission to intervene in these proceedings. In so far as the contents of these witness statements are material to a matter which I have to decide, I will refer to the relevant evidence when I discuss the relevant topic later in this judgment.

### *Representation*

11. The Derby FT was represented by Mr Tidmarsh QC, Ms Quint and Mr Wilcox. Derby City Council was represented by Ms Tipples QC and Mr Smith. The Charity Commission was represented by Mr McCall QC and Ms Hart. I am grateful to counsel for their excellent submissions which were of great assistance to me.

#### *The 1988 Act*

12. I have already referred to the effect of sub-sections (5) and (6) of the 1988 Act. Section 67(10) contains a definition of “a charity” in these terms:

“A charity is an institution or other organisation established for charitable purposes only or any person administering a trust established for charitable purposes only.”

#### *The organisation of the NHS*

13. The principal Act of Parliament which currently governs the organisation of the NHS in England is the National Health Service Act 2006 (“the 2006 Act”). The 2006 Act has been materially amended by the Health and Social Care Act 2012 (“the 2012 Act”). The 2006 Act is a lengthy statute. I will attempt to summarise those parts of it which might have a bearing on the preliminary issue. In that summary, I will not quote the various sections which provide for the matter being summarised. I will refer in more detail to the purposes or objects and the powers of a foundation trust.

#### *The Secretary of State*

14. The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England, and in the prevention, diagnosis and treatment of physical and mental illness. For that purpose, the Secretary of State must exercise the functions conferred by the 2006 Act so as to secure that services are provided in accordance with that Act. The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England. The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.

#### *NHS Bodies*

15. Part 2 of the 2006 Act contains the sections which provide for a number of entities which are referred to as “NHS Bodies”. These bodies include the National Health Service Commissioning Board, Clinical Commissioning Groups, NHS trusts (dealt with in Chapter 3 of Part 2), Special Health Authorities, NHS foundation trusts (dealt with in Chapter 5 of Part 2) and Trust Special Administrators.

#### *NHS Trusts*

16. Although this case is not concerned with NHS trusts, but only with NHS foundation trusts, I will provide a brief summary of the position in relation to NHS trusts before I consider the position of NHS foundation trusts in more detail, if only to explain that the two bodies are different and operate in different ways. NHS trusts were established by order of the Secretary of State to provide goods and services for the purposes of the

health service. An NHS trust must not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and an NHS trust's property must not be regarded as property of, or property held on behalf of, the Crown. Each NHS trust is a body corporate. Each NHS trust has a board of directors consisting of a chairman appointed by the Secretary of State, and executive and non-executive directors.

17. The functions of an NHS trust are specified in the order establishing the NHS trust. The functions which may be specified in an NHS trust order include a duty to provide goods or services so specified at or from a hospital or other establishment or facility so specified. An NHS trust must exercise its functions effectively, efficiently and economically. The Secretary of State may give directions to an NHS trust about its exercise of any functions.
18. An NHS trust may do anything which appears to it to be necessary or expedient for the purposes of or in connection with its functions. In particular it may acquire and dispose of property, enter into contracts, and accept gifts of property (including property to be held on trust, either for the general or any specific purposes of the NHS trust or for any purposes relating to the health service). An NHS trust may enter into arrangements for the carrying out, on such terms as the NHS trust considers appropriate, of any of its functions jointly with any special health authority, local health board or other NHS trust, or any other body or individual.
19. The 2012 Act provided for the abolition of NHS trusts with the expectation that all NHS trusts would achieve foundation trust status. This process has proved more difficult and slower than expected and there are still a number of NHS trusts in existence. Consequently, the abolition of NHS trusts has been delayed until an unspecified future date. Existing NHS trusts are overseen by the NHS Trust Development Authority, which forms part of NHS Improvement.

#### *NHS foundation trusts*

20. NHS foundation trusts were introduced by Part 1 of the Health and Social Care (Community Health and Standards) Act 2003 and are now governed by the relevant provisions of the 2006 Act, as amended by the 2012 Act.
21. An NHS trust may make an application to the regulator (currently, Monitor) for authorisation to become an NHS foundation trust, if the application is supported by the Secretary of State. The application must be accompanied by a copy of the proposed constitution of the NHS foundation trust, and must give any further information which the regulator requires the applicant to give.
22. On an authorisation being given to a body corporate which is an NHS trust, it ceases to be an NHS trust and becomes an NHS foundation trust, the proposed constitution has effect, and any order establishing the NHS trust is revoked. The authorisation is conclusive evidence that the body in question is an NHS foundation trust.
23. An NHS foundation trust is a public benefit corporation. A public benefit corporation must have a constitution. I will refer later in this judgment to the provisions relating to the constitution of an NHS foundation trust. An NHS foundation trust must not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or

privilege of the Crown; and an NHS foundation trust's property must not be regarded as property of, or property held on behalf of, the Crown.

*The functions of an NHS foundation trust*

24. I will now refer to the specific statutory provisions which describe the functions and powers of a foundation trust. The relevant provisions are contained in sections 43 to 47 of the 2006 Act together with schedule 7 to that Act. The part of the 2006 Act which contains sections 43 to 47 is preceded by the sub-heading “Functions” and that word is defined by section 275(1) to include functions and powers.

25. Section 43 of the 2006 Act provides:

**“43 Provision of goods and services**

(1) The principal purpose of an NHS foundation trust is the provision of goods and services for the purposes of the health service in England.

(2) An NHS foundation trust may provide goods and services for any purposes related to—

(a) the provision of services provided to individuals for or in connection with the prevention, diagnosis or treatment of illness, and

(b) the promotion and protection of public health.

(2A) An NHS foundation trust does not fulfil its principal purpose unless, in each financial year, its total income from the provision of goods and services for the purposes of the health service in England is greater than its total income from the provision of goods and services for any other purposes.

(3) An NHS foundation trust may also carry on activities other than those mentioned in subsection (2) for the purpose of making additional income available in order better to carry on its principal purpose.

(3A) Each annual report prepared by an NHS foundation trust must give information on the impact that income received by the trust otherwise than from the provision of goods and services for the purposes of the health service in England has had on the provision by the trust of goods and services for those purposes.

(3B) Each document prepared by an NHS foundation trust under paragraph 27 of Schedule 7 (forward plan) must include information about—

(a) the activities other than the provision of goods and services for the purposes of the health service in England that the trust proposes to carry on, and

(b) the income it expects to receive from doing so.

(3C) Where a document which is being prepared under paragraph 27 of Schedule 7 contains a proposal that an NHS foundation trust carry on an activity of a kind mentioned in subsection (3B)(a), the council of governors of the trust must—

(a) determine whether it is satisfied that the carrying on of the activity will not to any significant extent interfere with the fulfilment by the trust of its principal purpose or the performance of its other functions, and

(b) notify the directors of the trust of its determination.

(3D) An NHS foundation trust which proposes to increase by 5% or more the proportion of its total income in any financial year attributable to activities other than the provision of goods and services for the purposes of the health service in England may implement the proposal only if more than half of the members of the council of governors of the trust voting approve its implementation.”

26. Section 44 of the 2006 Act provides:

**“44 Power to charge for accommodation etc.**

...

(6) According to the nature of its functions, an NHS foundation trust may, in the case of patients being provided with goods and services for the purposes of the health service, make accommodation or further services available for patients who give undertakings (or for whom undertakings are given) to pay any charges imposed by the NHS foundation trust in respect of the accommodation or services.

(7) An NHS foundation trust may exercise the power conferred by subsection (6) only to the extent that its exercise does not to any significant extent interfere with the performance by the NHS foundation trust of its functions.”

27. Section 46 of the 2006 Act provides:

**“46 Financial powers**

(1) An NHS foundation trust may borrow money for the purposes of or in connection with its functions.

...

(4) An NHS foundation trust may invest money (other than money held by it as trustee) for the purposes of or in connection with its functions.

(5) The investment may include investment by–

(a) forming, or participating in forming, bodies corporate,

(b) otherwise acquiring membership of bodies corporate.

(6) An NHS foundation trust may give financial assistance (whether by way of loan, guarantee or otherwise) to any person for the purposes of or in connection with its functions.”

28. Section 47 of the 2006 Act provides:

**“47 General powers**

(1) An NHS foundation trust may do anything which appears to it to be necessary or expedient for the purpose of or in connection with its functions.

(2) In particular it may–

(a) acquire and dispose of property,

(b) enter into contracts,

(c) accept gifts of property (including property to be held on trust for the purposes of the NHS foundation trust or for any purposes relating to the health service),

(d) employ staff.

(3) Any power of the NHS foundation trust to pay remuneration and allowances to any person includes power to make arrangements for providing, or securing the provision of, pensions or gratuities (including those payable by way of compensation for loss of employment or loss or reduction of pay).

(4) “*The purposes of the NHS foundation trust*” means the general or any specific purposes of the trust (including the purposes of any specific hospital at or from which services are provided by the trust).”

29. Section 63 of the 2006 Act provides that an NHS foundation trust must exercise its functions effectively, efficiently and economically.

*The constitution of a foundation trust*



30. Section 30 of the 2006 Act provides that an NHS foundation trust is constituted in accordance with schedule 7 to the 2006 Act. Paragraph 1(1) of schedule 7 states that a public benefit corporation must have a constitution. Paragraph 1(2) of schedule 7 provides that as well as any provision authorised or required to be made by statute, the constitution may make further provision (other than provision as to the powers of the corporation) consistent with the statutory provisions. Paragraph 2(2) of schedule 7 provides that if the corporation is an NHS foundation trust, the constitution must specify its principal purpose and reference is made to section 43(1). Provision is made as to the membership of a public benefit corporation. A public benefit corporation has a board of governors and a board of directors. An NHS foundation trust may make amendments of its constitution with the approval of a majority of the board of governors and the board of directors.
31. Section 37 of the 2006 Act permits an NHS foundation trust to amend its constitution but an amendment is of no effect in so far as the constitution would, as a result of the amendment, not accord with Schedule 7.

*The Constitution of the Derby FT*

32. As required by the 2006 Act, the Derby FT has a constitution. It has amended its constitution from time to time and during the six-year period of its claim for over-payment of rates, there have been a number of different versions of the constitution. Nothing turns on the differences between the versions. I will refer to the current version.
33. As one would expect, the terms of the constitution which refer to the functions of the Derby FT track the relevant statutory provisions. Thus:
  - i) Paragraph 2 is headed: Principal Purpose;
  - ii) Paragraph 2.1 is the same as section 43(1);
  - iii) Paragraph 2.2 is the same as section 43(2A);
  - iv) Paragraph 2.3 is the same as section 43(2);
  - v) Paragraph 2.4 is the same as section 43(3);
  - vi) Paragraph 3 is headed: Powers, Functions, Framework and Commitments;
  - vii) Paragraph 3.1 states that the powers of Derby FT are set out in the 2006 Act; although the constitution does not appear to set out the wording of section 44 of the 2006 Act, this general provision in the constitution has the effect of incorporating the provisions of section 44;
  - viii) Paragraph 3.4 is the same as section 47(1) and (2);
  - ix) Paragraph 3.5 is the same as section 47(3);
  - x) Paragraph 3.6 is the same as section 46(1);
  - xi) Paragraph 3.7 is the same as section 46(4) and (5);

- xii) Paragraph 3.8 is the same as section 46(6);
- xiii) Paragraph 3.9 is similar to section 43(2); and
- xiv) Paragraph 3.10 is similar to section 43(3).

*Other provisions as to foundation trusts*

- 34. Section 275(1) provides that in the 2006 Act, “goods” include accommodation. Section 65(2) of the 2006 Act provides that for the purposes of Chapter 5 of Part 2, references to “goods and services” include, in particular, facilities, education and training.
- 35. Section 51 of the 2006 Act states that the Secretary of State may provide for the appointment of trustees for an NHS foundation trust to hold property on trust for the purposes of an NHS foundation trust or for any purposes relating to the health service. In this section, “the purposes of the NHS foundation trust” means “the general or any specific purposes of the trust (including the purposes of any specific hospital at or from which services are provided by the trust)”. Section 1 of the NHS (Charitable Trusts etc) Act 2016 provides for section 51 of the 2006 Act to be replaced by regulations but section 1 of the 2016 Act has not yet been brought into force. There is a charitable trust in existence, the Derby Hospitals Charitable Trust, where Derby FT is the corporate trustee. This charitable trust is a registered charity and exists to support the work of the Derby FT. However, the functions and the assets of the Derby FT are not subsumed into this particular charitable trust.
- 36. Section 57A of the 2006 Act permits a foundation trust to apply to the regulator for dissolution. The regulator must grant the application if it is satisfied that the foundation trust has no liabilities. Where an application for dissolution is granted, the regulator must make an order providing for the transfer of the property of the foundation trust to the Secretary of State. There is no restriction on the purposes for which the Secretary of State may use such property following a transfer to him.
- 37. Chapter 5A of Part 2 provides for the appointment of a special administrator of a foundation trust. The regulator may appoint such a special administrator to exercise the functions of the governors, chairman and directors of a foundation trust in specified circumstances, including where the foundation trust is unable to pay its debts or is guilty of certain serious failures to provide services. In some circumstances, the Secretary of State may decide to dissolve a foundation trust which is the subject of special administration. In that event, the regulator may make an order dissolving the foundation trust and providing for the transfer of the property and liabilities of the foundation trust to an NHS body or to the Secretary of State. There is no restriction on the purposes for which the Secretary of State may use such property following a transfer to him.
- 38. There are other statutory provisions which are relevant to foundation trusts but which apply more generally. Section 81 of the 2012 Act requires any person who provides a health care service to hold a licence under Chapter 3 of Part 3 of the 2012 Act. That Chapter contains section 94 (dealing with standard conditions) and section 95 (dealing with special conditions). Chapter 4 of Part 3 of the 2012 Act deals with the prices payable by commissioners for NHS services.

*Monitor*

39. Before the 2012 Act, foundation trusts were the subject of regulation by a body corporate known as the Independent Regulator of NHS Foundation Trusts. Pursuant to section 61 of the 2012 Act, that body corporate continues to exist but was thereafter known as Monitor. By section 62 of the 2012 Act, the main duty of Monitor in exercising its function is to protect and promote the interests of people who use health care services by promoting the provision of health care services which are economic, efficient and effective and maintain or improve the quality of the services. Monitor is required to exercise its functions with a view to preventing anti-competitive behaviour.

*Caselaw on foundation trusts*

40. In relation to the purposes and the powers of a foundation trust, I was referred to the description of the position given by Cranston J in *R (Unison) v Monitor* [2009] EWHC 3221 (Admin), [2010] PTSR 1827. That case concerned the role of the Independent Regulator of NHS Foundation Trusts which used the name of Monitor even before the 2012 Act. The case also concerned the provisions then in force (before the 2012 Act) which were designed to control the amount of income which a foundation trust could earn from private patients as compared with its income from the NHS. The judge referred to government proposals in relation to the NHS and, specifically in relation to foundation trusts. He said at [5] – [6]:

“5. NHS foundation trusts were introduced as part of the Government's ten-year programme of reform known as “the NHS plan” in 2000. Under the NHS plan the Government have a commitment to increase the scope and range of private sector activity with NHS services by creating independent public interest corporations with foundation status. Under the Government's proposals foundation status organisations would have NHS assets transferred to their ownership and control; be granted a licence to operate by an independent regulator; be freed from certain NHS controls; be run on a not-for-profit basis; and be accountable not to the Secretary of State for Health but to a board comprising employers, staff and local residents, some of whom would be locally elected. Foundation status would mean greater freedom to generate income. While they would not be allowed to sell their core assets, they would be allowed to raise finance for new facilities from the capital markets, subject to the Government's overall borrowing limits, and to set up joint ventures with the private sector. According to the Department of Health's guide to NHS foundation trusts, published in December 2002, the top performing NHS hospital trusts would be allowed to apply for foundation status.

6. NHS foundation trusts were introduced by Part 1 of the Health and Social Care (Community Health and Standards) Act 2003 and are now governed by Chapter 5 of Part 2 of the National Health Service Act 2006, a consolidating Act. In accordance with the NHS plan the statute gives them broader freedoms than NHS trusts: under the legislation they have greater financial freedoms, they are not subject to direction by the Secretary of State and they can retain any operating surpluses they generate.

Instead of being centrally managed, they are supervised by the independent regulator, Monitor. The legislative scheme is explored at greater length below.”

41. In giving that description of what had been intended in relation to foundation trusts, the judge referred to the proposals in the NHS Plan. Of course, in the present case, I must consider and apply the statutory provisions themselves rather than the proposals which led to those provisions. However, it was not suggested that the judge’s description was in any way inaccurate as a description of the actual position. I also must have regard to what the statutory provisions allow a foundation trust to do rather than the possibly narrower range of activities which it actually carries on.
42. I was also referred to *R (Mitocariu) v Central and North West London NHS Foundation Trust* [2018] EWHC 126 (Admin), [2018] PTSR 1287. In that case it was held that a foundation trust had power to provide financial assistance to patients whilst they were detained pursuant to hospital orders made under the Mental Health Act 1983. It was held that a foundation trust had such a power pursuant to sections 43, 46 and 47 of the 2006 Act to give financial assistance for the purposes of its functions under section 43. The giving of financial assistance was a matter for the discretion of the foundation trust taking into account the judgment of clinicians as to the specific therapeutic requirements of the patient.

#### *The legislation as to charities*

43. Charities in England and Wales are subject to the Charities Act 2011 (“the 2011 Act”). Sections 1 to 4 of the 2011 Act contain the key definitions of “charity”, “charitable purpose” and “the public benefit requirement”.
44. Section 1 of the 2011 Act provides:

#### **“1 Meaning of “charity”**

(1) For the purposes of the law of England and Wales, “charity” means an institution which—

- (a) is established for charitable purposes only, and
- (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

(2) The definition of “charity” in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.”

45. There is an issue in the present case as to whether the definition of “a charity” in section 67(10) of the 1988 Act is a different definition of “charity” for the purposes of section 1(2) of the 2011 Act.
46. Section 2 of the 2011 Act provides:

#### **“2 Meaning of “charitable purpose”**

(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

(a) falls within section 3(1), and

(b) is for the public benefit (see section 4).

(2) Any reference in any enactment or document (in whatever terms)—

(a) to charitable purposes, or

(b) to institutions having purposes that are charitable under the law relating to charities in England and Wales,

is to be read in accordance with subsection (1).

(3) Subsection (2) does not apply where the context otherwise requires.

(4) This section is subject to section 11 (which makes special provision for Chapter 2 of this Part onwards).”

47. It is agreed that the reference in section 67(10) of the 1988 Act to “charitable purposes” is a reference in an enactment within section 2(2) of the 2011 Act so that that reference is to be read in accordance with section 2(1) of the 2011 Act (assuming that the definition in section 67(10) of the 1988 Act is the relevant definition).

48. Section 3 of the 2011 Act relevantly provides:

**“3 Descriptions of purposes**

(1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

...

(d) the advancement of health or the saving of lives;

...

(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;

...

(m) any other purposes—

(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or

(iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

(2) In subsection (1)—

...

(b) in paragraph (d), “*the advancement of health*” includes the prevention or relief of sickness, disease or human suffering,

...

(e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph, and

..

(3) Where any of the terms used in any of paragraphs (a) to (l) of subsection (1), or in subsection (2), has a particular meaning under the law relating to charities in England and Wales, the term is to be taken as having the same meaning where it appears in that provision.

(4) In subsection (1)(m)(i), “*the old law*” means the law relating to charities in England and Wales as in force immediately before 1 April 2008.”

49. Section 4 of the 2011 Act provides:

#### **“4 The public benefit requirement**

(1) In this Act “*the public benefit requirement*” means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.

(2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

(4) Subsection (3) is subject to subsection (2).”

50. The 2011 Act provides for charities to be registered in a register maintained by the Charity Commission. Subject to certain exceptions which do not apply in this case, a charity must be registered: section 30. Where a charity is required to be registered the trustees of the charity must apply to the Charity Commission for registration: section 31. An institution which is registered as a charity is conclusively presumed to be a charity: section 37. However, non-registration as a charity does not prevent an institution establishing that it is nonetheless a charity. None of the foundation trusts in this case has ever applied to be registered as a charity in relation to their main activities (apart from any registration of specific charitable trusts where a foundation trust is the corporate trustee).

*The order in which I will consider the questions arising*

51. It is convenient to consider questions 3 and 4 together before considering the other questions. In relation to questions 1 and 2, the principal reason put forward by Derby City Council as to why Derby FT was not subject to the control of the court was that it was not established for charitable purposes only; that reason therefore relies on the arguments of Derby City Council in relation to questions 3 and 4. It seems sensible, therefore to consider questions 3 and 4 first. As to the other questions, it was accepted that if a foundation trust satisfied all of the other requirements for a charity, it would not fail to have the status of a charity by reference to the public benefit requirement (and thus I do not need to address question 6).

*Questions 3 and 4*

52. Questions 3 and 4 concern whether a foundation trust is an institution “established for charitable purposes only”, which is the relevant statutory wording, whether I am applying section 67(10) of the 1988 Act or section 1(1)(a) of the 2011 Act.
53. Some matters are clear as to the meaning of the phrase “established for charitable purposes only”. First, in a case like the present, the purpose for which an institution is established will be defined by the instrument which establishes the institution. In the case of a foundation trust, the relevant instrument will be the relevant statutory provisions and the constitution of the foundation trust. The court does not assess the purposes for which an institution is established by considering the motives of those who established the institution. The word “only” is of the essence. An institution which is established for charitable purposes and for other purposes is not a charity. This is the case even if, in practice, the institution pursues only its charitable purposes. It will also be the case if the other purposes are to be less significant or less extensive than the charitable purposes.
54. Section 67(10) of the 1988 Act and sections 1 and 2 of the 2011 Act refer to the “purposes” for which an institution is established. As a matter of nomenclature, “purposes” are sometimes referred to as “objects” and “purposes” and “objects” can usually be distinguished from “powers”. The usual distinction is that an institution is given its powers to enable it to carry out its purposes or objects so that its powers are not themselves distinct purposes or objects. However, sometimes this distinction becomes blurred or is difficult to apply. *Oxford Group v IRC* [1949] 2 All ER 537 is an example of a case where the court considered that certain provisions in a company’s

memorandum of association which were described as “powers” extended the purposes of the company and produced the result that the company was not established for charitable purposes only.

55. In other cases, where it has been held that the institution is authorised to carry on activities or confer benefits which are not themselves charitable it may be held that these activities or benefits are merely subsidiary or incidental to the charitable objects or purposes of the institution. In this context, distinctions between ends, means and consequences have been suggested to be helpful: see Picarda on the Law and Practice Relating to Charities, 4th ed., at page 333. These distinctions were described by Lord Millett in the Privy Council in *Latimer v CIR* [2004] 1 WLR 1466 at [36], where he said:

“The distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.”

56. With this guidance, and subject to the need to examine some of the examples more closely, I will begin with a provisional classification of the various functions and activities of a foundation trust as either “purposes” or “powers” in the following way. In this classification, references to statutory provisions are to the provisions of the 2006 Act.

57. My provisional view is that the purposes for which a foundation trust is established include:

- i) The provision of goods and services for the purposes of the health service in England i.e. the NHS (see section 275(1)): section 43(1); this is described as “the principal purpose”; this is plainly a purpose of a foundation trust;
- ii) The provision of goods and services for any purposes related to the provision of services provided to individuals for or in connection with the prevention, diagnosis or treatment of illness: section 43(2)(a); although section 43(2)(a) states that a foundation trust “may” carry out these activities, the sub-section does not provide that the foundation trust may carry out these activities for the purpose of achieving its principal purpose so it cannot be said that these activities are subservient to achieving its principal purpose or a means to that end; thus, section 43(2)(a) identifies a further purpose;
- iii) The provision of goods and services for any purposes related to the promotion and protection of public health: section 43(2)(b); the above comments as to section 43(2)(a) apply here also;
- iv) “goods” include accommodation (see section 275(1)) and “goods and services” include, in particular, facilities, education and training (see section 65(2)).

58. Section 44(6) needs separate consideration. Section 44(6) permits a foundation trust to make accommodation or further services available for patients who give undertakings to pay for the accommodation or further services. Section 44(6) limits this permission



to the case of patients being provided with goods and services for the purposes of the health service. A foundation trust could rely on section 44(6) to provide hotel accommodation and hotel services to day-patients who are travelling to the hospital and who wish to stay in such an hotel either the night before or the night after their treatment. Section 44(7) provides that a foundation trust may only exercise the power in section 44(6) to the extent that its exercise does not to any significant extent interfere with the performance by it of its functions. However, these sub-sections do not say that the power may only be exercised where the provision of accommodation and further services is for the purpose of the foundation trust providing healthcare. It may be, to use the above example, that the foundation trust may wish to provide hotel accommodation in a way which is not for the purpose of providing healthcare but nonetheless does not interfere (and even more so, does not interfere to a significant extent) with the performance of its functions. Thus, section 44(6) is not merely a power to provide accommodation and other services in a way which is subservient to achieving some other purpose or a means to that end and so should be considered as a separate purpose for which a foundation trust is established. These sub-sections do not restrict the provision of accommodation or further services to cases where the provision of accommodation or further services is for the advancement of health or the relief of a need attributable to ill-health.

59. The following are activities which are expressed as powers given to a foundation trust to enable it to pursue its purposes so I will provisionally treat them as powers rather than purposes:
- i) The carrying on of activities for the purpose of making additional income available in order to carry on its principal purpose: section 43(3); as explained above, the principal purpose of a foundation trust is the provision of goods and services for the purposes of the health service in England; this is plainly a power which is to be used in order to help a foundation trust achieve its principal purpose;
  - ii) Borrowing money for the purposes of or in connection with its functions: section 46(1); if this had been limited to borrowing “for the purposes of its functions” then it would plainly be a power which is to be used for the purpose of the various functions of a foundation trust; however, it is to be noted that the borrowing may be “in connection with” its functions;
  - iii) Investing money for the purposes of or in connection with its functions: section 46(4); again, the provision extends to investing money “in connection with” its functions;
  - iv) Giving financial assistance to any person for the purposes of or in connection with its functions: section 46(6); again, the provision extends to providing financial assistance “in connection with” its functions;
  - v) Doing anything which appears to it to be necessary or expedient for the purpose of or in connection with its functions; again, the reference is to “in connection with” its functions.
60. Before proceeding further, it is useful to consider whether the purposes of a foundation trust identified in sections 43(1), 43(2)(a), 43(2)(b) and 46 are charitable purposes.

61. The purpose in section 43(1) is plainly a charitable purpose within section 3(1)(d) of the 2011 Act, which refers to the advancement of health. As to sections 43(2)(a) and 43(2)(b), if the sub-section had not used the words “any purposes related to” and if section 43(2)(a) had not used the words “in connection with”, then I consider that those sub-sections, without those words, would again have referred to a purpose within section 3(1)(d) of the 2011 Act, being a purpose for the advancement of health. Ms Tipples submitted that the use of the words “any purposes related to” and also the words “in connection with” took the expression of the relevant purposes outside section 3(1)(d) of the 2011 Act or any other purpose within section 3 of the 2011 Act.

62. I was referred to one authority on the meaning of “related to”, namely, the decision of the High Court of Australia in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1960-1961) 105 CLR 602. The issue in that case concerned the interpretation of an exemption in a statute dealing with stamp duty. The exemption referred to “instruments relating to the services of apprentices, clerks and servants”. The High Court was divided, with three judges holding that the exemption did not apply and two judges holding that it did. Kitto J, in the minority, reviewed a number of earlier English authorities. His judgment makes it clear that when one considers the ambit of the words “relating to” or “related to”, one must consider the context and the object of the provision being construed. Taylor J, in the majority, said at page 620:

“There can be no doubt that the expression “relating to” is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used. With this in mind it may be said with some certainty that an examination of the language of the exempting provision shows that it does not admit of its application to an instrument merely because it makes a reference to the existence of a relationship of master and servant between the parties to it, or still less, because it refers to the existence of a master and servant relationship between persons who are not parties to it. It is, I think, not open to argument that “relating to”, in the context in which it appears, is equivalent to “referring to” and the “relationship” must be based upon some more substantial ground.”

63. In *Tooheys Ltd*, Windeyer J at page 624 referred to “the elastic character” of the phrase “relating to”.

64. The phrase “related to” is used in section 43(2) of the 2006 Act to describe the degree of connection between “any purposes” and the purposes of the prevention, diagnosis or treatment of illness of the purpose of the promotion and protection of public health. The phrase shows that there must be a connection but does not tell one very much about how close that connection must be. The closeness of the connection, or the relationship, which is required depends upon the perceived purpose of the statutory provision. It is not easy to define what precisely is required but nonetheless it is possible to make some useful comments as to what is involved.

65. The purpose of the words “related to” in section 43(2) is to permit the foundation trust to pursue additional purposes (the phrase used is “any purposes”) provided they are “related to” the purposes specified in paragraphs (a) and (b) of section 43(2). The words “related to” do not carry the meaning that the additional purposes must be subservient to the specified purposes in the sense that they are being pursued in order to achieve the specified purposes. This means that the additional purposes may be pursued even if they are not intended to assist with the achievement of the specified purposes. Further, the words used do not carry the meaning that the additional purposes must be incidental to the specified purposes or a means of achieving the specified purposes.
66. The result of the above reasoning is that section 43(2) allows a foundation trust to pursue “any purposes” provided that they have a connection to, or a relationship with, the specified purposes. I consider that it is not possible to say that the additional purposes, even though they have a relationship with the specified purposes, will be for the advancement of health within section 3(1)(d), or within any of the other purposes referred to or described in section 3, of the 2011 Act.
67. I will next consider the words “in connection with” in section 43(2)(a). These words appear in the phrase “for or in connection with” and are followed by the words “the prevention, diagnosis or treatment of illness”. The words “in connection with” are wider words than the word “for”. In this context, “for” means “for the purpose of” and the words “in connection with” can refer to the provision of services otherwise than for the purpose of the prevention, diagnosis or treatment of illness.
68. I was referred to a number of cases concerning charities or alleged charities which considered the words “in connection with” or similar wording.
69. *In re Bain* [1930] 1 Ch 224 concerned a bequest in a will in favour of the vicar of a named church “for such objects connected with the church as he shall think fit”. That case did not turn on the fact that the vicar had a discretion as to the choice of the objects because all such objects had to satisfy the objective criterion that they were objects “connected with the church”. The way in which the case was argued in the Court of Appeal appeared to involve a distinction between objects connected with the church as distinguished from the parish. If the permitted objects were confined to being connected with the church as a place of religious worship then the objects were charitable. Conversely, if the permitted objects included objects connected with the parish of the church or the welfare of parishioners, then those objects would not be exclusively charitable. The majority in the Court of Appeal held that it was possible to give the words the narrower of the two meanings and, so read, the gift was charitable.
70. *In re Davies* (1932) 49 TLR 5 is reported shortly in the Times Law Reports. That case concerned a bequest to the Archbishop of Cardiff “for work connected with the Roman Catholic Church in the Archdiocese of Cardiff”. The Court of Appeal rejected an argument that the words simply meant “for the work of the Roman Catholic Church” in the Archdiocese and that the words “work connected with” enlarged the scope of the words so as to cover objects which were not charitable. The report does not indicate if the Court of Appeal considered the earlier case of *In re Bain*.
71. Both *In re Bain* and *In re Davies* were considered by Jenkins J in *In re Eastes* [1948] Ch 257. That case concerned a bequest to the vicar and churchwardens of a named church to be used by them “for any purposes in connexion with the said church which

they may select it being my wish that they shall especially bear in mind the requirements of the children in the said parish of” the named church. The court held that the words “any purposes in connexion with the said church” were to be construed in the same way as the similar words in *In re Bain*. The court further held that that result was not affected by the expression of wishes contained in the words of the bequest.

72. *Oxford Group v IRC* involved the construction of a company’s memorandum of association. The memorandum stated that its objects were set out in clauses 3(A) and (B). The object in clause 3(A) was a charitable object. It was held by all members of the Court of Appeal that the object in clause 3(B) was not charitable. One member of the court, Cohen LJ, considered further arguments as to the effect of clauses 3(C)(9) and (10). Clause 3(C) referred to “the exercise of the following powers” but that did not prevent Cohen LJ holding that some of the paragraphs of clause 3(C) identified further objects and not just powers. Clause 3(C)(9) allowed the company to establish or support charitable or benevolent associations or institutions and to subscribe money for charitable or benevolent purposes in any way “connected with” the purposes of the company or calculated to further its objects. Cohen LJ held that clause 3(C)(9) allowed the company to spend monies on benevolent objects which were not charitable. He rejected an argument that this power was ancillary only to furthering the company’s charitable purposes. He said at 544H:

“I think an institution could be connected with the advancement of religion without being itself an institution for the advancement of religion.”

73. I consider that the decisions in *In re Bain* and *In re Eastes* are not so helpful to me as the sentence quoted above from Cohen LJ in *Oxford Group*. The decisions in the two earlier cases were influenced by the consideration that a wide construction of the relevant words would cause the gift to fail whereas a narrow construction of those words would produce a valid charitable gift. That consideration does not apply to the construction of section 43 of the 2006 Act as the statute does not disclose any general intention to confine the purposes of a foundation trust to exclusively charitable purposes.
74. I consider that the sentence I have quoted from *Oxford Group* is plainly right and accords with my own reaction expressed above that if the phrase being construed is “for or in connection with”, the word “for” means for the purposes of and the words “in connection with” can refer to activities which go beyond activities for the purposes of (in the case of section 43(2)(a)) the prevention, diagnosis or treatment of illness. So construed, section 43(2)(a) allows a foundation trust to carry on activities in connection with the prevention, diagnosis or treatment of illness which are not themselves for the purpose of the prevention, diagnosis or treatment of illness. The concept of “connection” in section 43(2)(a) is not confined to activities which are subservient to or ancillary to or incidental to the purpose of the prevention, diagnosis or treatment of illness nor confined to being a means to that end. Accordingly, the words “in connection with” in section 43(2)(a) allow a foundation trust to pursue a purpose which is not within section 3(1)(d), or any other purpose within section 3, of the 2011 Act. Further, the difficulty for the assertion that a foundation trust is established for charitable purposes is compounded when one combines my two findings, as to the meaning of “related to” and “in connection with”, as to the scope of section 43(2)(a).

75. I have already discussed the meaning and effect of section 44(6) and (7) of the 2006 Act. In accordance with that discussion, I consider that the effect of section 44(6) is to permit a foundation trust to carry on further activities which are not necessarily for the purpose of advancing its charitable objects in section 43 of the 2006 Act (to the extent that parts of section 43 identify objects which are charitable).
76. I have not overlooked section 43(2A) of the 2006 Act. This provides that a foundation trust does not fulfil its principal purpose unless, in each financial year, its total income from the provision of goods and services for the purposes of the health service in England is greater than its total income from the provision of goods and services for any other purposes. This does not prevent a foundation trust from pursuing other purposes and deriving income therefrom which other purposes are not subservient to, or incidental to the principal purpose or not a means to the end of achieving the principal purpose. Accordingly, section 43(2A) does not affect any of the above reasoning.
77. It is clear that the drafting style adopted in the 2006 Act in relation to foundation trusts was not with a view to ensuring that their purposes were narrowly stated so that they would be exclusively charitable purposes. Instead, the drafting style adopted appears to have been to define the functions of a foundation trust in wide terms; hence, the use of words like “any purposes”, “related to” and “in connection with”.
78. The result of the above reasoning is that a foundation trust is not established for charitable purposes only and so is not a charity within the meaning of section 67(10) of the 1988 Act or section 1(1)(a) of the 2011 Act.
79. The above conclusion means that it is not necessary to consider in any detail the statutory provisions which I have provisionally classified as conferring powers on a foundation trust. However, for completeness, I will express my conclusions on one of those matters, namely, the effect of section 47(1) of the 2006 Act.
80. Section 47(1) permits a foundation trust “to do anything which appears to it to be necessary or expedient for the purpose of or in connection with its functions”. The language is very wide. It refers to “anything” and then it refers to it appearing to the foundation trust that such a thing is necessary or expedient for the purpose of or in connection with its functions. Even if the “functions” of a foundation trust as referred to in section 47(1) were exclusively charitable, the things permitted by section 47(1) need not be for the purpose of those functions but may be in connection with those functions. In accordance with my earlier reasoning, section 47(1) would allow a foundation trust to do things which are not subservient, or ancillary or incidental to its other objects and things which are not a means to an end of securing its other objects.
81. In addition, it was argued that section 47(1) allowed a foundation trust to pursue non-charitable objects for another reason. Section 47(1) allows a foundation trust to do anything “which appears to it” to be necessary or expedient for the purposes of its functions and, even more widely, “which appears to it” to be necessary or expedient in connection with its functions. It is said that the activities which the foundation trust can pursue are not defined by objective criteria but are left to the foundation trust’s own discretion. It is accepted that if a trust has defined objects all of which are charitable and the trustee has a discretion as to whether to pursue all or only some of those objects, then the trust is a charitable trust because all of the permissible objects are charitable. However, it is said that if the institution has a discretion as to what its objects are, then

it cannot be said that all of its objects are charitable because they are not defined by objective criteria which meet the test for a charitable object.

82. In connection with the argument as to the subjective nature of section 47(1), I was referred to the decision of the Court of Appeal in *Keren Kayemeth Le Jisroel Ltd v IRC* [1931] 2 KB 465. In that case, the association could pursue objects or exercise powers as should “in the opinion of the Association be conducive to the attainment of the said primary object”. It was held that the objects of the association were not objectively defined in a way which confined them to charitable objects only as the association could form its own subjective opinion as to what its objects could be. The Court of Appeal took the view that neither the court nor anyone else could control the association’s opinion or otherwise interfere with the manner in which it chose to carry out its objects: see per Lawrence LJ at page 482. Mr Tidmarsh submitted that that statement went too far as the court has always had some measure of control over the exercise of discretionary powers. He also submitted that the decision making of a foundation trust as to what was necessary or expedient for the purposes of section 47(1) of the 2006 Act would be subject to judicial review, for example, in a case where the foundation trust had failed to have regard to material considerations only or where its decision was perverse.
83. In *Keren Kayemeth*, the House of Lords dismissed an appeal from the decision of the Court of Appeal. The principal speech was that of Lord Tomlin and his reasoning did not include the reasoning of the Court of Appeal as to the discretion of the association to select its own objects. However, one member of the House of Lords, Lord Thankerton, concurred with the reasoning of Lawrence LJ in the Court of Appeal.
84. The views of Lawrence LJ in *Keren Kayemeth* were applied by Cohen LJ in *Oxford Group v IRC* in relation to a power or object which referred to the company doing such things as it might think conducive to the attainment of its other objects: see at page 541B-C and 544H-545E. It was added that the earlier decision of the Privy Council in *Dunne v Byrne* [1912] AC 407 was a similar case.
85. The decision of Cohen LJ on this point in *Oxford Group* was followed by Upjohn J in *Associated Artists Ltd v IRC* [1956] 2 All ER 583.
86. If section 47(1) had merely provided that a foundation trust could do what it thought was necessary or expedient for the purposes of its functions and all of those functions were charitable, then it could be said that section 47(1) conferred a power and did not describe any further object or purpose of the foundation trust. On that basis, the fact that section 47(1) conferred on the foundation trust a power to do what it thought was necessary or expedient for its charitable purposes could be regarded as permissibly leaving to the foundation trust a power to decide how best to advance its charitable purposes. However, that reasoning is not applicable here for two separate reasons. First, not all of the other functions of a foundation trust are charitable. Secondly, the foundation trust is given a power to decide upon other matters which it thinks are necessary or expedient in connection with the other functions of the trust and that allows activities which are not strictly for the purposes of those other functions. The foundation trust’s case that it is a charity which faces the difficulty that, under section 47(1), it can carry on activities which are not for the purposes of its other functions, but only in connection with them, is made yet more difficult by the fact that what is necessary or

expedient in connection with its other functions is not restricted by objective considerations but is left to the foundation trust itself to decide.

87. I can now express my overall conclusion in relation to questions 3 and 4, which conclusion is determinative of the preliminary issue in this case. I conclude that a foundation trust is not established for charitable purposes only and therefore the preliminary issue should be answered by holding that a foundation trust is not a charity for the purposes of section 43(6) of the 1988 Act.
88. In the light of this overall conclusion, no other question needs to be decided. However, I will comment on further submissions which were made in relation to questions 3 and 4 and the other questions and indicate the extent to which I will express my views on them.
89. Ms Tipples submitted that there was a fundamental reason why a foundation trust could not be a charity. She described a foundation trust as a cog in a machine, where the machine was the whole complex of connected bodies which made up the NHS. She submitted that the purpose of providing the services of the NHS was not a charitable purpose because it was more accurately regarded as a purpose of government. She cited the Australian decision *In re Cain* [1950] VLR 382 where Dean J said at page 387 that a gift for carrying on the ordinary activities of a Government department pursuant to statute would not be a gift for charitable purposes. The judge nonetheless held that the gift in that case was valid because it was to be construed as a gift to be used by the Children's Welfare Department for activities over and above its ordinary duties.
90. Ms Tipples also referred to an article by Matthew Harding in volume 31 of the Sydney Law Review at page 558, entitled "Distinguishing Government from Charity in Australian Law". The thesis of the article was that the best explanation as to what distinguishes government from charity in Australian law is the fact that government is characterised by administration and charity is characterised by voluntarism. The author acknowledged that this conclusion was not consistent with all of the decided cases but he suggested that it was consistent with the majority of them.
91. Finally, Ms Tipples submitted that her conclusion was supported by *London Borough of Richmond upon Thames v Attorney-General* (1982) 81 LGR 156 and *Phonographic Performance Ltd v South Tyneside Metropolitan Council* [2001] 1 WLR 400.
92. Mr Tidmarsh relied on *Construction Industry Training Board v Attorney-General* [1971] 1 WLR 1303 (High Court) and [1973] Ch 173 (Court of Appeal) ("*CITB*"). He submitted that the corporation in that case was established to pursue a government purpose. At first instance, Pennycuik V-C held that the corporation was charitable as it was established for the advancement of education. It was submitted to him that the corporation was a political body and therefore not a charitable body: see at page 1308A-B. The judge held that the fact that the corporation was under the control of the Minister did not prevent it being a charity. When that case was considered by the Court of Appeal, it was conceded that the corporation was established for charitable purposes only and that concession was not questioned by the court. The issue before the Court of Appeal concerned the application of what is now section 1(1)(b) of the 2011 Act, which refers to the institution being under the control of the court in the exercise of its jurisdiction with respect to charities. I will refer to that topic later in this judgment when I consider questions 1 and 2.

93. Mr Tidmarsh also referred to the guidance given by the Charity Commission in “The Independence of Charities from the State – RR7” which expressed the view that in order to be a charity a body needed to be independent of government and it must exist to carry out its charitable purposes and not for the purpose of implementing the policies of a governmental authority or of carrying out the directions of a governmental authority. Mr Tidmarsh added a reference to the decision dated 21 April 2004 by the Charity Commissioners in relation to the registration of Trafford Community Leisure Trust and Wigan Leisure and Culture Trust as charities. In that decision, the Charity Commissioners considered in detail the question whether the bodies were independent of their respective local authorities. The Commissioners held that the bodies were sufficiently independent. They also concluded that there was no rule of law which prohibited such bodies from being charities notwithstanding that they operated to discharge a function or service that a governmental authority had a responsibility to provide.
94. These submissions give rise to three questions. The first is: is there a relevant distinction between charitable purposes and governmental purposes; the second question is: if there is a distinction, what specific test should be applied to distinguish between such purposes; and thirdly, when one applies the relevant test, what is the result in the present case?
95. The parties’ submissions raised an important question of principle. If I had to decide it, I would at this level of decision probably take the view that I should follow the decision at first instance in *CITB* and hold that a foundation trust could be a charity notwithstanding the fact that it was created by statute and plays a part in the provision of the services of the NHS.
96. However, it is not necessary to decide this point in order to determine the preliminary issue in this case. If all I did was to follow the first instance decision in *CITB*, then my decision would be obiter and would not add anything to, or detract from, the authority of that decision. Ms Tipples’ submission raises a point of general importance and I consider that it would be prudent to leave the point to be resolved in a case where it is necessary to decide it. Because I have held on other grounds that a foundation trust is not established for charitable purposes only, the present case is not a good example of a case where Ms Tipples’ fundamental point might arise where the only barrier to an institution being a charity is that its purposes should be classified as governmental rather than charitable.

#### *Questions 1 and 2*

97. Question 1 asks whether a foundation trust is required to be subject to the control of the High Court exercising its jurisdiction in relation to charities in order to be able to rely on section 43(5) and (6) of the 1988 Act. If the answer to question 1 is in the affirmative, then question 2 arises and asks whether a foundation trust is so subject.
98. The definition of charity in section 1(1) of the 2011 Act includes a requirement, at section 1(1)(b), that the institution must be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. Accordingly, if that definition applies for the purposes of section 43(6) of the 1988 Act, question 1 will be answered accordingly. However, Mr Tidmarsh says that the effect of section 1(2) of the 2011 Act is that the definition of charity in section 1(1) of the 2011 Act does not apply for the



purposes of the 1988 Act because a different definition of charity applies for the purposes of the 1988 Act. He refers to the definition of charity in section 67(10) of the 1988 Act which does not, at least as a matter of its express language, repeat the requirement which is in section 1(1)(b) of the 2011 Act. Therefore, he says that the 1988 Act definition is different from the 2011 Act definition and the 1988 Act definition applies.

99. Ms Tipples counters this argument by submitting that, properly understood, the definition in the 1988 Act is the same as the definition in section 1(1) of the 2011 Act and therefore section 1(2) of the 2011 Act does not apply and instead the definition in section 1(1) of the 2011 Act does apply. Of course, if she is right that the two definitions are the same, it ought not to matter which definition I apply. If she is wrong and the definitions are different then I must apply the definition in the 1988 Act because that is what section 1(2) of the 2011 Act provides.
100. So the question becomes: are the words in section 1(1)(b) of the 2011 Act part of the definition of charity in section 67(10) of the 1988 Act, even though those words do not appear in section 67(10)?
101. There is clear authority for saying that that the word “charity” in an ordinary context in an English Act of Parliament means an institution regulated by, and subject to the jurisdiction of, the laws or the courts of the United Kingdom and constituted for the carrying out of objects or purposes which in the courts of the United Kingdom would be held to be charitable: see per Evershed MR in *Camille and Henry Dreyfus Foundation Inc v IRC* [1954] Ch 672 at 684. The decision of the Court of Appeal in that case was upheld by the House of Lords: see [1956] AC 39. The decision in *Camille and Henry Dreyfus Foundation Inc* is still a correct statement of the law: see *Routier v HMRC* [2019] 3 WLR 757. Based on these authorities, Mr Tidmarsh was prepared to accept that section 67(10) of the 1988 Act was subject to the same limitation as to territorial jurisdiction even though that limitation is not made explicit in section 67(10) itself. Of course, that concession does not matter on the facts of this case as a foundation trust would satisfy a territorial limitation.
102. Before considering whether there are other limitations implicit in section 67(10) of the 1988 Act, it is helpful to consider the effect of section 1(1)(b) of the 2011 Act. Section 1(1) of the 2011 Act is in essentially the same terms as section 45(1) of the Charities Act 1960 which was considered in *CITB*, to which I referred earlier. In *CITB*, there was extensive discussion as to the meaning of what is now section 1(1)(b) of the 2011 Act. The most detailed discussion was in the judgment of Russell LJ, who dissented in the result although at least one other member of the court (Plowman J) agreed with his ultimate conclusion as to the meaning of the statutory provision; Plowman J disagreed with Russell LJ as to the application of the provision to the facts of that case.
103. In *CITB*, Russell LJ doubted if the reference to the institution being subject to the control of the High Court was for the purpose of imposing a territorial limitation because the existence of the territorial limitation was established by the *Camille and Henry Dreyfus Foundation* case and, anyway, the provision in section 45(1) of the Charities Act 1960 was an odd way to go about expressing a territorial limitation. Russell LJ referred to the general jurisdiction of the High Court in relation to trusts and the specific powers of the High Court in relation to charities. He then expressed the conclusion, with some misgivings, that the statutory wording might have been included

to deal with a case where the charity was established in such a way that the powers of the court to control the charity were substantially ousted. He then applied that meaning to the facts of the case and held that the institution in that case had been established in a way which substantially ousted the powers of the court to control. It followed in his view that the institution was not a charity within section 45(1) of the Charities Act 1960. He accepted that the corporation in that case would be subject to the control of the court over the acts of a corporation, such as deciding whether its acts were ultra vires, but he held that a control of that kind could not be referred to the jurisdiction of the court in respect of charities.

104. In *CITB*, Buckley LJ held that the powers of the court to control the corporation had not been ousted and so the corporation satisfied the tests in section 45(1) of the Charities Act 1960. Plowman J accepted that the question was the one identified by Russell LJ as to whether the powers of the court had been substantially ousted. He concluded that they had not been and the corporation satisfied the statutory tests.
105. In order to form a bridge between the decision in *CITB* as to the meaning of section 1(1)(b) of the 2011 Act and section 67(10) of the 1988 Act and, in particular, to support the submission that a body is not a charity for the purposes of section 67(10) if the powers of the court to control it have been substantially ousted, Ms Tipples relied on the statement of Lord Simonds in *National Antivivisection Society v IRC* [1948] AC 31 at 62-63 where he said that one of the tests, and a crucial test, as to whether a trust was charitable lay in the competence of the court to control and reform it. In that case, it was held that the Society was not a charity because one of its main objects was the promotion of legislation to change the law. Lord Simonds considered what the situation would be if it were held that such an object was a charitable object. He described the source of the court's jurisdiction in charity matters. He pointed out the difficulties which there would be if the Attorney-General were under a duty to intervene and demand that the trust be administered to achieve a change in the law which he and the Government think was not conducive to the welfare of the state. Ms Tipples submits that Lord Simonds did not say that the court's power to control an institution would be the consequence of an earlier decision that the institution was a charity but instead he stressed that one of the tests for whether an institution was a charity was whether the court could control it. Based on that statement, Ms Tipples is able to submit that it is necessary to apply a similar test as to control when construing section 67(10) of the 1988 Act, even though such a test is not made explicit in the wording of section 67(10). Although I have doubts about this submission, I will assume for present purposes that it is correct and will proceed to ask whether the powers of the court to control a foundation trust are substantially ousted by the statutory provisions which establish a foundation trust.
106. I consider that if a foundation trust satisfied all other tests for a charity, then the statutory provisions which establish it do not substantially oust the powers of the High Court to control it in the exercise of its jurisdiction with respect to charities. The fact that a foundation trust is regulated would not produce that result.
107. It was submitted that an arbitration clause in the constitution of the Derby FT had the effect of ousting the powers of the court to control it. The arbitration clause in question relates to disputes between Derby FT and (1) a member; (2) a person who had ceased to be a member within the previous six months; (3) any person bringing a claim under the constitution of Derby FT; and (4) an office-holder of Derby FT. I have considered

what the position would be if one had an institution which was undoubtedly established for charitable purposes only but yet had an arbitration clause, like the clause in the case of Derby FT, which referred certain internal disputes to arbitration. Would one say that the institution was not a charity because an entirely sensible provision as to arbitration was a substantial ouster of the jurisdiction to the court? There can be only one answer to such a question and that is that such an institution would still satisfy section 1(1)(b) of the 2011 Act. I do not accept the submission that the arbitration clause in this case amounted to a substantial ouster of the powers of the court to control Derby FT in the exercise of its jurisdiction with respect to charities.

#### *Question 5*

108. Question 5 arises because sections 57A and 65LA of the 2006 Act provide for the possibility of the dissolution of a foundation trust whereupon its remaining assets are transferred to the Secretary of State, who is not restricted in the use which may be made of those assets.
109. Ms Tipples submitted that it is a fundamental requirement for a charity that its assets be dedicated to charitable purposes in perpetuity. Thus, she submitted, it was not possible to have a trust for charitable purposes for a fixed period or until the happening of an event. Further, she said, it was not possible for a corporation to be a charity if on dissolution its assets could be distributed amongst its members and used for non-charitable purposes.
110. Mr Tidmarsh submitted that, in the case of a corporation, that the corporation had to be “established” for charitable purposes only. The purposes for which a corporation was established were the purposes which it could pursue while it existed. The distribution of its assets on its dissolution was not a purpose for which it was established and so the destination of its assets on a dissolution was irrelevant.
111. Mr Tidmarsh submitted that the rival argument, that assets must be dedicated to charitable purposes in perpetuity, was contrary to a number of decisions including *Sir Robert Peel’s School at Tamworth* (1868) LR 3 Ch 543, *IRC v Yorkshire Agricultural Society* [1928] 1 KB 611, *Gibson v South American Stores* [1950] Ch 177 and *CITB* (referred to above).
112. Ms Tipples countered by citing *Girls’ Public Day School Trust v Minister of Planning* [1951] Ch 400, *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193 and *Latimer v CIR* [2004] 1 WLR 1466.
113. The cases relied on by the parties, and others relating to unincorporated associations, were examined in detail at the hearing. I found that neither side was able to reconcile all of the decisions with the submissions it put forward. In the event, I have decided that a foundation trust is not a charity for quite separate reasons so that Question 5 does not need to be answered in order to determine the preliminary issue in this case. In view of the difficulty of reconciling all of the authorities, and because to do so will not affect the outcome of this case, I have concluded that the prudent course is not to express any views on this question which would be obiter dicta only and might not be considered to be helpful in another case where the point does need to be decided.

#### *Question 6*

114. At the hearing, Ms Tipples accepted that a foundation trust would not fail to satisfy the public benefit requirement in section 4 of the 2011 Act if it satisfied all of the other requirements for being a charity.

*The preliminary issue answered*

115. For convenience, I will set out again my answer to the preliminary issue which is that Derby Teaching Hospitals NHS Foundation Trust is not a charity for the purposes of section 43(6) of the Local Government Finance Act 1988.